



January 24, 2011

Department of the Interior  
Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE)  
381 Elden Street, MS-4024  
Herndon, Virginia 20170-4817

Attn: Regulations and Standards Branch (RSB)

Re: Increased Safety Measures for Energy Development on the Outer Continental Shelf,  
1010-AD68, IRFA

Dear Sir or Madam:

The American Petroleum Institute (API), The International Association of Drilling Contractors (IADC), the Independent Petroleum Association of America (IPAA), the National Ocean Industries Association (NOIA), the Offshore Operators Committee (OOC), the Offshore Equipment and Operating Procedures Joint Industry Task Forces (JITF) and the US Oil and Gas Association appreciate this opportunity to provide written comments on BOEMRE's Initial Regulatory Flexibility Analysis (IRFA) on the already-implemented interim final rule, *Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Increased Safety Measures for Energy Development on the Outer Continental Shelf*, 75 Fed. Reg. 80717 (December 23, 2010). Specifically, the undersigned organizations believe BOEMRE's initial regulatory flexibility analysis does not account for a massive change to existing regulatory requirements found in its interim final safety rule that is likely to impose years of confusion and delay on offshore permitting, harming thousands of small firms and destroying American jobs. We urge BOEMRE to amend its initial regulatory flexibility analysis to take account of the true impacts of its actions and to publish a revised final rule removing the purported changes to industry standards incorporated by reference.

These trade associations and joint industry task forces represent oil and gas producers who conduct the vast majority of the OCS oil and gas exploration and production activities in the Gulf of Mexico. Additionally, many of our members are involved in drilling, construction and support services for the offshore oil and gas industry and will be significantly impacted by this BOEMRE IRFA and rulemaking.

America's oil and natural gas industry recognizes that offshore operations must be conducted safely and in a manner that protects the environment. The offshore industry in the Gulf of Mexico has a long history of safe operations that have advanced the energy security of our nation. These energy resources are crucial for our nation's energy security and economy.

Our comments are submitted without prejudice to any member company's right to have or express different or opposing views.

## **I. The IRFA did not fulfill the requirements of the RFA.**

The IRFA published by BOEMRE does not satisfy the agency's statutory obligation under the Regulatory Flexibility Act of 1980, as amended ("the RFA").<sup>1</sup> We believe that, since there is not a "good cause" exception to the Administrative Procedure Act's notice and comment rulemaking requirement,<sup>2</sup> BOEMRE was required to publish an IRFA at the time of the proposed rulemaking. Further, the IRFA BOEMRE eventually published did not account for the significant costs likely to be imposed by BOEMRE's new interpretation of 14,000 discretionary provisions found in API standards as mandatory permitting requirements. Importantly, the IRFA also did not account for how these changes could impose conflicting or confusing requirements on operators, or the inevitable delays these changes could impose on permitting. Finally, the IRFA may not properly account for costs for other provisions found in the interim final safety rule.

### **A. BOEMRE did not consider the regulatory alternatives it presented in the IRFA prior to imposing serious regulatory burdens on small entities.**

First and foremost, BOEMRE's procedure in this rulemaking establishes that the regulatory alternatives presented in the IRFA were not actually considered by the agency prior to imposing regulatory changes on small entities.<sup>3</sup> The RFA requires agencies to publish the IRFA "at the time of the publication of general notice of proposed rulemaking for the rule."<sup>4</sup> The IRFA is required to contain a "description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."<sup>5</sup> Consistent with our December 13 comments, we believe that BOEMRE was required by law to promulgate the interim final safety rule through notice and comment rulemaking, and therefore the RFA's provisions applied to the agency.<sup>6</sup> The RFA does not require agencies to make specific substantive decisions, but to

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<sup>1</sup> 5 U.S.C. §§601, et seq.

<sup>2</sup> See Comment Letter from API, IADC, IPAA, NOIA, OOC and USOGA to BOEMRE Dec. 13, 2010 (hereinafter, "the December 13 comments")(attached).

<sup>3</sup> We note that this Administration has stated its commitment to reducing regulatory burdens on small entities, as the President stated, "My Administration is firmly committed to eliminating excessive and unjustified burdens on small businesses, and to ensuring that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses. ... In the current economic environment, it is especially important for agencies to design regulations in a cost-effective manner consistent with the goals of promoting economic growth, innovation, competitiveness, and job creation." See Presidential Memoranda - Regulatory Flexibility, Small Business, and Job Creation (January 18, 2011).

<sup>4</sup> 5 U.S.C. §603(a).

<sup>5</sup> 5 U.S.C. §603(b).

<sup>6</sup> *December 13 Comments*, at 2-6. As the President has stated, "If regulations are preceded by careful analysis, and subjected to public comment, they are less likely to be based on intuition and guesswork and more likely to be justified in light of a clear understanding of the likely consequences of alternative courses of action." See Presidential Memoranda - Regulatory Flexibility, Small Business, and Job Creation (January 18, 2011).

simply show the public that the agency has actually considered the real world impacts of its actions on small entities. Thus, the IRFA is an important document, since it explains to the public the facts the agency considered while regulating.

In the interim final rule published on October 14, 2010, BOEMRE stated:

Given the emergency nature of these rules, BOEMRE has not yet prepared a detailed Initial Regulatory Flexibility Analysis for this rule; however, BOEMRE intends to publish a supplemental Initial Regulatory Flexibility Analysis in the near future which will examine the impact of this regulation on small entities in greater detail than provided below.

*75 Fed. Reg.* at 63365.

In the brief analysis BOEMRE did provide along with its interim final safety rule, BOEMRE presented two alternatives—delayed implementation and differing compliance regimes—but dismissed both alternatives out of hand with no analysis. There, BOEMRE simply stated:

Both of these alternatives are being rejected by BOEMRE for this interim final rule because of the overriding need to reduce the chance of a catastrophic blowout event. We do not believe it is responsible for a regulator to compromise the safety of offshore personnel and the environment for any entity including small businesses. Offshore drilling is highly technical and can be hazardous, any delay may increase the interim risk of OCS drilling operations.

*75 Fed. Reg.* at 63366.

This analysis did not satisfy BOEMRE’s statutory requirement to provide a “description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.”<sup>7</sup>

In the follow-up IRFA, published just two weeks after the close of the comment period, but more than three months after the agency’s “emergency” rulemaking, BOEMRE elaborated on regulatory alternatives, this time analyzing five regulatory alternatives, including; (1) providing different compliance requirements for small entities, (2) providing alternative testing requirements, (3) paperwork consolidation, (4) using performance rather than design standards, and (5) exemptions from rule requirements. The agency rejected all of these alternatives.<sup>8</sup>

In its analysis of different compliance requirements for small entities, BOEMRE stated:

The primary reason for not including additional compliance time or different requirements is the overriding need to reduce the chance of a catastrophic blowout event. The risk is not lower for small entities and BOEMRE cannot compromise the safety of offshore personnel and the environment for any entity including small businesses. Offshore drilling is highly technical and can be hazardous; any delay in the implementation of Safety Measures Rule may increase the risk of OCS drilling operations.

The regulatory provisions do not require significant equipment or capital upgrades and can be met in short order ... The compliance costs are mostly the increased time to conduct drilling operations. Thus, any additional time provided to comply with the rule would not result in cost savings in the form of reduced short-term cash flow expenditures that might be expected if the rule required the installation of capital equipment.

*IRFA*, at 12.

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<sup>7</sup> 5 U.S.C. §603(b).

<sup>8</sup> To be fair, BOEMRE did state that a small entity harmed by BOEMRE’s final safety rule could write to their BOEMRE District Manager or Regional Supervisor and request a departure from the regulatory requirements BOEMRE imposed. We do not believe that BOEMRE satisfied its RFA obligations by stating that the Agency might grant a departure solely at its own discretion on a case by case basis without providing any specific conditions that would qualify an applicant for such a departure.

Aside from the fact that courts have now repeatedly rejected assertions of an existing emergency,<sup>9</sup> these representations are demonstrably false. First, as discussed in more detail below, BOEMRE's changes to 30 CFR 250.198(a)(3) affected more than 14,000 discretionary provisions in 80 standards. BOEMRE has made public no analysis of the safety benefits stemming from all of these provisions. Moreover, BOEMRE has not done any economic analysis to see impacts these changes will have.<sup>10</sup> BOEMRE made no attempt to analyze whether each of the new mandatory requirements it is imposing on drilling operations would yield a safety benefit or could be adjusted to mitigate costs. BOEMRE's IRFA does not represent a good faith attempt to mitigate the harm faced by small entities through blanket changes to API standards.

In short, two weeks after the close of the comment period for the interim final safety rule, BOEMRE had not reviewed and addressed the comments in the administrative record. The agency wrongly concluded that there was absolutely no alternative to the direct final rule it published without any serious consideration of the impacts of its actions on small entities. The agency has not fulfilled its statutory duty to identify regulatory alternatives which comply with its regulatory goals while minimizing impacts, and the process chosen by BOEMRE underscores the agency's apparent unwillingness to consider the actual harm the rule will impose on small entities.

**B. The IRFA did not reflect industry comments pointing out serious problems with BOEMRE's changes to more than 14,000 provisions in industry best practices.**

In response to BOEMRE's October 14 request for comments, industry groups submitted 24 pages of comments on specific provisions of the rulemaking which would harm small entities. Importantly, these comments identified BOEMRE's changes to 30 CFR 250.198(a)(3) as likely to cause serious harm to small entities. Specifically, BOEMRE has amended 30 CFR 250.198(a)(3) to make compliance with 80 API industry standards mandatory, and has issued a blanker revision to more than 14,000 provisions, reading all instances of the word "should" to mean "must." In our December 13 comments, industry specifically stated:

As BOEMRE does not know the true costs of compliance for requiring mandatory compliance with API standards, including the conflicts created by BOEMRE's own changes to over 14,000 discretionary provisions, it would be impossible for the agency to currently provide an actual estimate of compliance costs for completing its required initial regulatory flexibility analysis. The industry expects increased costs for compliance in the following areas; 1) Capital Investments, 2) Additional time to execute testing provisions, 3) Delays in operations due to professional engineering certification requirements and 4) Additional contingency planning for unlikely catastrophic events. The Interim Final Rule misstates the "Compliance Costs" as only affect drilling, because the rule affects drilling, completion, workover, intervention and abandonments. Nor has the agency provided the statutorily required analysis of regulatory alternatives. 5 U.S.C. §604(a)(5). The interim final rule contained two straw man regulatory alternatives—exempting small businesses and delaying implementation—but dismissed these unspecific and broad

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<sup>9</sup> See *EnSCO Offshore Co. v. Salazar*, 2010 WL 4116892 (E.D. La. 2010) (holding BOEMRE was not justified in imposing NTL-05 without notice and comment rulemaking), *Hornbeck Offshore Services, L.L.C. v. Salazar*, 696 F.Supp.2d 627, 637-38 (E.D. La. 2010) (holding that plaintiffs had made a sufficient showing of likelihood of success on the merits in a claim that MMS was arbitrary and capricious in imposing a six-month moratorium).

<sup>10</sup> In fact, though it is not clear from this IRFA, it appears from BOEMRE's economic analysis that the agency may have disclaimed any need to account for the economic impacts and permit delays it is causing by amending 14,000 discretionary provisions to become mandatory. *BOEMRE Cost Benefit Analysis*, at 69. We believe such a position would be legally indefensible, and we encourage the agency to actually account for the impacts of its actions.

alternatives without consideration, stating “[w]e do not believe it is responsible for a regulator to compromise the safety of offshore personnel and the environment for any entity including small businesses.” 75 *Fed. Reg.* at 63366. This statement is not a legally sufficient basis for rejecting any consideration of regulatory alternatives, especially since BOEMRE has not identified how safety could be compromised by eliminating mandatory new compliance regimes for provisions that are currently impossible to comply with—such as those identified below.  
*December 13 Comments*, at 5, FN9.

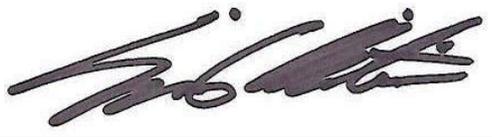
Further, industry provided pages of comments in a non-exhaustive list of provisions from just a few of the standards which BOEMRE’s new interpretation would make confusing or actually impossible to comply with. BOEMRE appears to have ignored this submission and has not provided any discussion of compliance costs imposed by its changes to 30 CFR 250.198(a)(3). The IRFA does not satisfy the RFA’s requirements, since BOEMRE continues to fail to even identify the main cost it is imposing.

**II. We recommend that BOEMRE revise 30 CFR 250.198(a)(3) immediately to remove the sentence interpreting discretionary provisions of standards incorporated by reference as imposing mandatory requirements.**

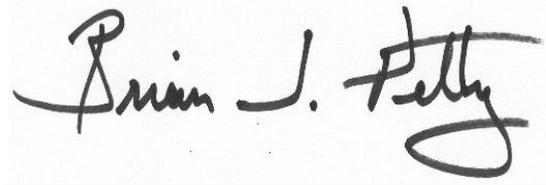
In publishing the interim final safety rule, BOEMRE has not complied with the requirements of the RFA. Importantly, it appears to industry that the agency has closed its eyes to the very real, serious harm the rule will cause to small entities through its changes to 30 CFR 250.198(a)(3). We strongly urge BOEMRE to revise its interim final rule with immediate publication of a final rule which revises 30 CFR 250.198(a)(3) to eliminate the sentence which reads, “If any incorporated document uses the word *should*, it means *must* for purposes of these regulations.” Of course, BOEMRE remains free to identify individual provisions in the standards it incorporates by reference which the agency believes should be mandatory for safety reasons. However, by removing this blanket amendment, BOEMRE will avoid an unsupportable regulatory outcome and avoid serious, ongoing harm to many small entities engaged in offshore production.

Again, we appreciate the opportunity to provide comments on the IRFA of the interim final rule. America’s oil and natural gas industry will continue to maintain safe operations and advance the energy security of our nation.

Sincerely,



Erik Milito, API



Brian Petty, IADC



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Daniel Naatz, IPAA



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Michael Kearns, NOIA



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Allen Verret, OOC



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Alby Modiano, US Oil and Gas Association