

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2561 Rayburn House Office Building
Washington, DC 20515-6515

November 20, 2023

Ms. Liz Klein
Director
Bureau of Ocean Energy Management
1849 C Street NW
Washington, DC 20240

Dear Director Klein:

The House Committee on Small Business (the Committee) writes regarding the Bureau of Ocean Energy Management's (BOEM) policy to not discuss its proposed rules with Congress. As part of the Committee's investigation into how agencies comply with the Regulatory Flexibility Act (RFA), the Committee sent the BOEM letters seeking a deeper explanation of two recently proposed rules' impact on small businesses.¹ In response to the Committee's first letter, the BOEM indicated it would not discuss proposed rules with Congress, and the Committee expects the BOEM's response to our second letter will be substantially similar.² The Committee vehemently disagrees with the BOEM's position and seeks a deeper explanation of how the BOEM complies with Congressional requests for information.

In response to letters from the Committee, the BOEM indicated it was against their policy to comply with Congressional requests for information on its proposed rules.³ The BOEM also indicated in their response that they would submit the Committee's letter as a comment on its rule, and may address the Committee's concerns in the preface to its final rule.⁴ Leaving a comment on this proposed rule was not the Committee's intent when sending our communications, and our questions were not rhetorical comments for the record; the Committee is well aware of the process it should go through to submit comments on rules. The Committee disagrees with the BOEM's conclusion that communications regarding this rule constitute comments for the record, and the BOEM's belief that a nonspecific response included in the preamble to its final rule is a sufficient response to this Committee.

Pursuant to House Rule X, this Committee has a duty to the House of Representatives and the American people to legislate and conduct oversight on "the problems of all small

¹ Letter from Roger Williams, *et al.*, Chairman, H. Comm. on Small Bus., to Liz Klein, *et al.* Director, U.S. Bureau of Ocean Energy Mgmt. (Aug. 3, 2023); Letter from Roger Williams, *et al.*, Chairman, H. Comm. on Small Bus., to Liz Klein, *et al.* Director, U.S. Bureau of Ocean Energy Mgmt. (Sept. 12, 2023).

² Letter from Liz Klein, Director, U.S. Bureau of Ocean Energy Mgmt., to Roger Williams, *et al.*, Chairman, H. Comm. on Small Bus. (Oct. 13, 2023).

³ *Id.*

⁴ *Id.*

business.”⁵ The Committee cannot conduct oversight if the BOEM continues to withhold requested information. Similarly, the Committee cannot draft adequately informed legislation without the BOEM’s input on substantive questions. As a general rule, *ex parte* communications between federal agencies and Congress are encouraged for Notice-and-Comment rulemakings such these.⁶ Courts have found that better legislation and rules are created when agencies and Congress work together to create rules which implement legislation correctly.⁷ This is valuable since agencies are tasked with implementing laws and have subject matter expertise in the relevant field, while Congress is responsible for passing the laws, thus having a better understanding of its intent and purpose.

In your responses to the Committee, you indicated “[t]he Regulatory Impact Analysis for this proposed rule addresses impacts on small businesses.”⁸ While it is reassuring the BOEM claims to have considered these interests, the purpose of our letter was to ensure that the BOEM was, indeed, complying with their obligations to small businesses. Congress’ authority to conduct oversight is inherent in Article I, sec. 1 which states: “All legislative powers herein granted shall be vested in a Congress of the United States.” The United States Supreme Court has consistently affirmed Congress’s authority to conduct oversight and investigations, holding that “the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”⁹ Rule X of the Rules of the United States House of Representatives delegates this responsibility to standing committees.¹⁰

Denying the Committee the requested information prevents it from upholding and acting in furtherance of its legislative function, namely reviewing regulatory burdens imposed on small businesses by federal agencies and determining how they may be alleviated.¹¹ This includes the ability of this body to initiate investigations to inform itself about how existing laws function, whether new laws are necessary and if old laws should be repealed or altered. Responding substantively to the Committee’s letter using information available in the docket, or information BOEM makes available prior to the final rule, would in no way undermine the completeness of the docket or effectiveness of this rulemaking.¹²

It is important for agencies to examine small businesses interests—which make up 99.9 percent of all businesses in the United States—when passing any new rule. America’s small businesses deserve to have their voices heard and considered. Seeing no valid reason for the BOEM to withhold information on this rule, we reiterate our requests from our August 3, 2023

⁵ Rules of the House of Representatives, Rule X(1), 118th Cong. (2022).

⁶ MAEVE P. CAREY, *ET AL.*, CONG. RESEARCH SERV., IF12368, COMMUNICATIONS BETWEEN CONGRESS AND FEDERAL AGENCIES DURING THE RULEMAKING PROCESS (Mar. 30, 2023).

⁷ *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981).

⁸ Letter from Liz Klein, Director, U.S. Bureau of Ocean Energy Mgmt., to Roger Williams, *et al.*, Chairman, H. Comm. on Small Bus. (Oct. 13, 2023).

⁹ *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

¹⁰ *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020); *McGrain v. Daugherty*, 273 U.S. 135 (1927).

¹¹ Rules of the House of Representatives, Rule X(1)(q)(1), 118th Cong. (2022).

¹² Administrative Procedure Act (APA), 5 U.S.C. § 553; *See also* JONATHAN GAFFNEY, CONG. RESEARCH SERV., LSB10558, JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT (APA) (Dec. 8, 2020).

and October 12, 2023 letters as well as request the following additional information as soon as possible but no later than December 4, 2023:

1. A copy of BOEM's policy with regard to sharing information with Congress generally.
 - a. An explanation of when this policy was implemented, and any policy which may have predated BOEMs current policy regarding sharing information with Congress.
2. A copy of BOEM's policy with regard to responding to Congressional oversight requests related to a proposed rule.
 - a. An explanation of when this policy was implemented, and any policy which may have predated BOEMs current policy regarding sharing information with Congress.
3. An explanation of the legal reason the BOEM believes sharing information with Congress regarding proposed rules is improper.
4. An explanation for BOEM's rationale for not engaging in *ex parte* communications with Congress about proposed rules.
5. All training and supplemental support materials provided by the BOEM to its employees regarding the Regulatory Flexibility Act.
6. An explanation for how the BOEM accounts for the disparate costs incurred by small businesses compared to larger businesses, when conducting rulemaking.

For your convenience, the requests from the August 3, 2023 and October 12, 2023 letters are copied below:

7. Will this rule, by establishing tiers largely based on credit ratings, disproportionately impact small businesses?¹³
 - a. Will the BOEM's proxy credit ratings also adversely rate small entities based on their size?
8. Since this rule relies on ratings from credit ratings agencies, did the BOEM include the costs associated with a small business receiving a rating when drafting this rule?
9. Are there readily accessible resources for small entities to assist them in appealing a supplemental financial assurance demand?

¹³ *Id.*

10. The BOEM's analysis indicates that non-investment grade companies will pay four times more for decommissioning bonds than investment grade companies.¹⁴ What alternatives did BOEM consider?
 - a. This rule discusses alternative rules that are similar to this standard but are slightly more or less restrictive. Did the BOEM only consider these options, or did it consider any alternatives which were more narrowly tailored to meet the needs of small businesses?
11. Since 2009, most bankruptcy filings by OCS lease and grant holders did not result in cost to the taxpayer, for what reason does the BOEM believe there is substantial risk of needing taxpayer dollars to cover decommissioning expenses?¹⁵
12. Studies into the Rice's Whale's extended habitat have repeatedly proved difficult.¹⁶ If scientists in the field are generally unable to locate Rice's Whales in these areas when they are intentionally looking for them, for what reason does the BOEM believe regular ships conducting business on regular trade routes will encounter Rice's Whales?
13. In its 2022 Supplemental Environmental Impact Study, the BOEM concluded that a vessel striking a Rice's Whale was "extremely unlikely."¹⁷ Given this conclusion, why did the BOEM include speed limits and nighttime travel bans within the Rice's Whales protective zone?
14. What would be the impact on small entities if the terms of the settlement agreement were implemented through the rulemaking process—a process which allowed for small businesses to have input—instead of a notice document?
15. The RFA requires the consideration of not just small businesses, but also local governments and other small entities.¹⁸ This rule would likely have a tremendous impact on ports along the Gulf of Mexico, increasing port traffic in the daytime, and reducing nighttime traffic; additionally, local governments have expressed concerns that this rule will drive down demand for their ports along the Gulf.¹⁹ What does the BOEM expect the impact on small entities and local governments would be if this decision were made through proper formal or informal rulemaking?

¹⁴ Bureau of Ocean Energy Mgmt., Risk Management Financial Assurance and Loss Prevention Initial Regulatory Impact Analysis (Jun. 29, 2023).

¹⁵ Risk Management and Financial Assurance for OCS Lease and Grant Obligations, 88 Fed. Reg. 42136, 42139 (to be codified at 30 C.F.R. 550, 556, 590).

¹⁶ Louisiana v. Haaland, No. 2:23-CV-01157, 2023 U.S. Dist. LEXIS 175998, 14 (5th Cir. Sep. 21, 2023).

¹⁷ *Id.*

¹⁸ The Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (2011).

¹⁹ Benjamin Zycher, *Biden Administration Continues its Anti-Democratic Sue and Settle Masquerade*, THE HILL (Sep. 14, 2023); *Sue and Settle: Regulating Behind Closed Doors*, U.S. CHAMBER OF COM. (Mar. 6, 2018).

¹⁹ Kelsey Brugger, *EPA revokes Trump-era 'sue and settle' memo*, E&E NEWS (Mar. 24, 2022).

16. Is it accurate to describe BOEM's agreement with the Sierra Club as a "sue and settle" arrangement?
- a. If so, does BOEM intend to continue making decisions through "sue and settle" tactics?
 - b. How can the Committee attain confidence that the BOEM is considering the interest of small businesses in its decision-making when its decisions are made behind closed doors with special interest groups?
17. In *Louisiana v. Haaland*, BOEM argued that the compliance costs described by industry representatives were too speculative.²⁰ Given that BOEM did not describe the anticipated compliance costs in its updated terms sheet, what does BOEM believe is the compliance costs associated with the terms it added in Lease Sale 261?
- a. What are the additional costs a small business may incur that other larger entities may not?

To schedule the delivery of your response or ask any related follow-up questions, please contact Committee on Small Business Majority Staff at (202) 225-5821. The Committee on Small Business has broad authority to investigate "problems of all types of small business" under House Rule X. Thank you in advance for your cooperation with this inquiry.

In God We Trust,



Roger Williams
Chairman
Committee on Small Business

cc: The Honorable Nydia M. Velasquez, Ranking Member
Committee on Small Business

²⁰ *Louisiana v. Haaland*, No. 2:23-CV-01157, 2023 U.S. Dist. LEXIS 175998, 14 (5th Cir. Sep. 21, 2023).