ENERGY LITIGATION
AMERICAN BAR ASSOCIATION SECTION OF LITIGATION

BSEE's Assertion of Authority over Oilfield Contractors Questionable

By Laurie D. Clark and Christopher M. Hannan

With the settlement of certain portions of the *Deepwater Horizon* multidistrict litigation completed or imminent, offshore oilfield-service companies need to be reminded that they are now regulated differently than ever before. The Department of Interior's Bureau of Safety and Environmental Enforcement (BSEE), the federal agency that regulates offshore oil and gas, has made it clear that it intends to hold not just operators and leaseholders accountable for offshore pollution, but also contractors and service providers who *do not* act as the owner, operator, or person in charge of a vessel, onshore facility, or offshore facility (oilfield contractors). Such action is unprecedented, and there is good reason to question the BSEE's authority in this regard. Litigation over this issue is likely, particularly as the multidistrict litigation approaches a resolution.

Since the blowout of BP's Macondo well and the resulting explosion and sinking of Transocean's rig *Deepwater Horizon* (the DWH incident), the BSEE has issued more than 15 incidents of non-compliance (INCs) to operators, lessors, *and oilfield contractors* as part of an initial group of violations related to the joint-investigation findings of the DWH incident. These INCs are the first step toward imposing civil penalties under the Outer Continental Shelf Lands Act (OCSLA), *see* 43 U.S.C. §§ 1330, 1334(a), and 13509(b), and its enabling regulations, *see* 30 C.F.R. § 250 *et seq.*, and may ultimately result in upwards of $12 million in fines. Transocean recently settled certain INCs as part of a larger settlement with the government regarding unrelated Clean Water Act (CWA) penalties, so any guidance that may have come from a Transocean appeal is now mooted.

In the pre-Macondo era, federal regulation of offshore operations did *not* extend beyond the lessee or the designated operator of an Outer Continental Shelf (OCS) drilling site. In the aftermath of the DWH incident, however, and with its issuance of INCs to oilfield contractors on the Macondo project, BSEE has claimed the authority to reach various operations of oilfield contractors on the OCS under several regulations, including:

1. 30 CFR § 250.107(a)(1)—Oilfield contractors failing to "protect health, safety, property, and the environment by . . . [failing to perform] all operations in a safe and workmanlike manner."
2. 30 CFR § 250.300—Oilfield contractors failing to "take measures to prevent unauthorized discharge of pollutants into the offshore waters."
3. 30 CFR § 250.401(a)—Oilfield contractors failing to "take necessary precautions to keep [the well] under control at all times."

4. 30 CFR § 250.420(a)(1) and (2)—Oilfield contractors did not take measures to "[p]roperly control formation pressures and fluids" and "[p]revent the direct or indirect release of fluids from any stratum through the wellbore into offshore waters."

But the plain language of the OCSLA regulations regarding INCs and civil penalties seemingly does not support the BSEE's exercise of authority over oilfield contractors. Sections 250.107, 250.401, and 250.420 apply only to the entities encompassed within the definition of "**you**" under 30 C.F.R. Part 250, which includes (in pertinent part) "a lessee, the owner or holder of operating rights" [i.e., "any interest held in a lease for exploration/development/production of oil and gas" or "a designated operator or agent of the lessee(s)," such as the entity designated as the "operator" of a well]. *See* 30 C.F.R. § 250.107 ("**You** must protect health, safety, property, and the environment. . . ."); 30 C.F.R. § 250.401 ("**You** must take necessary precautions to keep wells under control at all times. . . ."); 30 C.F.R. § 250.420 ("**You** must case and cement all wells. . . ."). Similarly, section 250.300 applies only to "the lessee" of a well. In other words, based on the plain language of the regulations under which the BSEE asserts its authority to issue INCs and impose civil penalties, it would appear that the BSEE has jurisdiction only over the actions of the lessee or the operator of a well.

The BSEE has acknowledged the unprecedented nature of its exercise of authority over oilfield contractors in the wake of the DWH incident. In an October 12, 2011, press release, the BSEE noted:

This is the first time the Department of the Interior [BSEE] has issued INCs directly to a contractor that was not the well's operator. The decision reflects the severity of the incident, the findings of the joint investigation [by the United States Coast Guard and BOEMRE], as well as Secretary Ken Salazar and Director Bromwich's commitment to holding all parties accountable.

The BSEE did not identify any specific statutory or regulatory basis for its actions, but instead merely made passing reference to the "severity of the incident" as the justification for the INCs. Further, without citing any statutory or regulatory authority, Director Bromwich declared on May 2, 2011, that the BSEE intends "to hold all players involved in drilling and production activity in the nation's oceans to high standards and [in the event of an accident, will hold] not only those companies that operate leases, the traditional subjects of agency regulation and enforcement, but their contractors and service providers such as the owners of drilling rigs as well."

Given the BSEE's lack of express statutory authority to extend its jurisdiction to service companies—and its failure to even issue a notice of proposed rulemaking to do so—significant questions exist about agency standards for exercising its authority and the legality of the BSEE's actions in general. Further, the industry has voiced concerns over the effects that will result from the BSEE's unilateral broadening of its jurisdiction. In March 2012, the National Ocean Industries Association submitted a four-page letter to the BSEE specifically challenging the agency's jurisdiction to extend its regulatory powers to offshore oilfield-service companies, and requesting "details and fully supported justification and authority of its announced extension of

BSEE jurisdiction beyond federal lessees and their designated operators," as well as the revocation of certain INCs or (at the very least) the "commencement of formal rulemaking procedures to enable the industry's input regarding the jurisdictional expansion." The BSEE's two-page response merely cited generally to OCSLA and its implementing regulations, and noted that:

BSEE has broad legal authority over all activities conducted under federal offshore leases, whether such activity is engaged in by lessees, operators, or contractors, and we can exercise such authority as we deem appropriate. . . . The 'any person' language of section 24(b) makes it clear that persons other than lessees and operators can be subject to the Secretary's rules or orders.

Indeed, even another federal agency, the Chemical Safety Board, which released its preliminary findings regarding the DWH incident on July 24, 2012, has questioned the extension of the BSEE's jurisdiction.

The BSEE issued its final rule in mid-August 2012, titled "Oil and Gas and Sulphur Operations on the Outer Continental Shelf." *See* 77 Fed. Reg. 50856 (Aug. 22, 2012). The bulk of the rule addresses drilling-safety standards and does not discuss the extension of potential CWA liability to oilfield contractors, other than to note, perfunctorily, that "This final rule affects lessees, operators of leases, and drilling contractors on the OCS. . . ." *Id.* at 50885. This comment appears in a section addressing the financial impact of the extension of authority over drilling contractors on small business entities, and the BSEE specifically recognizes that small companies will "bear meaningful costs under the rulemaking" and recommends that "some small businesses may therefore decide to focus more on shallow water or other oil and gas offshore provinces overseas." *Id.* at 50886-87. In other words, the final rule did nothing to clarify the source of the BSEE's authority over oilfield contractors.

In an interim policy document issued on August 15, 2012, the BSEE reaffirmed its plans to issue INCs to oilfield contractors in addition to operators and lessees, citing only 30 C.F.R. §§ 250.107(a)(1) and (a)(2), two of the provisions discussed above that arguably do not confer authority to the BSEE. The BSEE also outlined four factors used to determine whether to issue INCs to oilfield contractors: (1) the type of violation; (2) the harm or threat of harm resulting from the violation; (3) the foreseeability of harm; and (4) the extent of the contractor's involvement in the violation.

While the BSEE has made clear that the primary reason for this new approach is the BSEE's belief that there was much blame to spread around after the DWH incident, the agency still has not explained the basis of its authority to cite contractors who are not operators or lessees of the drill site. Transocean opted to settle its INCs and CWA civil penalties, but others may not. Thus, it is uncertain whether the BSEE's unilateral extension of its jurisdiction can withstand challenges to its jurisdiction. Pending appeals regarding INCs issued in 2011 may be decided soon, considering that the Interior Board of Land Appeals postponed review until the conclusion of the multidistrict litigation. In the meantime, offshore oilfield contractors operating on the OCS would be wise to reassess their safety and insurance programs in the interest of avoiding further

unprecedented enforcement actions as well as potential fines under the BSEE's aggressive new strategy.

Keywords: energy litigation, Deepwater Horizon, Department of Interior, Bureau of Safety and Environmental Enforcement, BP, Macondo, Transocean, Incident of Non-Compliance, Outer Continental Shelf Lands Act, Clean Water Act

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