



Departure Requests from the Financial Assurances for Decommissioning Regulations in the Offshore Renewable Energy Sector

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Offshore renewable energy, specifically offshore wind is a technical and growing field, especially in New England.¹ The development process for offshore wind facilities involves many phases, from initial leasing to decommissioning at the end of the facility's life. Throughout the development process, local communities may be financially impacted. This is especially true when the time comes for removal of a no longer operational facility, particularly if developers do not have the financial ability to decommission the facility.² This report analyzes the Bureau of Ocean Energy Management ("BOEM") and the Bureau of Safety and Environmental Enforcement's ("BSEE") regulations pertinent to departure requests from financial assurances for decommissioning.

Section 1 of this report provides a brief overview of the restructuring of BOEM and BSEE's regulatory authority over offshore energy development generally. Section 2 explains what financial assurances are and what decommissioning is, as well as how these processes are regulated. Section 3 describes the departure request process, from when the departure is requested by the developer, to BOEM and BSEE's framework for approving such a request, to challenging an approved request. Section 3 also includes a relevant example of Revolution Wind, LLC's ("Revolution Wind") approved departure request for the Revolution Wind project from the financial assurances for decommissioning regulations. Finally, Section 4 provides an overview of new regulations in the offshore oil and gas field that may be utilized as a model in the offshore wind field.

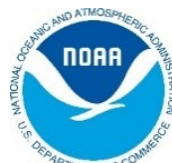
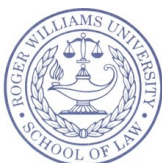
1 History of Agency Oversight of Offshore Energy Development

BOEM and BSEE play different roles in offshore energy development and their authority has shifted over time. In 2010, the Bureau of Ocean Energy Management, Regulation and Enforcement, formerly the Minerals Management Service, was split into three separate organizations; the Office of Natural Resources Revenue, BOEM, and BSEE.³ This split provided that BOEM and BSEE would

¹ See Press Release, Governor Maura Healey and Lt. Governor Kim Driscoll, Massachusetts Department of Energy Resources, Massachusetts and Rhode Island Announce Largest Offshore Wind Selection in New England History (Sep. 6, 2024), <https://www.mass.gov/news/massachusetts-and-rhode-island-announce-largest-offshore-wind-selection-in-new-england-history> (describing three multi-state offshore wind projects which will produce 2,878 megawatts of power).

² See Kevin Killough, *Feds waive financial assurances for offshore wind losses, leaving future costs to taxpayers*, JUST THE NEWS (Aug. 16, 2024 11:00 PM), <https://justthenews.com/politics-policy/energy/feds-waiving-financial-assurances-offshore-wind-leave-future-costs-taxpayers>.

³ Reorganization of Title 30: Bureaus of Safety and Environmental Enforcement and Ocean Energy Management, 76 Fed. Reg. 64431 (Oct. 18, 2011).



be responsible for conventional offshore energy sources, such as oil and gas, and offshore renewable energy, for example, offshore wind.⁴ After the reorganization, BOEM's related management functions over offshore energy include, but are not limited to: activities involving resource evaluation, planning, and leasing; environmental science; and environmental analysis.⁵ In contrast, BSEE is responsible for safety and environmental enforcement functions including, but not limited to: the authority to permit activities, inspect, investigate, summon witnesses and produce evidence; levy penalties; cancel or suspend activities; and oversee safety, response, and removal preparedness.⁶ Although the goal of this reorganization was to properly separate authority between the agencies in a clear and concise way, both agencies still have a great deal of overlapping power.⁷ Further, decisions that may be made by BOEM in the initial phases of a project's development, may have an impact on the regulatory processes implemented by BSEE towards the end of a project's life.⁸ This is especially true in the context of financial assurances, which is discussed in Section 2. As such, this makes understanding the complex regulatory framework challenging, especially regarding departure requests, financial assurances, and decommissioning which may have broad reaching impacts on local communities and the environment.

Beyond the general functions and responsibilities of BOEM and BSEE, there are stages in the offshore energy development process that each agency explicitly oversees. Specifically, BSEE oversees facilities during construction, operation, and removal, while BOEM oversees the initial development phases.⁹ For example, BOEM is tasked with managing the leasing process and reviews the projects construction and operations plan ("COP").¹⁰ BSEE on the other hand, is in charge of regulatory decisions during the construction and operational period.¹¹ Therefore, even though BOEM and BSEE's responsibilities touch on one another throughout the offshore energy development process, there are certain times within the process that authority is held solely by one of the agencies. However, decisions made by BOEM in the initial stages of development, may impact BSEE's decision making down the line.

2 BOEM and BSEE's Regulations for Financial Assurances and Decommissioning

Developers seeking to construct an offshore wind facility are required to comply with multiple regulatory processes and interact with multiple agencies. Section 2.1 discusses BOEM's requirements that an offshore wind developer provide the agency with financial assurances prior to certain approvals, Section 2.2 explains the regulatory process for decommissioning a facility at the end of its life.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Renewable Energy*, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT [BSEE] [hereinafter BSEE Renewable Energy], <https://www.bsee.gov/about-bsee/renewable-energy> (last visited Jan. 14, 2025).

¹⁰ *Id.*

¹¹ *Id.*

2.1 What are Financial Assurances?

Before BOEM can execute or allow certain actions for each stage of a commercial lease, an offshore wind developer is required to provide financial assurances, in varying amounts. BOEM's relevant provisions dictating the financial assurance requirements for offshore wind are located in sections 585.516 to 585.529 of BOEM's regulations.¹² Section 585.516(a) provides three different instances where financial assurances are required: (1) before BOEM will "execute a commercial lease or approve an assignment of an existing commercial lease"; (2) before BOEM will "allow [the developer] to install facilities approved in [their Site Assessment Plan] SAP"; and (3) before BOEM will "allow [the developer] to install facilities approved in [their] COP."¹³ This report focuses on the financial assurances required prior to the installation of facilities approved in the SAP because, there, "a supplemental bond or authorized financial assurance in an amount determined by BOEM based on the anticipated decommissioning costs of the proposed facilities" is required.¹⁴ Therefore, if the developer does not provide the money, the development of the facility cannot continue. This financial assurance is particularly important because of the communities' reliance on the developer's ability to cover the decommissioning costs. Even if a developer were to go bankrupt, or ownership were to switch hands, this money would still be available to pay for the costs of removing the facility. Accordingly, the financial assurance requirement, particularly monies required prior to the installation of facilities, provides a safeguard to the community and a guarantee that end of life facilities will be properly disposed of.

2.2 What is Decommissioning?

As is the case with any large-scale energy facility, offshore wind facilities eventually become inoperative and need to be decommissioned. For offshore wind, the decommissioning process occurs at the end of the wind turbine and associated infrastructure's operational life,¹⁵ typically around twenty years after installation.¹⁶ The decommissioning process includes removal or discharging "of all facilities, projects, cables, pipelines and obstructions" and clearing "the seafloor of all obstructions created by activities on [a developers] lease, including [their] project easement or grant."¹⁷ Oversight of the decommissioning process was just recently transferred from BOEM to BSEE in 2023.¹⁸ Therefore, although BOEM requires financial assurances for decommissioning prior to facility construction, based on 30 C.F.R. § 585.516(a), BSEE is the agency responsible for overseeing the decommissioning process of offshore wind projects.¹⁹ As such, agency collaboration is vital in holding offshore wind developers accountable for decommissioning.

¹² See 30 C.F.R. §§ 585.516-585.519.

¹³ *Id.* § 585.516(a).

¹⁴ *Id.* § 585.516(a)(2).

¹⁵ *Wind Energy End-of-Service Guide*, OFF. ENERGY EFFICIENCY & RENEWABLE ENERGY, <https://windexchange.energy.gov/end-of-service-guide#:~:text=Decommissioning%20is%20the%20removal%20of,a%20project%20is%20fully%20repowered> (last visited Jan. 14, 2025).

¹⁶ *Understanding Offshore Wind Energy Complexities*, SEA GRANT OFFSHORE WIND ENERGY, <https://www.seagranteenergy.org/understanding-complexities> (last visited Jan. 14, 2025).

¹⁷ 30 C.F.R. §§ 285.902(a)(1-2).

¹⁸ Reorganization of Title 30: Bureaus of Safety and Environmental Enforcement and Ocean Energy Management, 76 Fed. Reg. 64431 (Oct. 18, 2011).

¹⁹ See *BSEE Renewable Energy*, *supra* note 9.

Since BSEE oversees decommissioning, it also sets the timeline for certain requirements in the process. Specifically, before decommissioning is allowed, the developer is required to submit an application to BSEE two years before the expiration of the lease, at the earliest.²⁰ This application must include identification of the applicant, a description of removal methods, a proposed schedule, and description of “resources, conditions, and activities that could be affected by or could affect [the] proposed decommissioning activities,” among other things.²¹ As decommissioning is an extensive process, with multiple requirements prior to beginning the actual removal, spanning stages under both BOEM and BSEE’s authority, those opposing such development may need to interact with both agencies at specific times in the facilities life cycle.

If a developer does not engage in proper decommissioning procedures, there are avenues the agencies can take to hold them accountable. Section 30 C.F.R. § 285.913 provides that if a developer fails to comply with an approved decommissioning plan or application, “BOEM may call for the forfeiture of [the developer’s] bond or other financial assurances.”²² Additionally, the developer “may remain liable for removal or disposal costs and responsible for accidents or damages that might result from such failure and BSEE may take enforcement action.”²³ Therefore, the financial assurances, required prior to facility installation, are crucial in holding a developer accountable if they fail to follow the decommissioning plan. Although there are additional penalties that may be leveraged if a developer does not comply, the financial assurances for decommissioning requirement is important in minimizing the financial risk to communities at the forefront.

3 Departure Requests

Although both agencies have some distinct authority over certain steps in the offshore wind development process, they also have overlapping powers, one being the power to approve departure requests. A departure is effectively a waiver or exemption from certain regulations.²⁴ As will be discussed in more depth in this section, both agencies have the authority to approve departure requests from the regulatory requirements at multiple stages in the project’s development, regardless of the phases each agency oversees. One regulation that a developer may seek a departure from is the financial assurances for decommissioning requirement.²⁵ If a developer goes bankrupt prior to the decommissioning process, or is no longer responsible for the facilities at this stage, as seen recently in the offshore oil and gas industry, communities may be concerned that they will be responsible for providing these funds. Therefore, communities should be aware of the different agencies they may need to interact with and how each agency oversees the development of offshore wind facilities. This section will explain the departure request process, from the developer’s initial request, to opportunities for community-based challenges of approved departures.

²⁰ 30 C.F.R. § 285.902(a)

²¹ *Id.* § 285.906

²² *Id.* § 285.913(a)

²³ *Id.* § 285.913(b).

²⁴ *See* 30 C.F.R. § 585.103 and § 285.103.

²⁵ *See e.g.* Baker, Chief, Off. of Renewable Energy Programs, to Peter Allen, Revolution Wind, LLC (March 4, 2024) [hereinafter Departure Approval, Revolution Wind], https://www.boem.gov/sites/default/files/documents/about-boem/REV_0486_Fin%20Assur%20Decom%20Departure%20Appr%20Ltr.pdf.

3.1 Requesting a Departure

Before BOEM or BSEE can approve a departure request, the developer must first request it. This report primarily provides information pertaining to departure requests from financial assurances for decommissioning, but it is important to note that departures are requested from other regulatory provisions as well. For example, deviations may be requested for the fabrication and installation of facilities or for certain COP requirements, such as inclusion of “in situ testing, boring and sampling” data.²⁶ Therefore, although some of the regulatory frameworks may be generally applicable to all departure requests, requirements may also differ depending on the regulation the developer seeks to depart from.

Developer’s request departures at varying times in the development process, depending on the requirement the developer is looking to deviate from. Based on a thorough review of agency and developer documentation and BOEM’s regulations, it is unclear if there is a specific timeframe when a developer is required to make a departure request from the financial assurances for decommissioning regulations to the agency. However, in practice, it is most often requested after BOEM’s approval of the COP.²⁷ This is likely because BOEM provides the developer with detailed cost estimates to decommission each project based on the COP.²⁸ Therefore, because these financial assurance estimates are provided to the developer after the COP is approved, such a departure would not make sense until the developer is aware of what their financial obligation will be.

BOEM maintains a website that contains information on approved departure requests for both the renewable energy and oil and gas sectors.²⁹ Although this website does not contain any documentation on the developer’s request, it does contain the date that the departure was approved as well as the approval letter. For example, BOEM issued its written decision on Orsted’s South Fork Wind Farm COP on November 24, 2021 and explicitly detailed the financial assurances the developer was required to provide.³⁰ BOEM approved the COP on January 18, 2022.³¹ Seven months later, on August 19, 2022, after BOEM approved the COP, the agency also approved the

²⁶ See generally, *Departure Request*, BUREAU OCEAN ENERGY MANAGEMENT [BOEM] [hereinafter BOEM Departure Request Spreadsheet], <https://www.boem.gov/departure-request> (providing a table listing the departure requests BOEM has approved, including a departure for in situ testing requested by Vineyard Wind, LLC and a approved request for pre plan approval fabrication and installation of facilities requested by Mayflower Energy LLC).

²⁷ See e.g. *Departure Approval*, *Revolution Wind*, *supra* note 25.

²⁸ *Supporting National Environmental Policy Act Documentation for Offshore Wind Energy Development Related to Decommissioning of Offshore Wind Facilities*, BUREAU OF OCEAN ENERGY MANAGEMENT [BOEM], 4 (2022), <https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Decommissioning%20White%20Paper.pdf>

²⁹ See BOEM Departure Request Spreadsheet, *supra* note 26.

³⁰ *Record of Decision, South Fork Wind Farm and South Fork Export Cable Project Construction and Operations Plan*, BUREAU OF OCEAN ENERGY MANAGEMENT [BOEM], D-27 (Nov. 24, 2021), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Record%20of%20Decision%20South%20Fork_0.pdf.

³¹ See *South Fork, Construction and Operations Plan*, BUREAU OCEAN ENERGY MGMT. [BOEM], <https://www.boem.gov/renewable-energy/state-activities/south-fork> (last visited Feb. 11, 2024).

departure.³² Similarly, in the Revolution Wind example provided in Section 3.2 BOEM also approved the departure request after it approved the COP.³³ Because BOEM typically approves departure requests a matter of months after it approves the COP, in conjunction with the fact that the agency provides financial assurance estimates after it approves the COP, it could be inferred that developers request departures from the financial assurances for decommissioning regulations sometime after COP approval. Therefore, communities should be mindful of when a COP is submitted to the agency, when the agency makes their decision on the COP, and when the COP is approved.

3.2 BOEM and BSEE's Approval of a Departure Request

Once a developer submits their request to BOEM or BSEE, the next step is for the agency to review it and decide whether to approve it. In order for BOEM or BSEE to approve a departure request from any of its regulatory provisions, it must address specific factors provided in 30 C.F.R. § 585.103 and § 285.103. BOEM's regulations and BSEE's regulations regarding departure requests are identical, besides the name of the agency, and state as follows:

- (a) BOEM [or BSEE] may prescribe or approve departures from the provisions of this part when BOEM [or BSEE] deems the departure necessary because the applicable provisions as applied to a specific circumstance:
 - (1) Are impractical or unduly burdensome and the departure is necessary to achieve the intended objectives of the renewable energy program;
 - (2) Fail to conserve the natural resources of the OCS [Outer Continental Shelf];
 - (3) Fail to protect life (including human and wildlife), property, or the marine, coastal, or human environment; or
 - (4) Fail to protect sites, structures, or objects of historical or archaeological significance.
- (b) Any departure approved under this section and its rationale must:
 - (1) Be consistent with subsection 8(p) of the Lands Act;
 - (2) Protect the environment and the public health and safety to the same degree as if there was no approved departure from this part;
 - (3) Not impair the rights of third parties; and
 - (4) Be documented in writing.³⁴

³² Letter from Karen J. Baker, Chief, Off. of Renewable Energy Programs, to Peter Allen, South Fork Wind, LLC (Aug. 19, 2022), <https://www.boem.gov/sites/default/files/documents/renewable-energy/OCS-A%200517%20Financial%20Decom%20Departure%20Approval%20Letter.pdf>.

³³ See Departure Approval, Revolution Wind, *supra* note 25.

³⁴ 30 C.F.R. § 585.103; 30 C.F.R. § 285.103.

Subsection (b)(2) of both BSEE and BOEM's regulations reference the Outer Continental Shelf Lands Act ("OCSLA"), which provides the Secretary of the Interior the power to administer mineral exploration and development of "all submerged lands lying seaward of state coastal waters (3 miles offshore) which are under U.S. jurisdiction."³⁵ Subsection 8(p) of the OCSLA states:

The Secretary shall ensure that any activity under this subsection is carried out in a manner that provides for—

- (A) safety;
- (B) protection of the environment;
- (C) prevention of waste;
- (D) conservation of the natural resources of the outer Continental Shelf;
- (E) coordination with relevant Federal agencies;
- (F) protection of national security interests of the United States;
- (G) protection of correlative rights in the outer Continental Shelf;
- (H) a fair return to the United States for any lease, easement, or right-of-way under this subsection;
- (I) prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas;
- (J) consideration of--
 - (i) the location of, and any schedule relating to, a lease, easement, or right-of-way for an area of the outer Continental Shelf; and
 - (ii) any other use of the sea or seabed, including use for a fishery, a sealane, a potential site of a deepwater port, or navigation;
- (K) public notice and comment on any proposal submitted for a lease, easement, or right-of-way under this subsection; and
- (L) oversight, inspection, research, monitoring, and enforcement relating to a lease, easement, or right-of-way under this subsection.³⁶

When taken in unison, BOEM's regulation under section 585.103, BSEE's regulation under section 285.103, and section 1337(p)(4) of the OCSLA, provide the ability for both BOEM and BSEE to grant developer requested waivers from agency regulations, if certain requirements are met, while taking into account the need to protect and conserve the environment.

³⁵ *OCS Lands Act History*, BUREAU OCEAN ENERGY MGMT. [BOEM], <https://www.boem.gov/oil-gas-energy/leasing/ocs-lands-act-history> (last visited Feb. 11, 2025).

³⁶ 43 U.S.C. § 1337(p)(4).

Although BOEM and BSEE are required to weigh the factors in sections 585.103 and 285.103, respectively, there are very few procedural rules they must follow in making their determination on a departure request.³⁷ The court in *Public Employees for Environmental Responsibility v. Hopper*, stated that although an approved departure is required to be in writing, it does not need to be “overly formalistic.”³⁸ Specifically, the regulations “‘impose no particular requirements for the form or disclosure’ of departures . . . [and] the regulations require only that ‘the supporting rationale’ for the departure ‘be documented in writing.’”³⁹ In that case, BOEM sent a letter to the offshore wind developer, explaining that it was willing to provide the developer with more time to obtain financing for geological and construction surveys.⁴⁰ Although the plaintiff environmental organization argued that the letter was simply an invitation to request a departure, the court held that the letter contained enough to be considered an approved departure under BOEM’s regulations.⁴¹ Therefore, based on *Hopper*, so long as the approval is in writing and addresses the factors in 30 C.F.R. § 585.103 and § 285.103, the approval, at least procedurally, will be upheld. As such, the agencies have a level of discretion in approving departures.

Courts have also held that a departure does not need to be subjected to a notice and comment period in order for it to be consistent with the OCSLA.⁴² In *Public Employees for Environmental Responsibility v. Beaudreau*, BOEM approved a departure from its requirement that an offshore wind developer’s COP contain specific geotechnical and geophysical surveys, as the developer represented that it needed additional financing to do such surveys.⁴³ The plaintiff environmental organization argued that BOEM violated the OCSLA both because BOEM approved the developer’s COP without first obtaining geotechnical and geophysical surveys and because the departure was not subject to notice and comment, as well as arguing that obtaining financing is not an “activity on a lease” for which BOEM could grant a departure.⁴⁴ The court noted that BOEM’s regulations allow a departure for the “facilitation” of activities on a lease; reasoning that financing surveys is “consistent with the facilitation of appropriate activities on a lease.”⁴⁵ The court added that all of the requirements in section 585.103(b) must be satisfied in order for BOEM to grant a departure.⁴⁶ Further, the court held that BOEM did not violate the OCSLA in approving the departure without a notice and comment period as plaintiff’s argument “relies on a selective reading of the Shelf Land Act which requires ‘public notice and comment on any proposal submitted for a lease[.]’ a departure is not a lease proposal.”⁴⁷ According to the court in *Beaudreau*, a departure is not a lease proposal,

³⁷ See 30 C.F.R. § 585.103; 30 C.F.R. § 285.103.

³⁸ *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077, 1085 (D.C. Cir. 2016).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Public Employees for Environmental Responsibility v. Beaudreau*, 25 F.Supp.3d 67, 107 (D.D.C. 2014)

⁴³ *Id.* at 105-6.

⁴⁴ *Id.* at 105-7.

⁴⁵ *Id.* at 106.

⁴⁶ *Id.*

⁴⁷ *Id.* at 107. 43 U.S.C. § 1337 only requires a notice and comment period for leases, rights of way, and easements. 43 U.S.C. § 1331 defines a lease as “any form of authorization which is issued under section 1337 of this title or maintained under section 1335 of this title and which authorizes exploration for, and development and production of, minerals.”

and therefore does not need to be subject to any kind of community participation, at least, not under the OCSLA. This creates substantial implications for communities who may wish to voice their concerns with a departure, especially if it raises questions of the communities' financial obligations, in the case of a departure from the financial assurances for decommissioning regulations.

3.3 Example of an Approved Departure Request: Revolution Wind

The departure request process is best explained through an example of an approved departure request made by Orsted's Revolution Wind. To provide relevant background, BOEM executed commercial wind energy lease OCS-A 0486, on September 12, 2013, which BOEM later segregated and a portion of which it assigned to Revolution Wind on March 24, 2023.⁴⁸ The lease area "is located approximately 18 statute miles southeast of point Judith, Rhode Island and approximately 15 statute miles east of Block Island, Rhode Island."⁴⁹ Prior to the assignment, on October 12, 2017, BOEM approved Revolution Wind's SAP.⁵⁰ Later, on November 17, 2023, BOEM approved Revolution Wind's COP.⁵¹ Therefore, Revolution Wind was given permission to "build and operate a commercial wind energy facility with up to 65 wind turbine generators and two offshore substations . . ." with "an estimated capacity of 704 megawatts of clean energy."⁵² As can be seen from the timeline here, Revolution Wind did not request a departure prior to the approval of its SAP in 2017, or its COP in 2023. This background sets the framework for the departure that Revolution Wind requested and the breadth of community members who may be impacted by the project.

On December 1, 2023 after BOEM approved both its SAP and COP, Revolution Wind requested a departure from BOEM's requirement that it provide financial assurances for decommissioning costs before the installation of facilities on its lease.⁵³ Specifically, it requested "to defer providing the full amount of its decommissioning financial assurances until 15 years after the date on which the Revolution Wind Farm and the Revolution Wind Export Cable Project (project) begins commercial

Therefore, although the court did not explain why a departure is not a lease proposal, it does not fall under the definition of a lease within the statute.

⁴⁸ *Revolution Wind Lease Assignment*, BUREAU OCEAN ENERGY MGMT. [BOEM], <https://www.boem.gov/renewable-energy/state-activities/revolution-wind#:~:text=Located%20approximately%2015%20nautical%20miles,of%20powering%20nearly%20250%2C000%20homes> (last visited Jan. 14, 2025).

⁴⁹ *Revolution Wind Project Overview*, BUREAU OCEAN ENERGY MGMT. [BOEM], <https://www.boem.gov/renewable-energy/state-activities/revolution-wind#:~:text=Located%20approximately%2015%20nautical%20miles,of%20powering%20nearly%20250%2C000%20homes> (last visited Jan 14, 2025).

⁵⁰ *Revolution Wind Site Assessment Plan*, BUREAU OCEAN ENERGY MGMT. [BOEM], <https://www.boem.gov/renewable-energy/state-activities/revolution-wind#:~:text=Located%20approximately%2015%20nautical%20miles,of%20powering%20nearly%20250%2C000%20homes> (last visited Jan. 14, 2025).

⁵¹ *Revolution Wind Construction and Operations Plan*, BUREAU OCEAN ENERGY MGMT. [BOEM], <https://www.boem.gov/renewable-energy/state-activities/revolution-wind#:~:text=Located%20approximately%2015%20nautical%20miles,of%20powering%20nearly%20250%2C000%20homes> (last visited Jan. 14, 2025).

⁵² *Id.*

⁵³ *Id.*

operations.”⁵⁴ This request was made after BOEM notified Revolution Wind that its required financial assurances based on the estimated cost of facility decommissioning would be \$325,440,000.⁵⁵ Revolution Wind advanced in its departure request that providing this full amount, prior to receiving any revenue under its power purchase agreements would be unnecessarily and unreasonably burdensome.⁵⁶ It also provided risk reduction factors including: (1) a thirty five year asset life; (2) insurance during the construction and operations phase that would protect against the possibility of early decommissioning; and (3) a revenue stream secured by fixed prices in several of the power purchase agreements.⁵⁷ This departure request serves as an example of what factors need to be addressed in the request in order for the agency to properly review it. This includes a time frame for deferral of the financial assurance, reasons for the request, and risk reduction factors. Importantly, the developer’s request models the factors articulated in 30 C.F.R. § 585.103 and § 285.103 that BOEM and BSEE must consider in approving the departure. Therefore, even though the requests are not made publicly available, the approvals provide details on what the developer may need to include in its requests.

BOEM, after reviewing Revolution Wind’s projected revenue and costs and the risk reduction factors provided, agreed to approve the departure request in a written letter dated March 4, 2024.⁵⁸ In that letter, BOEM stated that the departure would “not expose the U.S. Government to undue risk.”⁵⁹ In modeling its approval after the requirements in section 285.13, BOEM noted that the departure is: (1) “necessary to facilitate appropriate activities on the lease”; (2) consistent with 8(p) of the OCS Lands Act because it protects U.S. interests and allows for “expeditious development of renewable energy projects”; (3) protects the health of the public and environment the same as if no departure were granted; and (4) does not impair third parties’ rights because it only involves the timing of decommissioning financial assurance obligations.⁶⁰ BOEM did subject Revolution Wind to additional conditions, including that it may demand financial assurances at any time during the first fifteen years if there is a change in revenue or operational expenses.⁶¹ As can be seen in the approval letter, BOEM directly weighed the factors in 30 C.F.R. § 585.103 and produced a written letter stating such reasons. Other than that, the agency did not, and was not required to, include additional reasons for its decision.

This example provides just one case in which BOEM approved an offshore wind developer’s departure request from the financial assurances for decommissioning requirement and also serves to show one example of when in the development process a departure request is made. For additional examples, both BOEM and BSEE keep publicly available records of approved departure requests

⁵⁴ BOEM Departure Request Spreadsheet, *supra* note 26; *see also* Departure Approval, Revolution Wind, *supra* note 25.

⁵⁵ Departure Approval, Revolution Wind, *supra* note 25, at 1.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 2.

⁶¹ *Id.*

from multiple different regulations for both offshore renewable energy and gas and oil.⁶² Based on BOEM's regulations, agency practice, and case law there seem to be very few requirements placed on developers and BOEM in requesting and granting these departures; so long as they are in writing, and the agency includes the relevant criteria, the agency seems to have some level of deference.

3.4 Challenging an Approved Departure Request

As seen in the *Hopper* and *Beaudreau* cases, one way to challenge a departure request may be to bring suit against the agency for a violation of the OCSLA. But, in both *Hopper* and *Beaudreau*, these challenges did not result in the vacatur of the approved departure.⁶³ Although both *Hopper* and *Beaudreau* dealt with departure requests, the approved departures were from different surveys required in the COP, not for financial assurances for decommissioning.⁶⁴ It is possible that a challenge to a departure request from the financial assurances for decommissioning regulations could face a different legal outcome, especially considering the possibility of future impacts to third parties, such as taxpayers, which is an explicit factor that BOEM and BSEE need to consider when determining whether to approve a departure request. This is one approach to challenging approved departures that could be further explored.

Another legal avenue that was tested in *Hopper* is bringing suit under the National Environmental Policy Act ("NEPA"). There, the court, although rather indirectly, held that the effect of an approved departure request from the geological surveys requirement did not violate NEPA.⁶⁵ In that case, the plaintiffs argued that the surveys should have been included as part of the COP and therefore BOEM violated NEPA in approving a construction plan prior to reviewing the surveys.⁶⁶ The court held that although "the departure delayed the surveys, [BOEM] still required Cape Wind to complete them before 'commencing construction or otherwise disturbing the sea floor.'"⁶⁷ This serves as an example that the effects of a departure request could be the basis for bringing a violation of NEPA, although whether that would be the case for departure requests from financial assurances is another question entirely.

Beyond the examples provided in this section, there is minimal litigation surrounding the approval of departure requests, and none regarding financial assurances for offshore wind. This may be because such challenges are not successful, as there are few requirements pertaining to both the procedural and substantive requirements dictating the agencies' approval of a departure request. Or this may be because the process of requesting and approving a departure, specifically from the financial assurances for decommissioning regulations, is widely unknown in the offshore wind sector. Regardless, there are avenues that can be explored further to challenge approved departure requests.

⁶² See BOEM Departure Request Spreadsheet, *supra* note 26; see also *Approvals Online Query*, BUREAU SAFETY & ENV'T ENFT [BSEE], <https://www.data.bsee.gov/Company/Approvals/Default.aspx> (last updated Jan. 12, 2025 3:00 AM).

⁶³ See *Public Employees for Environmental Responsibility v. Beaudreau*, 25 F.Supp.3d 67 (D.D.C. 2014); see also *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016).

⁶⁴ *Beaudreau*, 25 F.Supp.3d at 105-6; *Hopper*, 827 F.3d at 1084.

⁶⁵ *Hopper*, 827 F.3d at 1084-85.

⁶⁶ *Id.* at 1084.

⁶⁷ *Id.* at 1085.

4 Departure Requests, Financial Assurances, and Decommissioning in the Oil and Gas Industry

Bankruptcies in the oil and gas field have led regulators to rethink the way financial assurances for decommissioning are structured. Additionally, decommissioning costs are rising, infrastructure is aging, and the types of companies operating have changed.⁶⁸ Because few offshore wind facilities have been decommissioned, and none in the United States, it is unclear how BOEM and BSEE's approval of departure requests from the financial assurances for decommissioning requirement will impact taxpayers and the community at large. Therefore, an analysis of how financial assurances operate in the oil and gas field, which has been a growing industry for over 100 years, may provide some insight.⁶⁹

First, there is no specific regulatory mechanism allowing BOEM or BSEE to approve departures from financial assurances for decommissioning oil and gas facilities as there is for the offshore wind industry.⁷⁰ Similar to the standards that are applied to departures for offshore wind, BOEM regulations for oil and gas specifically provide that departure requests may be given for geophysical surveys.⁷¹ There are also provisions for other departures, including bottomhole pressure surveys or other operational requirements, although the criteria for granting the departure is different.⁷² Therefore, it is unclear why departure requests, specifically for financial assurances from decommissioning is something utilized in the offshore wind development process.

Second, on April 24, 2024, BOEM released its final, more stringent rule on financial assurances and decommissioning for oil and gas.⁷³ The rule seeks to strengthen and simplify financial assurances while better protecting “the American taxpayer from bearing the cost of oil and gas facility decommissioning.”⁷⁴ Although there are multiple reasons for this new rule, bankruptcies have been the leading cause, as “more than 30 bankruptcies have occurred involving offshore oil and gas lessees that did not have sufficient financial assurance to cover their decommissioning liabilities [since 2009].”⁷⁵ The new rule establishes different evaluation criteria to assess a company's risk, and whether they are required to provide supplemental financial assurances. These include: (1) credit ratings, based on Nationally Recognized Statistical Rating Organization credit ratings or a BOEM generated credit rating; and (2) proved reserves, which is “the known value of remaining oil and gas reserves on an existing lease area.”⁷⁶ The new rule also contains provisions for additional financial

⁶⁸ *Id.*; see also *Risk Management & Financial Assurance Rule*, BUREAU OCEAN ENERGY MGMT. [BOEM] [hereinafter BOEM Fact Sheet on Risk Management & Financial Assurance Rule], https://www.boem.gov/sites/default/files/documents/oil-gas-energy/risk-management/BOEM_Risk%20Management_Financial%20Assurance%20Rule_Fact%20Sheet_0.pdf.

⁶⁹ *History of U.S. Offshore Oil Drilling*, INST. FOR ENERGY RSCH. (Sept. 21, 2020), <https://www.instituteeforenergyresearch.org/fossil-fuels/gas-and-oil/history-of-u-s-offshore-oil-drilling/>.

⁷⁰ See generally *Risk Management and Financial Assurance for OCS Lease and Grant Obligations*, 89 Fed. Reg. 31544 (Apr. 24, 2024).

⁷¹ 30 C.F.R. § 550.194(c).

⁷² *Id.* § 550.1153.

⁷³ *Risk Management and Financial Assurance for OCS Lease and Grant Obligations*, 89 Fed. Reg. 31544 (Apr. 24, 2024).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See BOEM Fact Sheet on Risk Management & Financial Assurance Rule, *supra* note 67.

assurance requirements of right of use and easement holders, as well as a provision that current grant holders must hold their own financial assurances and cannot solely rely on the prior owners.⁷⁷ Based on this rule and BOEM's acknowledgment that decommissioning rates may be higher than the financial assurances available to pay for it in the offshore wind field, it may be beneficial for BOEM to create a uniform rule for all offshore energy developments, including offshore wind.

Conclusion and Final Considerations

Departure requests provide an avenue for developers to defer financial assurances for decommissioning for a number of years, which does provide benefits for the developer. However, these benefits may be at the expense of tax payers and local communities.⁷⁸ For developers who may not have stable financial funding prior to the project's operation, departure requests provide them the opportunity to gain capital before BOEM requires them to upfront the money for decommissioning. Yet, if the rationale is that the developer is not financially stable enough to post the assurance now, or if the offshore oil and gas industry can provide any insight into what the offshore wind sector may face, it may be shortsighted to think that offshore wind developers will be able to provide financial assurances in the future.⁷⁹ There also remains the possibility that a developer will not stay in business long enough for the assurances to come due and owing, as is a current issue faced in the oil and gas sector. Although there are mechanisms for holding developers accountable in these instances, such as conditions on the approved departure, or responsibility within the statute, whether these provisions get utilized in the offshore wind field is yet to be seen.

Overall, BOEM and BSEE seem to have broad discretion in approving departure requests, there are minimal opportunities for community engagement or challenging of approved requests, and if the oil and gas industry is any indicator, there may be rough seas ahead if the agencies have unfettered ability to approve departures from the financial assurances for decommissioning requirements.

⁷⁷ *Id.*

⁷⁸ See Killough, *supra* note 2.

⁷⁹ See U.S. Congressman Jefferson Van Dren, *An Examination into Offshore Wind Industrialization: Part Three*, 2:57:45 (Aug. 13, 2024), <https://www.youtube.com/watch?v=axqdSN0M96Q&t=1s> (providing Meghan Lapp, fisheries liaison for Seafreeze Ltd's, testimony on departure requests).