

BSEE and Its Assertion of Jurisdiction over Service Companies

***The Perfect Regulatory Storm:
Equipment Suppliers Are In the Same
Boat with Everyone Else***

Petroleum Equipment Suppliers Association

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An Accumulation of Agency and Regulatory Developments

- A perfect storm of regulatory changes for the whole industry, but especially service companies and equipment suppliers:
 - ✓ BSEE formed primarily as an enforcement agency
 - ✓ Continued and growing use of NTL's and other informal means virtually all without public notice or comment
 - ✓ BSEE's self-announced extension of jurisdiction over service companies at OTC in May 2011
 - ✓ Citations – INC's – to Halliburton and Transocean in Oct 2011
 - ✓ 4 INC's to service companies last week, March 19, 2013

The Summary Story: *a Real Impact*

- Until rescinded or overturned by the Courts or corrected through proper rulemaking
- Every service company and equipment supplier to the OCS, must consider itself subject to BSEE jurisdiction
- There's no blanket exemption for equipment suppliers
- Consider the multiple impacts on you:
 - ✓ Business impacts as to SEC filings and investor relations, insurance, customer contracts, compliance plans, loan covenants
 - ✓ Penalties for violations, both civil and criminal
 - ✓ Is demand for bonding or other financial security next?

The Impact of Extension of Jurisdiction to Service Companies

➤ *WHO?*

- ✓ *Who's covered?*

➤ *WHAT?*

- ✓ *For what activities and actions?*

➤ *HOW?*

- ✓ *Civil and criminal penalties*
- ✓ *Impacts on business*

➤ *HANDLING AND DEFENDING CITATIONS!*



WHO? *Who is Covered?*

➤ No statute or rulemaking, no standards or definitions =

No limits

➤ Only informal, inconsistent pre-existing sources

➤ The most pernicious: ***Joint and Several*** under 146 (c):

✓ “The *person actually performing the activity* to which the regulation’s requirement applies...

✓ is “*jointly and severally responsible for complying*” with the lessee and operator. (30 CFR §250.146(c))

WHAT? *For What Activities and Actions?*

- Three additional problems to no-limits, old-sources:
 - ✓ Regs drafted for Lessees = incomplete, inapplicable and ambiguous as to Service Companies and Equipment Suppliers
 - ✓ Substantive rules not only in Regs in CFR, but in long line of NTL's
 - ✓ Regs run an incredibly wide range
 - *Very precise* – think of BOP testing and pre-use crane inspection
 - Some Regs expressly mention contractors: BOP testing and cert.; 3rd party cert. of well design; Drilling Requirements; SEMS; Cranes
 - *Vague and aspirational* – think of **30 CFR §250.107**:
 - (a) “You must protect health, safety, property, and the environment by:
 - (1) Performing all operations in a safe and workmanlike manner;...”

Add It All Up: *How does this affect me?*

- ***There is no blanket exemption for suppliers***
- The basic bogey: *Joint and several liability for any activity that is subject to a regulation's requirement*
- Easier to see liability for *activities* installation services, repair and maintenance, onshore monitoring
- Dumb steel? Is there dumb steel anymore?
- False statements and filings, including *technical specs?*
- BOP regs and NTLs for testing and *manufacturer* certifications
- SEMS regs under Subpart S
- Drilling personnel training under Subpart O
- Involved in transportation and sale of oil and gas

HOW? *With What Penalties?*

➤ ***Civil and criminal penalties***

- ✓ Multiple tracks for penalties
- ✓ Civil penalty by Reviewing Officer after investigation for major accident or threatened danger, \$40,000 per day limits
- ✓ INC for correctible actions or conditions
- ✓ Often, INC's follow or part of incident under investigation
- ✓ Procedures are too complicated for full discussion
- ✓ Investigation ends with Letter of Notice from Reviewing Officer
- ✓ Final Decision can be appealed to IBLA
- ✓ Criminal penalties, under FOGRMA, for false statements and specified others

HOW? *With What Impacts on Business?*

◆ *Until rescinded or overturned by courts, all service and equipment suppliers on the OCS should Consider impact on all aspects of operations and corporate governance:*

- Review or implement regulatory compliance programs
- Public companies, review adequacy of securities filings
- Review insurance agreements for lack of or limits on coverage
- Evaluate the burden of bonding and other C.O.F.R.
- Review service contracts:
 - ✓ No indemnification for penalties under *Macondo* MDL holding
 - ✓ Can INC under “egregious” standard equate to punitive?
 - ✓ Cooperation with operator for compliance
- Review finance covenants

HANDLING AND DEFENDING CITATIONS

➤ **Civil Penalty Investigation by Reviewing Officer**

- ✓ Follows *a serious incident* – evidence gathering – maybe a Panel
- ✓ Immediately begin investigation with accident reconstruction experts
- ✓ Anticipate and begin Root Cause Analysis Report
- ✓ Distinguish between *cause of this* accident and possible *remediation or avoidance of future* accident
- ✓ Keep in mind other possible liabilities – civil, environmental, statutory and criminal

➤ **INC's (Incidents of Non Compliance) = actual citation**

- ✓ Two Types: time to correct or no time to correct? Part of Investigation?
- ✓ Prepare response for each incident on INC form
- ✓ Where appropriate, describe corrective action and certify
- ✓ Where appropriate, describe objection or defense
- ✓ Draft cover letter with full explanation and clarification

HANDLING AND DEFENDING CITATIONS

➤ **Criminal Penalties**

- ✓ Upon referral to Dept of Justice
- ✓ Carefully review incident and include in self-investigation
- ✓ Carefully analyze limited grounds for criminal penalties under existing regulations referring to FOGRMA

In the End,

Until rescinded or overturned or clarified through proper
rulemaking,

The default mode must be that every company operating or
supplying products to the OCS is subject to

WHO? WHAT? HOW?

And you need to practice safe-business as best you can and
prepare *TO DEFEND*

Thank You

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Appendix Slides



The New World

“Dynamic regulatory environment...These new rules and the aggressive reform agenda we have undertaken are raising the bar...”

– Secretary of Interior Salazar
September 30, 2010

Formation of BSEE and BOEM from BOEMRE

- Final Rule October 2011 divides BOEMRE into BSEE and BOEM
- BSEE's mission: *Enforcement*
 - ✓ Generally, to enforce safety and environmental regulations
 - ✓ All field operations: permitting and research, inspections, offshore regulatory programs, oil spill responses, training and environmental compliance
 - ✓ *Co-responsibility* with BOEM for several subparts and individual regulations and subsections
- BOEM's mission: *Leasing and Management*

Extension of BSEE Jurisdiction to Service Companies: *Big Bang and then Admin Creep*

- **May 2, 2011** – OTC, Bromwich announces BOEMRE to extend its authority directly over service companies
- **Oct 10, 2011** – BSEE issues INCs to Halliburton and Transocean over Macondo incident
 - ✓ Admits first time INCs directly to a contractor not the well's operator
- **Mar 30, 2012** – Watson Response Letter to NOIA:
 - ✓ Refuses to withdraw extension to service co's
 - ✓ Cites “broad statutory authority” under OCSLA
 - ✓ Cites 30 CFR §250.146(c): “joint and several liability with lessee”
- **Aug 15, 2012** – BSEE “Policy Statement” to inspectors for citing contractors AND Final Safe Drilling Rule
 - ✓ For internal use only
 - ✓ For “egregious behavior”

Extension of BSEE Jurisdiction to Service Companies: *Big Bang and then Admin Creep*

- **Dec 19, 2012** – BSEE issues Draft Safety Culture Policy Statement
 - ✓ To develop a “robust safety culture”
 - ✓ Will apply to **contractors** along with lessees and operators
 - ✓ 9 “Characteristics” of a safety culture
 - ✓ Too vague for enforcement standards
 - ✓ Public comments by March 19, 2013
- **Feb 19, 2013** – Consent Decree settling all federal claims vs Transocean, but
 - ✓ Does not resolve INC
 - ✓ Transocean to abandon appeal
 - ✓ BSEE to forego seeking penalties

WHO? *Who's Covered?*

- **“Actually performing...Joint and Several Liability” under Subsection 146 (c):**
 - ✓ “The *person actually performing the activity* to which the regulation’s requirement applies...
 - ✓ is “*jointly and severally responsible for complying*” with the lessee and operator. (30 CFR §250.146(c))

- **BUT, when promulgating *this Regulation* in 1998, MMS said:**
 - ✓ “The operator is responsible for the performance of its contractors. MMS will hold the operator accountable for the contractors’ performance.”

WHAT? *For What Activities and Actions?*

The vague and aspirational:

➤ **Section 107**

(a) “You must protect health, safety, property, and the environment by:

(1) Performing all operations in a safe and workmanlike manner;...”

WHAT? *For What Activities and Actions?*

- *There are Regs that specifically mention contractors:*
 - ✓ BOP installation, testing and certification
 - ✓ Third party certifications for other operations, like well and well-casing design
 - ✓ Drilling Requirements under Subsection 400
 - ✓ S.E.M.S. (Safety and Environmental Management Systems), Subpart S
 - ✓ Cranes

Shortcomings of NTL's and Other Means Without Public Notice and Comment

- APA has limited exceptions
- NTL'S are to be restricted to non-substantive effect
- *Yet*, most NTL's – especially Post-Macondo – are intended to achieve substantive effect
- Purely as a matter of administrative law, subject to subsequent challenge
- NTL'S have substantive and procedural problems: unstructured lengthy narrative
- Susceptible to *post hoc* variances, inconsistencies and revisionist interpretations in actual application by the agency

HOW? *With What Penalties?*

- Procedures are too complicated for full discussion
- Investigation ends with Letter of Notice from Reviewing Officer that one can respond to and demand meeting and record
- Final Decision can be appealed to IBLA
- INC is on ticket form and requires statement of completion
- Appeal to IBLA

HOW? *With What Impacts on Business?*

- ❑ Publicly held companies should consider adequacy of filings with the SEC
- ❑ Review their insurance agreements
 - ✓ Check for lack of coverage
 - ✓ Check if coverage can now be denied
- ❑ Review their service contracts
 - ✓ Prices
 - ✓ Risk sharing and indemnification
 - ✓ Cooperation with operator for compliance
- ❑ Review their finance covenants

HANDLING AND DEFENDING CITATIONS

➤ **INC's (Incidents of Non Compliance)**

- ✓ Whether stand alone or part of Investigation
- ✓ Determine Type: time for correction or no-time for correction?
- ✓ Prepare response for each incident on INC form
- ✓ Where appropriate, describe corrective action and certify
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The Statutes

- ***O.C.S.L.A. (Outer Continental Shelf Lands Act, 43 U.S.C. §1331)***
 - ✓ Broad language, but no express reference to contractors
 - ✓ Secretary must act through regulations
- ***F.O.G.R.M.A (Federal Oil and Gas Royalty Management Act, 30 U.S.C. §1701)***
 - ✓ Civil penalties for violation of any law, regulation or lease terms (§1719 (a))

BUT

- ✓ Purpose of statute: “the responsibilities and obligations of lessees, operators *and other persons involved in transportation and sale of oil and gas* from Federal and Indian lands..”