

Shake-Up in Deepwater Permitting Continues Over a Year After BP Spill

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As memories of the *Deepwater Horizon* oil spill fade into history, the process of obtaining permission to drill in the United States' deepwater areas remains in the midst of regulatory reform and structural upheaval. Over the last year and a half, government regulators have burned through numerous acronyms in the quest for a new regulatory regime. MMS became BOEMRE which became ONRR, BOEM, and BOEE. Along the way, the government introduced numerous new safety and design requirements for wells. Environmental scrutiny for new applications receive has also dramatically increased. At the same time, critics claim that the slower pace of issuing permits is harming the already fragile economy. When it comes to new wells, the only certainty in the near future is more uncertainty.

“Like the Deepwater Horizon, MMS had ceased to exist.”¹

One of the most visible changes since Deepwater Horizon was the breakup of the Minerals Management Service (“MMS”). Since 1982, MMS was responsible managing the development of offshore oil. This role included both the collection of royalties and the approval of drilling plans and permits. Despite this rather technical mission, MMS tended to make headlines for the wrong reasons and draw the ire of environmentalists. In 1990 and 2008, MMS employees were implicated in well publicized sex scandals, which, rightly or wrongly, put the agency's credibility on the line.

Soon after the spill, President Barack Obama's administration was quick to point to MMS as a cause of the oil accident. According to the administration's narrative, MMS's combined role of collecting revenue and approving plans and permits compromised its integrity and was a factor in the oil spill.² Secretary of the Interior Ken Salazar moved quickly to change MMS's name to Bureau of Ocean Energy Management, Regulation and Enforcement (“BOEMRE”) and appoint professional watchdog Michael Bromwich to lead the organization. Bromwich previously worked in numerous reform-focused positions, including cleaning up police departments and prisons, and served as an associate counsel in the Iran-Contra investigation. According to Obama,

Bromwich's mission was "to build an organization that acts as the oil industry's watchdog—not its partner."

Ultimately, the Obama Administration decided that the name change was not enough, and broke BOEMRE into three new regulatory entities. On October 1, 2010, BOEMRE broke off the Office of Natural Resources Revenue ("ONRR") to solely handle revenue generation and distributions from offshore oil. On October 1, 2011, BOEMRE further split into the Bureau of Ocean Energy Management ("BOEM") and the Bureau of Safety and Environmental Enforcement ("BSEE"). BOEM is responsible for tasks such as the review of oil and gas exploration and development plans, National Environmental Policy Act ("NEPA") analysis, and environmental studies. BSEE oversees safety and environmental compliance and enforcement actions as well as spill response.

It is too early to tell what effect the breakup of BOEMRE will have on the approval of plans and permits. While some in the industry think that the division of BOEMRE will further slow down and complicate the introduction of new wells, this change may not have a dramatic impact on the planning and permitting process. In fact, some environmental groups are pushing for the former pieces of MMS to be *further* isolated from one another. For now, developers should anticipate working with BOEM when submitting planning and permitting paperwork, but working with BSEE when it is time to conduct inspections. Bromwich will stay on as the head of BSEE until a replacement is found and his advisor, Tommy Beaudreau will lead BOEM.

The End of the "Cookie Cutter" Permit Application?

Since the oil spill, the government has implemented numerous new rules effecting offshore planning and permitting. More rules are in the works. Fundamentally, the changes affect both the technical criteria for new wells and the implementation of various safety plans. These requirements are in a state of flux and new applications must be sure to meet all of the new requirements or face rejection. The new requirements make it necessary to carefully tailor each application to specific conditions of the proposed well-site. Bromwich cited the use of "cookie cutter" permit applications as a major reason why drilling applications were being rejected.³

One of the first new requirements added after the spill was the submission of a "blowout scenario description."⁴ This could best be described as a technical worst case scenario and response plan. New plans must include detailed information such as an estimated flow rate, total volume, and maximum duration of the potential blowout and estimates of the time it would take to contract for a rig, move it onsite, and drill a relief well. Applicants must demonstrate that they have the ability to respond to another accident in the magnitude of *Deepwater Horizon*.

The government implemented the new "Drilling Safety Rule" under the emergency provisions of the Administrative Procedure Act ("APA"). This new rule creates a number of upfront design requirements for new wells. The two primary areas covered are the standards for well bore integrity, particularly the cements and drilling fluids used, and the design of a blow out preventer

and control system. These requirements include certification by a professional engineer that the cement used in the well is appropriate.

New permit applications must also submit a verification certifying that the applicant has adequate spill response and well containment resources available.⁵ In practice, this means contracting with either the Marine Well Containment Company (“MWCC”) or Helix Energy Solutions Group (“Helix”) to provide containment systems. The government will approve plans that designate MWCC or Helix systems because they have already been pre-reviewed and approved.⁶

Another new emergency rule is the “Workplace Safety Rule,” which aims to reduce human and organizational errors in well operation. Human error is cited as a major reason for most work-related accidents and offshore oil spills. Specifically, the rule requires operators to have a Safety and Environmental Management System (“SEMS”). An approved SEMS plan is required for new wells and will have to be recertified every three years.

The government has proposed another safety rule, called SEMS II that will require further safety measures for offshore wells. The rule will supplement the original SEMS rule with new requirements and will also follow the traditional requirements of the APA including public comment. Building on the Workplace Safety Rule, SEMS II will require wells to designate a worker with “stop work authority” and also call for the outside, third-party, review of all SEMS plans.

On top of these new and proposed rules, future applicants should expect more proposed regulations based on the recently released Deepwater Horizon joint report authored by BOEMRE and the Coast Guard. Unlike the Obama Administration’s Report, the joint BOEMRE/Coast Guard report placed most of the blame for *Deepwater Horizon* on “serious safety management system failures and a poor safety culture manifested in continued maintenance deficiencies, training and knowledge gaps, and emergency preparedness” on the part of the well’s owner and operator.⁷ Specifically, the safety culture was described as, “‘running it until it breaks,’ ‘only if it’s convenient,’ and ‘going through the motions.’”⁸ New rules are expected to correct these safety and maintenance deficiencies.

The BOEMRE/Coast Guard report lists numerous regulatory improvements to ensure increased oversight of safety and environmental programs. Based on the report’s recommendations, new rules will likely be forthcoming regarding explosion prevention, fire prevention, evacuation planning, response to flooding and sinking, and improved safety systems. The report was also sharply critical of the how the Marshall Islands, the flag state for *Deepwater Horizon*, oversaw its vessel. Based on this criticism, it is likely that foreign flagged mobile offshore drilling units will face more regulation and oversight.

Curtailing the Categorical Exception

Perhaps the most painful change to the planning and permitting process is limitations on the use of categorical exclusions in under the National Environmental Policy Act (“NEPA”). Under NEPA, federal agencies must consider the environmental consequences of their actions prior to making a decision. This can mean that agencies must complete lengthy Environmental Impact Statements (“EIS”) to justify their actions. Regulators can avoid preparing an EIS if the proposed action fits into an established categorical exclusion (“CE”). Two CEs, established in 1981 and 1986, applied specifically to government approval of leases in the Gulf of Mexico and approval “Application for Permit to Drill (APD) an offshore oil and gas exploration or development well.”⁹ A report by the Council on Environmental Quality (“CEQ”) concluded that CEs be used more sparingly for offshore wells.

At the same time, the government is under considerable time constraints to complete NEPA assessment of new proposals for wells because the Outer Continental Shelf Lands Act (“OCSLA”) mandates the completion the NEPA process for a proposed well in 30 days.¹⁰ According to Obama, his and previous administrations, “just automatically gave the environmental waiver because you couldn’t complete an environmental study in 30 days.”¹¹ While the CEQ report expressed hope that the Administration would be able to convince Congress to amend this requirement, it is unlikely that Congress will do so. According to Bromwich his agency managed to stay within the 30-day limit even while conducting more rigorous and extensive reviews.¹²

Also adding to the complexity of NEPA analysis, the government changed the way that that it uses “tiering” to streamline NEPA approval. “Tiering” is defined in the as “the coverage of general matters in broader environmental impact statements . . . with subsequent narrower statements or environmental analyses . . . incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.”¹³ In other words, the reviewing agency will rely on EIS information completed for similarly situated wells to the extent that it is the same. In practice, this meant that the government periodically completed full EISs for Gulf wells than applied these to numerous other wells. Under the CEQ’s recommendations, analysis under NEPA will focus more on the individual characteristics of a proposed well and use less tiering.

The governments beefed up application NEPA will require the submission of more information on the part of applicants. In theory, as long as the OCSLA 30-day rule remains law and applicants provide all information requested, these changes should not add more time to the permitting process.

Is the “Slowmatorium” over?

Many critics have noted that the time for approval for offshore permits has grown. While there is debate about the reasons for these delays, undoubtedly, the numerous new requirements for

wells is a major cause of delay. According to a recent report, the number of approved of plans and permits were down 86% and 63% in the wake of President Obama's drilling moratorium.¹⁴

The Administration denies that it is slow rolling new plan and permit applications, and has begun to actively fight allegations of slow permitting. Bromwich recently lashed out at critics and blamed industry for delays, saying:

And the truth is that industry needs to step up its game if it is genuinely interested in a more efficient process. . . . The fact is that flawed and incomplete applications are a significant source of delays in the process. Operators need to stop turning in applications with missing or incomplete information, or that completely lack information about subsea containment. . . . We are talking about applications with completely incorrect data, or that are missing key data, or that contain completely inconsistent data. We see this day in and day out – and then we face criticism for the high rate of drilling applications that are returned to operators.¹⁵

Bromwich noted that his agency had approved permits for 40 unique deepwater wells requiring containment and 45 permits for activities that include water injection and procedures using blow out preventers.

In June, the Justice Department settled a lawsuit with Ensco Offshore Oil Co. that alleged that the government delayed issuing six permits requested by the company. Under the terms of the settlement, the government agreed to "to act on those of the six permit applications that are presently before the defendants no later than July 8, 2011." Previously, the Judge for the case described the Administrations pace of issuing permits as "unreasonable, unacceptable, and unjustified" and found the Obama Administration in contempt of court for failing to issue the permits.

To address slowness concerns, BOEMRE has attempted to make new planning and permitting requirements more comprehensible. These efforts include the creation of a new checklist¹⁶ that spells out the material required for a complete application. Previously, many complained that the requirements for a complete application were not clearly listed and permits were delayed because of failure to provide information.

One area where the Administration and its critics agree is the need for more funding for the agencies involved in offshore permitting. BOEMRE has begun an active campaign to hire more personnel. Undoubtedly, more personnel are needed to keep pace with all the new required plans and inspections. The proposed budget includes an increase of \$119.3 million for BOEM and BSEE. This includes the addition of 52 new environmental studies employees and 41 new permitting employees.

As new regulations continue to take shape, all new deepwater plans and permit applications continue to face uncertainty and potential delay. With no end to the ongoing reform in sight, it is necessary to pay close attention to new regulations and carefully prepare all applications to

meet the government's guidelines. In the words of Chevron CEO John Watson, "[t]he bar has been raised." "One of the opportunities for the Obama administration is to make sure the BOEM is fully funded, because right now . . . there is pressure on permitting," Watson said.

- (1) Deep Water – The Gulf Oil Disaster and the Future of Offshore Drilling- Report to the President 55 (Jan. 2011) (available at <http://www.oilspillcommission.gov/final-report>) ("Presidential Report")
- (2) Id. at 55-85.
- (3) Speech by Michael Bromwich before the Center for Strategic and International Studies (CSIS) Energy and National Security Program (Sept. 13, 2011) ("CSIS Speech, Sept. 2011").
- (4) NTL No. 2010-N06 (2010).
- (5) NTL No. 2010-N10 (2010).
- (6) Statement of Michael R. Bromwich before the House of Representatives Committee on Natural Resources (March 30, 2011).
- (7) Report of Investigation into the Circumstances Surrounding the Explosion, Fire, Sinking and Loss of Eleven Crew Members aboard the MOBILE OFFSHORE DRILLING UNIT DEEPWATER HORIZON in the GULF OF MEXICO April 20 – 22, 2010, Volume I, 119. ("BOEMRE/Coast Guard Report") (available at <https://homeport.uscg.mil/mycg/portal/ep/home.do>).
- (8) Id. at 120.
- (9) CEQ Report Regarding the Minerals Management Service's National Environmental Policy Act Policies, Practices, and Procedures as They Relate to Outer Continental Shelf Oil and Gas Exploration and Development (August 16, 2010).
- (10) 43 U.S.C. § 1340(c)(1); See also *Mobil Oil Exploration & Producing Southeast v. United States*, 530 U.S. 604, 609 (U.S. 2000).
- (11) Obama Press Conference (12:50 P.M., May 27, 2010).
- (12) CSIS Speech, Sept. 2011.
- (13) 40 C.F.R. § 1508.28
- (14) HIS Global Insight and HIS CERA, *Restarting the Engine – Securing American Jobs, Investment, and Energy Security* (July 21, 2011).
- (15) CSIS Speech, Sept. 2011.
- (16) Available at <http://www.boemre.gov/ooc/PDFs/APDSubmissionChecklistFINAL.pdf>.