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Enforcing Legacy Environmental Liabilities for Offshore Oil and Gas Infrastructure

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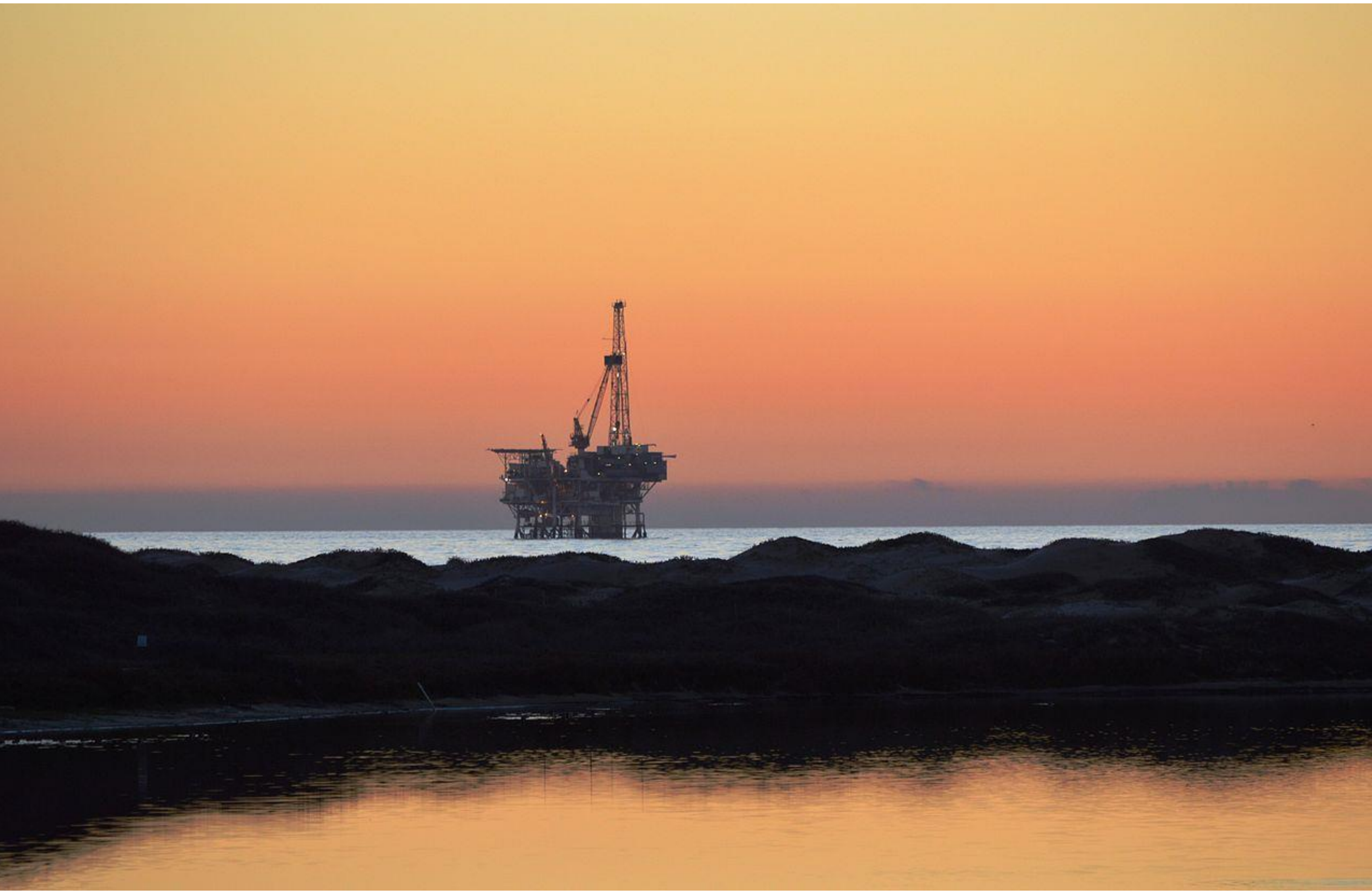

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INTRODUCTION

For more than a century, American fossil fuel companies have extended their operations offshore to exploit the vast oil and gas reserves that lie under the seafloor.[1] In accordance with international law, the United States has claimed jurisdiction over offshore areas extending up to 200 nautical miles from the coast.[2] Since 1953, near-shore oil and gas operations within three nautical miles, and sometimes out to nine nautical miles from the coast,[3] have been controlled by the closest coastal state.[4] However, seabed resources that lie beyond the "seaward boundaries" of coastal states, but still within the jurisdiction of the United Statesare exclusively controlled by the federal government.[5] This area of federal jurisdiction spans more than 1.75 billion acres, "an area over 10 times the size of Texas," and is known as the "outer continental shelf," or "OCS."[6] The Outer Continental Shelf Lands Act of 1953 ("OCSLA") gives the U.S. Department of the Interior ("DOI") the authority to issue and regulate mineral leases on the OCS. Under DOI's leasing system, private oil and gas companies have "drilled more than 55,000 wells and installed more than 7,000 platforms in federally managed waters on the [OCS], nearly all of which have been in the Gulf of Mexico."[7]

DOI's leasing regime requires companies to plug wells, remove offshore platforms, and generally return their operation sites to a safe and stable condition when their leases end. This process, known as "decommissioning," can cost tens or hundreds of millions of dollars for each offshore platform.[8] If offshore oil and gas facilities are not promptly and properly decommissioned, they represent serious ongoing environmental risks—metal rusts, concrete decays, and storms and natural disasters threaten to release oil

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[1] *See History of U.S. Offshore Drilling*, INSTITUTE FOR ENERGY RESEARCH (Sept. 21, 2020), https://www.instituteforenergyresearch.org/fossil-fuels/gas-and-oil/history-of-u-s-offshore-oil-drilling/.

[2] Proclamation 2667—Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf (Sept. 28, 1945).

[3] In most of the United States, coastal states have primary jurisdiction over areas within 3 nautical miles of the coast. However, in the Gulf of Mexico, the jurisdiction of Texas and Florida extends 9 nautical miles from the coast. The U.S. territory of Puerto Rico also has jurisdiction over areas within 9 nautical miles of the coast.

[4] Prior to 1953, offshore oil and gas operations were governed by state law. *Id*. However, this was hotly contested, and the Supreme Court repeatedly rejected state authority over seafloor resources. *See* MARTIN LOCKMAN ET AL., DECOMMISSIONING LIABILITY AT THE END OF OFFSHORE OIL AND GAS: A REVIEW OF INTERNATIONAL OBLIGATIONS, NATIONAL LAWS, AND CONTRACTUAL APPROACHES IN TEN JURISDICTIONS, SABIN CENTER FOR CLIMATE CHANGE LAW & COLUMBIA CENTER ON SUSTAINABLE INVESTMENT, notes 591–93 and accompanying text (2023). This dispute was resolved in 1953 when Congress ceded control of near-shore resources to coastal states under the Submerged Lands Act. *See* 43 U.S.C. § 1312.

[5] 43 U.S.C. § 1333.

[6] *See History of U.S. Offshore Drilling*, INSTITUTE FOR ENERGY RESEARCH (Sept. 21, 2020), https://www.instituteforenergyresearch.org/fossil-fuels/gas-and-oil/history-of-u-s-offshore-oil-drilling/.

[7] GOVERNMENT ACCOUNTABILITY OFFICE, INTERIOR NEEDS TO IMPROVE DECOMMISSIONING ENFORCEMENT AND MITIGATE RELATED RISKS 1 (2024), https://www.gao.gov/assets/gao-24-106229.pdf.

[8] *See* MARTIN LOCKMAN ET AL., DECOMMISSIONING LIABILITY AT THE END OF OFFSHORE OIL AND GAS: A REVIEW OF INTERNATIONAL OBLIGATIONS, NATIONAL LAWS, AND CONTRACTUAL APPROACHES IN TEN JURISDICTIONS, SABIN CENTER FOR CLIMATE CHANGE LAW & COLUMBIA CENTER ON SUSTAINABLE INVESTMENT, note 116 and accompanying text (2023) (citing figures between USD 15 million and GBP 200 million to decommission a platform and its connected infrastructure, depending on its location and characteristics).

and natural gas into sensitive ocean environments.[9] Offshore wells with temporary plugs[10] or "faulty, damaged, or corroded well casings" can release methane and other hydrocarbons into the water, polluting the ocean and contributing to global climate change.[11] "As of 2024, more than 1,000 wells and 100 platforms on the [OCS] are overdue for [decommissioning]—more than 75% of the total number of inactive wells and platforms."[12] And this crisis is just beginning; of all the oil and gas rigs infrastructure installed on the outer continental shelf, only a fraction has been fully decommissioned.[13]

The long life and complex corporate structure of oil and gas assets can complicate the process of enforcing decommissioning obligations. Oil and gas production facilities may operate for many decades, changing hands between multiple owners along the way. However, DOI's decommission regulations contain a broad set of liability rules that allow regulators to hold prior owners and operators of offshore leases responsible for decommissioning obligations. These rules, known as "joint and several trailing liability," give regulators the authority to pursue predecessor companies for the costs of decommissioning if the current owner defaults on its obligations.

This white paper examines these legacy decommissioning liabilities. Part I reviews the sources and scope of DOI's authority to hold predecessor oil and gas companies liable for decommissioning obligations. Part II assesses the impact of these legacy liabilities on the parent companies of predecessor oil and gas operators, and identifies strategies to hold these companies liable for decommissioning obligations if their subsidiaries are unable to pay them. Part III concludes.

Key Findings

- **Federal law creates significant legacy liabilities for the former owners of offshore oil and gas rights.** Longstanding federal regulations hold the prior owners of offshore oil and gas rights responsible for decommissioning offshore oil and gas facilities if the current rightsholders default on their decommissioning obligations. This standard, known as "joint and several trailing liability," allows DOI to pursue any liable party, including prior lessees, for the full cost of decommissioning if the current owner fails to fulfill its decommissioning obligations.
- **The "joint and several trailing liability" standard that governs offshore oil and gas decommissioning rests on a firm statutory basis.** While the statutory text of OCSLA does not directly impose decommissioning obligations on lessees, sublessees, or operators on the OCS, it not

[9] *Id*. at 9–11.

[10] Torbjørn Vrålstad et al., *Plug & Abandonment of Offshore Wells: Ensuring Long-term Well Integrity and Cost-Efficiency*, 173 J. Petroleum Sci. & Engineering 478, 481 (2019), https://doi.org/10.1016/j.petrol.2018.10.049.

[11] Christoph Böttner et al., *Greenhouse Gas Emissions from Marine Decommissioned Hydrocarbon Wells: Leakage Detection, Monitoring and Mitigation Strategies*, 100 Int'l J. Greenhouse Gas Control 1, 2 (2020), https://doi.org/10.1016/j.ijggc.2020.103119.

[12] Martin Lockman, *Environmental Repair in the Energy Transition* (unpublished manuscript on file with author), citing Government Accountability Office, Interior Needs to Improve Decommissioning Enforcement and Mitigate Related Risks 1 (2024), https://www.gao.gov/assets/gao-24-106229.pdf.

[13] Bruce R. Huber, *Negative-Value Property*, 98 Wash. U.L. Rev. 1461, 1504 (2021) ("Of all the offshore drilling rigs on the continental shelf, only a few have been removed or disassembled . . . the bulk of the work of cleanup or land reclamation lies ahead").

only authorizes, but directs, the Secretary of the Interior to adopt a regime governing the assignment of decommissioning liability. This direction arises from three statutory features of OCSLA: (1) DOI's broad authority to design and implement an offshore leasing program, (2) DOI's statutory obligation to issue regulations that protect oil and gas reservoirs and prevent waste or destruction of OCS resources, and (3) DOI's statutory obligation to set terms governing the assignment and relinquishment of leases. In response to these statutory directions, DOI implemented the modern "joint and several trailing liability" regime immediately following the passage of OCSLA in 1953. Although Congress has modified OCSLA several times since DOI adopted this liability regime, it has never restrained DOI's practice of holding assignors jointly and severally liable for the default of their assignees. To the contrary, in 1978 Congress expanded DOI's statutory authority over lease assignments and transfers, with the explicit goal of codifying DOI's regulatory practice of monitoring and conditioning lease assignments.[14]

- **While the DOI regulations clearly impose decommissioning obligations on lessees and their predecessors, the regulations do not explicitly extend liability to the owners thereof. There are at least two means by which DOI may seek to hold parent companies liable for the decommissioning obligations of their subsidiaries but both present challenges.** Due to the capital intensive and risky nature of offshore operations, oil and gas companies often form new subsidiaries for each project. DOI regulations implementing OCSLA allow parent companies to guarantee the obligations of their subsidiaries. Such guarantees are rare, but where they exist, would provide a relatively simple option for DOI to enforce decommissioning obligations against the parent company of a current or former offshore lessee. As an alternative, DOI might pursue "veil-piercing" actions against parent companies. Veil-piercing actions seek to hold individuals and entities liable for the obligations of a company over which they have influence or control. These actions are highly complex and fact-specific, but generally require the plaintiff to show that (1) the controlling individual or entity improperly subverted or abused the purported independence of their subsidiary, and (2) an injustice would arise if the courts allowed the controlling individual or entity to benefit from the presumption of independence. In the offshore context, the law governing such actions may vary significantly depending on the location of the relevant facility, the state in which the liable subsidiary is incorporated, and the court in which a veil-piercing action is brought, among other factors.

[14] *See infra* at note 36 and accompanying text.

I. LEGACY LIABILITIES FOR OFFSHORE DECOMMISSIONING

Two divisions within DOI—the Bureau of Ocean Energy Management ("BOEM") and the Bureau of Safety and Environmental Enforcement ("BSEE")—currently regulate offshore oil and gas decommissioning on the OCS.[15] These bodies were created in 2011, when DOI reorganized its former offshore regulatory body—the Minerals Management Service ("MMS")—and split its responsibilities between BOEM and BSEE. BOEM is now responsible for issuing offshore oil and gas leases and overseeing development under those leases, while BSEE establishes and enforces safety and environmental regulations, including with respect to decommissioning.

The section of federal regulations that imposes joint and several trailing liability for decommissioning obligations was created in 2011 at the time of this reorganization.[16] DOI's current leasing regulations[17] provide that:

> "Lessees, owners of operating rights, and their predecessors are jointly and severally liable for meeting decommissioning obligations for facilities on leases, including the obligations related to lease-term pipelines, as the obligations accrue and until each obligation is met."[18]

Separately, the regulations provide that, if a lessee assigns its "record title interest," it "remain[s] liable for all obligations, monetary and non-monetary, that accrued in connection with [its] lease during the period in which it owned the record title interest, up to the date BOEM approves [the] assignment."[19] The regulations further warn lessees that, "[e]ven after assignment, BOEM or BSEE may require you to bring the lease into compliance if your assignee or any subsequent assignee fails to perform any obligation under the lease, to the extent the obligation accrued before approval of your assignment."[20]

Together, these two regulations impose a standard known as joint and several trailing liability.[21] This standard allows BOEM and BSEE to pursue any liable party, including prior lessees, for the full cost of decommissioning if the current leaseholder fails to fulfill its decommissioning obligations. This section

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[15] *The Reorganization of the Former MMS*, BUREAU OF OCEAN ENERGY MANAGEMENT (n.d.), https://www.boem.gov/about-boem/reorganization/reorganization-former-mms.

[16] *Id*.

[17] These regulations have moved throughout the Code of Federal Regulations several times in response to multiple administrative reorganizations of federal land management programs. The current iteration of these regulations was implemented in 2011 when BOEM and BSEE were created from DOI's reorganization of its former offshore regulator. *See id*. However, as discussed below, DOI's offshore liability rules have been incredibly consistent over the life of OCSLA, and administrative renumbering, without more, should not be interpreted as a substantive change.

[18] 30 C.F.R. § 250.1701(a).

[19] 30 C.F.R. § 556.710.

[20] *Id*.

[21] *See* MARTIN LOCKMAN ET AL., DECOMMISSIONING LIABILITY AT THE END OF OFFSHORE OIL AND GAS: A REVIEW OF INTERNATIONAL OBLIGATIONS, NATIONAL LAWS, AND CONTRACTUAL APPROACHES IN TEN JURISDICTIONS, SABIN CENTER FOR CLIMATE CHANGE LAW & COLUMBIA CENTER ON SUSTAINABLE INVESTMENT, 18–19 (2023).

examines the statutory framework for offshore decommission liability, the regulatory history of the liability standards, and the way that these liabilities have been interpreted by the courts.

The Statutory Framework for Offshore Decommissioning Liability

OCSLA delegates general regulatory authority to the Secretary of the Interior, and directs the Secretary to operate an offshore leasing program, prevent waste and contamination of offshore mineral reservoirs, and set standards for transferring, assigning, and relinquishing leases. The statutory text of OCSLA does not directly impose decommissioning obligations on offshore operators and lessees. Instead, DOI derives its regulatory authority to set decommissioning liability rules under three separate statutory provisions.

First, Section 5 of OCSLA grants the Secretary of the Interior broad authority to administer the OCS leasing program, and to "prescribe such rules and regulations as may be necessary to carry out" that program.[22] This broad grant of regulatory authority underlies all of DOI's regulations governing the OCS leasing program. It is supplemented by other statutory provisions, which provide additional direction regarding the appropriate scope of the DOI regulations.

Second, OCSLA authorizes the Secretary of the Interior to adopt well-plugging regulations, although the nature and scope of those regulations are left to the Secretary's discretion. Specifically, the Secretary of the Interior is directed to "prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the [OCS], and the protection of correlative rights therein."[23] While the full scope of this clause has not been litigated, at the time OCSLA was enacted, well-plugging requirements had long been recognized as a form of regulation designed to protect the integrity of oil and gas reservoirs.[24] OCSLA provides that, when these regulations are issued, "as of their effective date" they "apply to all operations conducted under a lease issued or maintained under [OCSLA]"[25]

Third, OCSLA also requires the Secretary of the Interior to issue regulations that govern "the assignment or relinquishment of [leases]."[26] OCSLA further requires the Secretary to condition "any assignment or other transfer of any lease . . . upon compliance with regulations issued under [OCSLA]."[27] These three statutory features—(1) DOI's broad authority to design and implement an offshore leasing program, (2) DOI's statutory obligation to issue regulations that protect oil and gas reservoirs and prevent waste or destruction of OCS resources, and (3) DOI's statutory obligation to set terms governing the assignment and relinquishment of leases—undergird the decommissioning liability regulations.

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22 43 U.S.C. § 1334(a).

23 43 U.S.C. § 1334(a).

24 *See Steelsmith v. Aiken*, 14 Pa. Super. 226, 226 (1900) (discussing the role that early well-plugging requirements in mineral leases played in protecting the correlative rights of other users of an offshore reservoir).

25 *Id*.

26 43 U.S.C. § 1334(a)(3).

27 43 U.S.C. § 1334(b).

The Regulatory History of OCS Decommissioning Liability

Regulations issued by DOI under OCSLA have imposed trailing liability for decommissioning obligations since at least 1954. Language holding former owners "jointly and severally" responsible for decommissioning obligations was added to the regulations in 1997, but the MMS insisted that this represented a "clarification" rather than a change in law.

As discussed above, OCSLA authorized the Secretary of the Interior to implement a leasing program governing mineral exploration and production on the OCS. By 1954, DOI had promulgated regulations to implement this program. The 1954 regulations contained decommissioning requirements. All lessors were required to:

> "remove all structures when no longer required for operations under the lease to sufficient depth beneath the surface of the waters to prevent them from being a hazard to navigation and the fishing industry; and … carry out at expense of the lessee all lawful and reasonable orders of the lessor relative to the matters in this section."[28]

Additionally, lessors were required to remove "all structures, machinery, equipment, tools, and materials" from their leased sites within 1 year of the end of their lease, "other than improvements needed for producing wells or for drilling or producing other leases, and other property permitted by the lessor to be maintained."[29]

These early regulations also contained trailing liability requirements. While lessors could transfer their leases, the transfer did not absolve them of their legal obligations. Instead, the 1954 regulations provided that "assignor[s] shall be liable for all obligations under the lease accruing prior to [the regulator's] approval of the assignment."[30] Together, this combination of decommissioning obligations and post-assignment liability for predecessor leaseholders created essentially the same regulatory structure of joint and several predecessor liability that exists today.

In 1978, Congress significantly amended OCSLA, creating the modern system of OCS leasing.[31] Among other things, these amendments responded to the environmental movement of the 1970s by explicitly requiring DOI to manage the OCS:

> "in a manner which considers economic, social, and environmental values of the renewable and nonrenewable resources contained in the [OCS], and the potential impact of oil and gas exploration on other resource values of the [OCS] and the marine, coastal, and human environments."[32]

While the 1978 amendments substantially reshaped OCSLA, Congress took no steps to modify the trailing liability regime DOI had established in the 1954 regulations. This was not for lack of attention; in fact,

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[28] 43 C.F.R. § 201.115 (1954).

[29] 43 C.F.R. § 201.122 (1954).

[30] 43 C.F.R. § 201.60 (1954).

[31] Sam Kalen, *Cruise Control and Speed Bumps: Energy Policy and Limits for Outer Continental Shelf Leasing*, 7 ENVT'L & ENERGY L. & POL'Y J. 155, 161–62 (2012) (describing the background of the 1978 amendments to the Outer Continental Shelf Leasing Act).

[32] OCSLA Amendments, Pub. L. 95-372 § 202 (Sept. 18, 1978) (codified, as amended, at 43 U.S.C. § 1344(a)(1)).

the 1978 OCSLA amendments added significant new statutory language addressing lease assignments. However, legislative debates at the time suggest that this new language was intended to address a concern that speculators and "straw bidders" might subvert Congress's leasing regulations by purchasing and then re-selling leases.[33] In response to this concern, the 1978 amendments to OCSLA reaffirmed DOI's authority to supervise the assignment and transfer of leases.[34] This additional language, which remains in effect today, provides that "no lease issued under [OCSLA] may be sold, exchanged, assigned, or otherwise transferred except with the approval of [DOI]."[35] In adopting this language, the Senate Conference Committee explained:

> "The intent of this provision is to codify existing practice [governing lease assignment], authorized by the 1953 act, and add Attorney General input on the competitive impacts of a sale, exchange, assignment or other transfer of a lease. The Secretary shall retain his power to approve or disapprove a sale, transfer, assignment or exchange."[36]

In response to these changes DOI adopted new implementing regulations in 1979. These new regulations renumbered, but did not change, the pre-existing trailing liability requirement.[37] The changes, including the persistence of DOI's trailing liability regime, attracted no public comment.[38]

DOI's OCS liability regulations have been renumbered, rearranged, and reorganized several times since 1979. However, the only substantial change to the text of DOI's liability regulations occurred in 1997 when DOI, through MMS, made several amendments to the OSCLA regulations. According to MMS, these amendments were intended to "reduce the risk of default by an underfunded entity who operates a lease or holds a pipeline right-of-way."[39] Among other changes, MMS added language to the regulations that clarified the responsibility of co-lessees and operating rights holders (essentially, offshore sublessees). As amended, the regulations provided:

> "Lessees and operating rights owners are jointly and severally responsible for performing nonmonetary lease obligations, unless otherwise provided in the regulations in this chapter. If

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[33] *See April 5, 1977 Hearings Before the H. Ad Hoc Select Committee on Outer Continental Shelf*, 95th Cong., (1977) (statement of Donald I. Baker, assistant attorney general, Antitrust Division, Department of Justice), *in* Legislative History of the Outer Continental Shelf Lands Act Amendments of 1978 P.L. 95-372 (1978).

[34] Interestingly, Congress's decision to reaffirm DOI's existing assignment regulations appears to have been supported by at least some oil and gas company representatives. *See* April 25, 1977 Hearings Before the Senate Committee on Energy & Natural Resources, 95th Cong., 95-44 (1977) (submission of Charles Neumeyer, Senior vice president, Brooklyn Union Gas Co., representing the Association of Gas Distributors), *in* Legislative History of the Outer Continental Shelf Lands Act Amendments of 1978 P.L. 95-372 (1978) (pointing to DOI's regulations governing "assignment of lease interests" as one area where "existing regulations would conform with requirements of the new Act, and thus, promulgation of new regulations would be unnecessary."

[35] OCSLA Amendments, Pub. L. 95-372 § 205(e) (Sept. 18, 1978) (codified at 43 U.S.C. § 1347(e)).

[36] S. Rep. No. 95-1091, at 99 (1978) (Conf. Rep.), *in* Legislative History of the Outer Continental Shelf Lands Act Amendments of 1978 P.L. 95-372 (1978).

[37] *See* Outer Continental Shelf Minerals Leasing and Rights-of-Way Granting Programs, 44 Fed Reg. 38268, 38284 (June 29, 1979) (*codified as* 30 C.F.R. § 3391 (1979)) available at https://www.govinfo.gov/content/pkg/FR-1979-06-29/pdf/FR-1979-06-29.pdf.

[38] *Id*. at 38272 (discussing the comments received on the new language of 30 C.F.R. § 3391).

[39] Surety Bonds for Outer Continental Shelf Leases, 69 Fed. Reg. 27948, *available at* https://www.govinfo.gov/content/pkg/FR-1997-05-22/pdf/97-13199.pdf.

the designated operator fails to perform any obligation under the lease or the regulations in this chapter, the Regional Director may require any or all of the co-lessees and operating rights owners to bring the lease into compliance."[40]

MMS also added language clarifying that, even after assignment of their interests, record title holders who assign their interest remain "jointly and severally liable . . . with each prior lessee and with each operating rights owner holding an interest at the time the obligation accrued."[41] In response to several comments objecting to this language, MMS replied that "[t]his rule merely codifies what has been the law under [OCSLA], since enactment and the common law."[42]

Decommissioning Liability in the Courts

Joint and Several Trailing Liability in the Courts

Courts hearing decommissioning disputes have consistently applied the "joint and several trailing liability" standard.[43] Moreover, these courts have held predecessors to the same joint and several trailing liability standards regardless of when their lease was issued.[44] For example, in March of 2014, BSEE issued a decommissioning order to Anadarko Petroleum Corp. "as a former co-lessee" on a lease where the current owner, ATP Oil & Gas Corporation, had failed to conduct decommissioning.[45] Anadarko appealed this order to DOI's Board of Land Appeals, arguing that it had only held an interest in the lease from 1979 to 1984, and claiming that the regulations in place at that time "did not impose 'residual contingent decommissioning liability' on assignors."[46]

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[40] *Id*. at 27955 (*codified as* 30 C.F.R. § 250.8 (1997)).

[41] *Id*. at 27960 (*codified as* 30 C.F.R. § 256.64(h)(1) (1997)).

[42] *Id*. at 27950.

[43] *See, e.g.*, *Mariner Energy, Inc. v. Devon Energy Prod. Co.*, 690 F. Supp. 2d 558, 562 (S.D. Tex. 2010), *aff'd sub nom. Mariner Energy, Inc. v. Devon Energy Prod. Co., L.P.*, 517 F. App'x 226 (5th Cir. 2013) (adjudicating a contract allocating decommissioning liability between a lessee and its predecessor, but noting that federal law applies such obligations jointly and severally to both parties); *Sojitz Energy Venture, Inc. v. Union Oil Co. of California*, 394 F. Supp. 3d 687, 697–99 (S.D. Tex. 2019) (assessing how and when each party to a dispute acquired its decommissioning obligations under federal law); *In re Northstar Offshore Grp., LLC*, 628 B.R. 286, 307 (Bankr. S.D. Tex. 2020) (assessing the impact of one party's bankruptcy on joint and several liability between multiple lessees).

[44] *See Cutting Underwater Techs. USA, Inc. v. Con-Dive*, LLC, No. CIV.A. 09-387, 2011 WL 1103679, at *7 (E.D. La. Mar. 22, 2011), *aff'd sub nom. Cutting Underwater Techs. USA, Inc. v. Eni U.S. Operating Co.*, 671 F.3d 512 (5th Cir. 2012) (discussing the "longstanding requirement that idle platforms be removed once oil and gas production ceases); *Noble Energy, Inc. v. Salazar*, 671 F.3d 1241, 1244 (D.C. Cir. 2012) (addressing a decommissioning order levied against Noble Energy, a 1979 lessee who "temporarily plugged and abandoned [a disputed] well in 1985" and whose lease was suspended in 1999, and noting that decommissioning "obligations expressly survive assignment, transfer, and termination of a lease").

[45] *Anadarko Petroleum Corp.*, GFS(OCS) 268(2016) (Feb. 2, 2016).

[46] *Id*.

The Board of Land Appeals rejected this appeal for two reasons. First, the Board noted that Anadarko's 1981 lease contained DOI's "standard term" that required Anadarko to comply with: "all regulations issued pursuant to [OCSLA] in the future which provide for the prevention of waste and the conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein."[47] Second, the Board held that, even without this term, the liability regulations in effect from 1979 to 1984 provided the same system of trailing liability imposed by modern regulations.[48]

While Anadarko was a decision by a regulatory agency, courts hearing OCSLA disputes have generally mirrored the approach of the Board of Land Appeals. Federal courts have held that OCSLA gives DOI the authority to bind lessees to not only present but future regulations that prevent pollution and waste from leases, including decommissioning regulations.[49] The U.S. Court of Appeals for the Fifth Circuit recently confirmed the overall structure of BOEM's OCSLA liability rules with little comment, noting that:

> "Inherent in offshore oil and gas production is the potential of significant future liabilities. One of those liabilities is the cost of ending production. Operators must decommission offshore oil and gas wells—colloquially, plug and abandon them—at the end of their life. Every lessee of an offshore oil and gas field—past and present—is jointly and severally liable for decommissioning the wells in their field."[50]

Loper Bright and Judicial Threats to Decommissioning Regulations

In the past few years, the Supreme Court has subjected agency regulations to increasing levels of scrutiny that threaten the stability of even long-standing regulatory regimes like the OCS regulations governing decommissioning liability. In 2024, the Supreme Court rejected longstanding doctrines that required courts to defer to reasonable agency interpretations as to the scope of their regulatory authority in *Loper Bright Enterprises v. Raimondo*.[51] The *Loper Bright* majority held that, while courts must respect specific delegations of authority to agencies "consistent with constitutional limits," they "need not and under the [Administrative Procedure Act] may not defer to an agency interpretation of the law simply because a statute is ambiguous."[52] Instead, courts will independently scrutinize authority for each regulation, with no deference to agency

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[47] *Id.*

[48] *Id*.

[49] *See, e.g.*, *Century Expl. New Orleans, LLC v. United States*, 745 F.3d 1168, 1177 (Fed. Cir. 2014); *see also Pauley Petroleum Inc. v. United States*, 591 F.2d 1308, 1325 (Ct. Cl. 1979) (holding that "a new regulation explicitly establishing absolute liability would not be 'inconsistent with any express and specific provision' of [a plaintiff's OCS] leases.")

[50] *Matter of Mem'l Prod. Partners, L.P.*, 799 F. App'x 221, 222 (5th Cir. 2020).

[51] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984), *overruled by Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

[52] *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024)

interpretations.[53] Three days later, in *Corner Post, Inc. v. Board of Governors of Federal Reserve System*, the Supreme Court extended the period available for challenges to regulations. The *Corner Post* majority held that the six-year challenge period provided by the Administrative Procedure Act only begins running "when the plaintiff has the right to assert it in court—and in the case of the [Administrative Procedure Act], that is when the plaintiff is injured by final agency action."[54] Together, these opinions render even longstanding regulations vulnerable to challenge, and remove deference standards that protected agency rulemakings conducted with delegated authority.

It is extremely difficult to predict how the courts will respond to a specific regulatory challenge post-*Loper Bright*. However, as explained above, DOI's decommissioning liability regulations rest on several explicit grants of authority. BOEM has broad statutory authority to prevent waste of OCS natural resources and protect correlative rights therein,[55] which mirrors the language used in the 19th and 20th centuries to justify early well-plugging and abandonment regulations.[56] This statutory authority represents a relatively explicit direction to issue some form of offshore well-plugging regulations. In addition, DOI also has express authority to regulate terms around "the assignment or relinquishment of [leases]."[57] The core restriction Congress has placed on this authority is the requirement that DOI condition "any assignment or other transfer of any lease . . . upon compliance with regulations issued under [OCSLA]."[58] In summary, then, OCSLA directs and authorizes DOI to: (1) protect the usability and integrity of offshore reservoirs, (2) issue regulations governing lease assignments, and (3) condition lease transfers upon regulatory compliance. The long-standing "trailing liability" regime does just that—it assigns responsibility for plugging and decommissioning, and ensures that lease transfers are conditioned upon compliance, including end-of-life obligations.

Moreover, BOEM and its predecessors have enforced essentially identical "trailing liability" rules since OCSLA was passed in 1953. During this seventy-year period, despite several significant revisions to OCSLA's leasing rules, Congress has never modified DOI's relevant regulatory authority or otherwise directed DOI to consider a different liability regime. While *Loper Bright* creates significant regulatory uncertainty across many domains, BOEM's trailing liability requirement responds to a specific regulatory mandate using broadly granted authority and applying timeworn regulatory tools. These factors offer DOI a powerful set of arguments to deploy in defense of the trailing liability regulations.

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[53] *Id*.

[54] *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2448 (2024).

[55] 43 U.S.C. § 1334(a).

[56] *See Steelsmith v. Aiken*, 14 Pa. Super. 226, 226 (1900).

[57] 43 U.S.C. § 1334(a)(3).

[58] 43 U.S.C. § 1334(b).

II. PURSUING PARENT COMPANIES FOR THEIR SUBSIDIARIES' LEGACY LIABILITIES

DOI's offshore regulations create clear paths to pursue lessees, owners of operating rights, and their predecessors for decommissioning expenses. However, they do not explicitly extend liability to the owners of liable parties. Companies are, generally, legal entities that are separate and legally distinct from their owners.[59] This presumption holds true even when a legal entity is wholly owned and controlled by another legal entity, and even when parents and their subsidiaries share officers or directors.[60]

Offshore oil and gas companies often have fairly complex ownership structures. A 2021 survey of 79 multinational offshore oil and gas companies found that, between them, they had nearly 10,300 subsidiaries around the globe.[61] More than 3,000 of these subsidiaries were located in the United States.[62] This complexity is, in part, because offshore oil and gas operations require enormous and relatively risky capital investments before they produce any revenue. Instead of raising money on their own credit, and taking the full risk if a project fails, oil and gas companies often form new subsidiaries, called special purpose vehicles ("SPVs").[63] These SPVs generally own nothing but a specific "project," like an oil rig or set of related rigs, along with the rights necessary to operate it.[64] Isolating assets protects both owners and corporate lenders: owners are protected from the risks (and debt) of a new project, while lenders can assess the financial viability of a specific, relatively simple project without worrying about the overall financial health of the project's owner.[65] SPVs also make it easier to sell specific assets—rather than individually transferring all of the things needed to make a project run (employees, leases, physical assets), owners can simply sell the SPV as a package deal.[66]

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[59] *See*

[60] Elizabeth Williams, *Cause of Action Against Parent Corporation for Debts or Liabilities of Subsidiaries*, § 4, *in* 91 CAUSES OF ACTION 2d 1 (2020).

[61] Georges Corbineau, *Exclusive Database of Multinational Oil and Gas Companies and Their Subsidiaries*, OFFSHORE TECHNOLOGIES (June 30, 2021), https://www.offshore-technology.com/features/database-multinational-oil-gas-offshore-operations-technologies-companies/.

[62] *See id*.

[63] Adam Hayes, *Project Finance: Definition, How It Works, and Types of Loans*, INVESTOPEDIA (Sept. 3, 2024), https://www.investopedia.com/terms/p/projectfinance.asp.

[64] *Id*.

[65] *See* Richard S. Brennan, *Current Trends in Oil and Gas Financing*, 25 ROCKY MOUNTAIN MINERAL LAW FOUNDATION 16 (1979) (describing the rise of "project financing" in the oil and gas industry, and its structure).

[66] *See* Jonathan Hannah, *A Strategic Approach to Infra M&A*, PROJECT FINANCE INTERNATIONAL (2022), available at https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/General/jonathon-hannah-PFI-project-finance-ma-article-2022.pdf.

While SPVs make it easier to finance and sell capital-intensive assets like offshore oil operations, they do so by isolating parent companies from the debts of their SPVs, and vice versa. This can also make it difficult to pursue parent companies for the environmental harm caused by their subsidiaries.[67] This limitation may frustrate attempts to enforce trailing liability standards against the previous owners and operators of offshore leases if these companies retain relatively few assets after selling their interest in a specific project. This section discusses two possible avenues for holding offshore oil and gas companies liable for the environmental repair debts of their subsidiaries: third-party guarantees and "veil-piercing" litigation.

Third-Party Guarantees under OCSLA

Offshore oil and gas regulators can hold parent companies liable for the debts of their subsidiaries when they have promised to pay those debts. DOI's leasing regulations require offshore oil and gas operators to provide financial assurance—*i.e.*, surety bonds, asset pledges, credit tests, or other collateral mechanisms—to guarantee the obligations incurred under their leases.[68] Subject to credit rating tests and various procedural requirements, BOEM will accept third-party guarantees, including guarantees from corporate parent companies, as a form of financial assurance.[69] These guarantees provide the most direct way to hold parent companies liable for their subsidiaries' decommissioning obligations.

While these guarantees would allow BOEM to pursue parent companies to pay for decommissioning debts on specific leases, such guarantees are likely to be relatively uncommon. Until June 28, 2024, BOEM required third-party guarantors to issue unlimited guarantees that "ensure[d] compliance with all lessees' lease obligations, the obligations of all operating rights owners, and the obligations of all operators on the lease."[70] This broad sweep of liability meant that parent companies could not simply guarantee their own subsidiaries' debts—instead, they were potentially liable for the defaults of their subsidiaries' partners and business counterparties as well. BOEM revised this requirement in 2024, in part because "few parties were willing to use third-party guarantees" under the previous terms.[71] Under the new regulatory standards,

> "a third-party guarantor may, as agreed to by BOEM at the time the third-party guarantee is provided, limit its cumulative obligations to a fixed dollar amount or limit its obligations so as to

[67] Shalanda H. Baker, *Unmasking Project Finance: Risk Mitigation, Risk Inducement, and an Invitation to Development Disaster?*, 6 TEX. J. OIL GAS & ENERGY L. 273, 311–12 (2011).

[68] *See generally* 30 C.F.R. § 556.900 (outlining financial assurance requirements and acceptable forms of financial assurance).

[69] *See* 30 C.F.R.§ 556.905 (outlining the requirements for third-party guarantees).

[70] 30 C.F.R. § 556.905(c) (2016) (emphasis added).

[71] Risk Management and Financial Assurance for OCS Lease and Grant Obligations, 88 Fed. Reg. 42136, 42145 (June 29, 2023), https://www.federalregister.gov/documents/2023/06/29/2023-12916/risk-management-and-financial-assurance-for-ocs-lease-and-grant-obligations.

cover the performance of one or more specific lease obligations (with no fixed dollar amount)."[72]

It remains to be seen whether this revision will increase the willingness of parent companies to guarantee the decommissioning liabilities of their subsidiaries.

Veil-Piercing Claims under OCSLA

Parent companies may also be held liable for the debts and obligations of their subsidiaries through targeted litigation. A fundamental principle of American corporate law is that companies are separate and legally distinct from their owners. This presumption holds true even when a legal entity is wholly owned and controlled by another legal entity, and even when parents and their subsidiaries share officers or directors.[73] However, under some circumstances, courts will set aside the "corporate veil" and deem owners liable for the debts of the entities they own,[74] in actions known as "veil-piercing" actions.[75] Broadly, "[v]eil-piercing refers to the process of treating two corporations," or a corporation and an individual, "as a single entity."[76]

Law Governing Veil-Piercing Claims in the Outer Continental Shelf

Veil-piercing actions, or equivalent doctrines, arise under the law of every state. However, parties attempting to bring veil-piercing actions against companies for the decommissioning liabilities of their subsidiaries may face complex choice-of-law issues. As a general matter, disputes arising under federal leases are governed by federal law, supplemented by the general principles of contract and landlord-tenant law of the host state.[77] This general rule is made explicit in the text of OCSLA, which extends federal law to the "subsoil and seabed" of the OCS, "all artificial islands" on the OCS, all "installations and other devices permanently or temporarily attached to the seabed" erected for mineral and energy exploration.[78] Thus, the courts have held that, "the only law on the OCS is federal law, and state laws are adopted as federal law only '[t]o the extent that they are applicable and not inconsistent with' federal law."[79]

[72] 30 C.F.R. § 556.905(b).

[73] Elizabeth Williams, *Cause of Action Against Parent Corporation for Debts or Liabilities of* Subsidiaries, § 4, *in* 91 CAUSES OF ACTION 2d 1 (2020).

[74] Or vice versa.

[75] *Id*.

[76] Eva Lilienfeld, *Simplified Veil-Piercing*, 16 VA. L. & BUS. REV. 375, 377 (2022).

[77] *Prudential Ins. Co. of Am. v. United States*, 801 F.2d 1295, 1298 (Fed. Cir. 1986) (*cert denied* 479 U.S. 1086 (1987)).

[78] 43 U.S.C. § 1333(a).

[79] *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 587 U.S. 601, 609 (2019).

In veil-piercing actions, a majority of courts apply the law of the state under which the debtor company is incorporated.[80] Others adopt "a more general choice-of-law analysis that focuses instead upon the creditor-corporation relationship and balances the interests of the different jurisdictions that may be involved."[81] When veil-piercing actions involving federal statutes are litigated in federal court, there is another layer of complexity. While corporations are creations of state law, federal courts evaluating veil-piercing actions in connection with federal statutes have created bodies of "federal common law"—interpretive standards for federal veil-piercing actions that go beyond simple applications of state law.[82] This means that the set of rules and precedents that will govern an offshore veil-piercing action may depend on the court in which the veil-piercing action is brought. Disputes under OCSLA may be brought "in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose,"[83] so a wide range of veil-piercing standards may be relevant to litigants enforcing decommissioning liability.

Factors Relevant to OCS Veil-Piercing Actions

Veil-piercing is the most heavily litigated area of corporate law, and a complex body of precedent governs veil-piercing actions in every jurisdiction. As a general rule, courts are highly reluctant to hold parent companies liable for the debts of their subsidiaries. While subtle distinctions between jurisdictions can significantly impact the outcome of specific cases, the Delaware Supreme Court summarized the general scope of veil-piercing actions when it noted that veil-piercing "may be done only in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or where equitable consideration among members of the corporation require it, are involved."[84]

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[80] Gregory Scott Crespi, *Choice of Law in Veil-Piercing Litigation: Why Courts Should Discard the Internal Affairs Rule and Embrace General Choice-of-Law Principles*, 64 N.Y.U. Ann. Surv. Am. L. 85, 90 (2008).

[81] *Id*.

[82] Sarah C. Haan, *Federalizing the Foreign Corporate Form*, 85 St. John's L. Rev. 925, 990–91 (2011) (outlining statutes around which a federal common law of veil-piercing has emerged); *see also United States v. Bestfoods*, 524 U.S. 51, 63n.9 (1998) (noting, but not resolving, "significant disagreement among courts and commentators over whether, in enforcing [a federal environmental statute, CERCLA's] indirect liability, courts should borrow state law, or instead apply a federal common law of veil piercing."). Scholars have characterized this analytical tangle as "erratic," "confusion," and "chaos." Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 Harv. L. Rev. 853, 859–60 (1982); *see* Sarah C. Haan, *Federalizing the Foreign Corporate Form*, 85 St. John's L. Rev. 925, 990 (2011) ("In 1982, an influential note in the Harvard Law Review described "chaos" in the choice-of-law regime for veil piercing in connection with federal statutes, and that chaos largely remains.").

[83] 43 U.S.C. § 1349(b)(1).

[84] *Pauley Petroleum Inc. v. Cont'l Oil Co.*, 239 A.2d 629, 633 (1968).

"The list of justifications for piercing the corporate veil is long," and "imprecise to the point of vagueness."[85] States differ significantly in their approaches to veil-piercing, and apply a broad range of factors and tests.[86] However, the standard is generally an equitable one—the core question is whether, in a specific case, allowing an entity, owner, or corporate manager to hide behind limited liability represents an unjust abuse of the corporate form.[87] The Delaware Court of Chancery, the most prominent forum for corporate governance litigation in the United States, has articulated a (nonexclusive) set of "factors" that Delaware courts consider when assessing veil-piercing claims. These include:

> "(1) whether the company was adequately capitalized for the undertaking; (2) whether the company was solvent; (3) whether corporate formalities were observed; (4) whether the dominant shareholder siphoned company funds; and (5) whether, in general, the company simply functioned as a facade for the dominant shareholder."[88]

However, in the same breath, the Court of Chancery also warned against overreliance on formal factors. "While these factors are useful, any single one of them is not determinative. An ultimate decision regarding veil-piercing is largely based on some combination of these factors, in addition to an overall element of injustice or unfairness."[89]

The most relevant factor in OCS veil-piercing actions will often be whether the subsidiary was "undercapitalized." "[T]he obligation to provide sufficient capitalization is an ongoing one, which begins at the time of incorporation and continues throughout the corporation's existence."[90] While the owners of companies have no general duty to guarantee the debts of the companies they own, courts will look askance at owners who force their subsidiaries to incur liabilities that they are highly unlikely to meet. "[T]he starting point for most courts in formulating a standard for adequate capitalization is the idea that capitalization must be adequate to cover the reasonably foreseeable risks of the business."[91]

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[85] Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 Cornell L. Rev. 99, 100 (2014).

[86] *See* Neil A. Helfman, *Establishing Elements for Disregarding Corporate Entity and Piercing Entity's Veil*, *in* 114 Am. Jur. Proof of Facts 3d 403 (2010)

[87] *Id*.

[88] *Manichaean Cap., LLC v. Exela Techs., Inc.*, 251 A.3d 694, 706–07 (Del. Ch. 2021) (*internal quotes and citations omitted*).

[89] *Id*.

[90] *United States v. Golden Acres, Inc.*, 702 F. Supp. 1097, 1104 (D. Del. 1988), *aff'd sub nom. Golden Acres, Inc. v. Sutton Place Corp.*, 879 F.2d 857 (3d Cir. 1989), and *aff'd sub nom. Appeal of J.L. Capano, Inc.*, 879 F.2d 857 (3d Cir. 1989), and *aff'd,* 879 F.2d 860 (3d Cir. 1989).

[91] Thomas K. Cheng, *Form and Substance of the Doctrine of Piercing the Corporate Veil*, 80 Miss. L.J. 497, 573 (2010) (internal quotations removed).

Courts are particularly likely to deem an entity undercapitalized where its owner actively extracts resources from it, leaving it without enough capital to operate as a going concern or pay its outstanding debts. This practice, sometimes called "asset-stripping," has long been recognized as an archetypical abusive conduct that can justify veil-piercing,[92] and a court may find that permitting the owner to walk away with the assets of its bankrupt subsidiary would represent an abuse of the corporate form. Asset stripping is subject to particular scrutiny where a company is "closely-held" with few distinct owners.[93] As DOI's OCS regulations hold all previous owners of offshore leases liable for decommissioning obligations, parent companies that extract assets from their offshore oil and gas subsidiaries run the risk of leaving their subsidiaries undercapitalized, and exposing themselves to veil-piercing actions. Courts in New York, for instance, have held that wrongful undercapitalization can be shown if "corporate funds were purposefully diverted to make it judgment proof," or if "a corporation was dissolved without making appropriate reserves for contingent liabilities."[94]

Investigations into undercapitalization are often highly fact-specific, and turn on detailed assessments of the transactions that moved assets out of a liable subsidiary.[95] One Delaware bankruptcy court, evaluating a veil-piercing claim against an oil and gas company for the pollution liabilities of its subsidiary, framed the assessment as evaluating a core question: "how does one appropriately run a business with productive assets, short-term funded debt, and long-tailed environmental liabilities that will destroy the business when they come to fruition?"[96] In the context of OCS decommissioning, courts may be reluctant to find that a parent company was abusing the corporate form unless the parent company had reason to suspect that its subsidiary would be held responsible for decommissioning costs. The trailing liability regime established under OCSLA means that even subsidiaries with no assets or operations may carry some level of decommissioning liability. However, U.S. courts generally do not require companies to carry enough capital to cover every possible liability. Instead, "[t]o value [a] contingent liability," courts look at the total potential liability, and discount it "by the probability that the contingency will occur and the liability become real."[97] Where a plaintiff alleges that a parent company stripped assets from its subsidiary and left it without enough resources to support an

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[92] *See* Thomas K. Cheng, *Form and Substance of the Doctrine of Piercing the Corporate Veil*, 80 MISS. L.J. 497, 505 (2010) (discussing this theory of veil-piercing, and citing a 1931 treatise that highlights asset-stripping as a form of impropriety that justifies disregarding corporate formalities).

[93] *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 685 (4th Cir. 1976).

[94] *Baby Phat Holding Co., LLC v. Kellwood Co.*, 123 A.D.3d 405, 407 (2014).

[95] *See, e.g.*, *In re Tronox Inc.*, 503 B.R. 239, 270 (Bankr. S.D.N.Y. 2013) (assessing in detail a series of transactions in which an environmental debtor allegedly "(i) created a new holding company near the top of the corporate chain (and above the entities responsible for the legacy liabilities); (ii) transferred all of the valuable oil and gas assets to that entity—assets that Defendants represented were "substantially all" of their assets; (iii) left all of the legacy liabilities in the old company or transferred them in; and (iv) when the market permitted, completed the separation of the best assets from the liabilities.").

[96] *In re Maxus Energy Corp.*, 641 B.R. 467, 492 (Bankr. D. Del. 2022).

[97] *Matter of Xonics Photochemical, Inc.*, 841 F.2d 198, 200 (7th Cir. 1988).

environmental guarantee, courts assess undercapitalization based on the extent to which the parent company believed that its subsidiary "would be called upon to honor its guarantee."[98]

As previously noted, undercapitalization alone is not enough to succeed in a veil-piercing action; in some sense, all bankrupt subsidiaries are by definition undercapitalized.[99] Instead, a court's decision to set aside the formal structures of corporate law "must involve a number of [relevant] factors."[100] Crucially, a court must also determine that an "injustice or fundamental unfairness" would occur if the court refused to allow a specific creditor to pursue the assets of the parent corporation.[101] Some observers have noted that courts are more likely to allow veil-piercing to "further[] a regulatory or statutory scheme whose purpose would be undermined by upholding the corporate form," including enforcing environmental cleanup laws.[102] However, even in cases where debtors pursue environmental claims, undercapitalization is more often used as an indicator that a parent company is abusing the corporate form rather than an independent justification for veil-piercing.[103] These high standards and complex analytical questions mean that veil-piercing remains the exception, rather than the norm, in corporate law, and may be difficult to pursue in the OCS context. Indeed, our research did not identify any attempts to directly enforce federal offshore decommissioning obligations through veil-piercing.

CONCLUSION

Over the past century, private oil and gas companies have constructed tens of thousands of offshore wells, platforms, and other installations to exploit the enormous oil and gas reserves under the U.S. OCS. These installations were built alongside a promise: companies leasing offshore oil rights from the federal government promised "to clean up after themselves—to remove their installations at the end of their useful

[98] *See Waste Mgmt., Inc. v. Danis Indus. Corp.*, No. 3:00CV256, 2009 WL 347773, at *23 (S.D. Ohio Feb. 10, 2009) (discussing the standard set in *Xonics Photochemical*, and applying this valuation process to assess whether a parent company had improperly stripped assets from a company with contingent environmental liabilities); *In re SMTC Mfg. of Texas*, 421 B.R. 251, 286 (Bankr. W.D. Tex. 2009) (applying the same standard when multiple companies guaranteed the debt of another, and noting that "it is necessary to consider whether the guaranteed debt would be satisfied by another obligor in order to decide whether or not there are enough of the guarantor's assets available to satisfy all claims against it."); *In re W.R. Grace & Co.*, 281 B.R. 852, 862 (Bankr. D. Del. 2002) (noting liabilities "triggered by the default of [a] third party" are an archetypical form of contingent liability).

[99] *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 687 (4th Cir. 1976).

[100] *Id*.

[101] *Id.*

[102] Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 115 (2014).

[103] *Browning-Ferris Indus. of Illinois, Inc. v. Ter Maat*, 195 F.3d 953, 961 (7th Cir. 1999) (describing general principles of accounting for contingent liabilities).

lives and make their abandoned sites safe."[104] Today, this promise is being tested. Thousands of wells and platforms sit idled in the Gulf of Mexico, their owners unwilling or unable to fulfill their decommissioning obligations.[105] If left in place this abandoned infrastructure represents an enormous environmental risk, as decaying facilities release pollutants into the oceans and atmosphere.[106]

Fortunately, federal regulations create a strong liability regime designed to ensure that the private companies who profited from offshore oil and gas operations pay the costs of removing infrastructure and otherwise returning their operation sites to a safe and stable condition. Since the beginning of federal leasing in 1953, federal regulations have made offshore oil and gas lessees and operators liable for decommissioning expenses—an obligation that is not extinguished when these companies transfer their leases to others.[107]

This white paper has explored the laws that create this system of legacy decommissioning liability, and identified strategies for enforcing legacy liabilities against the parent companies of under-funded or defunct offshore operations. In doing so, it reaches three key conclusions. First, the "joint and several trailing liability" standard that governs offshore oil and gas decommissioning rests on a firm statutory basis. While the text of OCSLA does not establish a trailing liability regime, it empowers and directs the Secretary of the Interior to do so. Moreover, for the past 70 years, DOI's offshore leasing regulations have allowed DOI to pursue any liable party, including prior lessees, for the full cost of decommissioning if the current owner fails to fulfill its decommissioning obligations. Following the adoption of the regulations, Congress significantly amended OCSLA, but those amendments ratified, rather than rebuked, DOI's approach to assigning liability.[108]

While DOI's regulations clearly impose decommissioning liability on lessees and their predecessors, they do not explicitly extend liability to the owners of those liable parties. This may make enforcing the obligations in DOI's regulations difficult. Due to the capital intensive and risky nature of offshore oil and gas operations, oil and gas companies often form new subsidiaries for each project. If those subsidiaries fail to fulfil their decommissioning obligations, DOI will generally have limited opportunities to pursue the parent company. DOI's leasing regulations allow, but do not require, parent companies to guarantee the lease obligations of their subsidiaries and such guarantees are relatively rare. One alternative would be to pursue parent companies through veil-piercing actions but this is likely to be challenging for a variety of reasons discussed in this paper. Indeed, our research did not identify any attempts to directly enforce federal offshore decommissioning obligations through veil-piercing. However, as offshore oilfields age, and as the economic, social, and legal pressures of the energy transition imperil the future of the offshore oil and gas industry,

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[104] Martin Lockman, *Environmental Repair in the Energy Transition* (unpublished manuscript on file with author).

[105] *See supra* note 12 and accompanying text.

[106] *See supra* notes 9–11 and accompanying text.

[107] *See supra* notes 18–21 and accompanying text.

[108] *See supra* notes 28–42 and accompanying text.

regulators and environmental litigants may need this and other tools to enforce the environmental promises of offshore oil and gas companies.