

An Regulatory Minefield

Energy, Environment & Resource Strategies

- Solicitor, U.S. Department of the Interior
- Deputy Solicitor, U.S. Department of the Interior
- Deputy Chief of Staff, U.S. Department of the Interior
- Counselor to the Secretary and Director of Congressional and Legislative Affairs, U.S. Department of the Interior
- General Counsel, U.S. Environmental Protection Agency
- Assistant Administrator for Water, U.S. Environmental Protection Agency
- Regional Solicitor, U.S. Department of the Interior
- Associate Solicitor, U.S. Department of the Interior
- Deputy Director, U.S. Mineral Management Service
- Deputy Director, Office of Congressional and Legislative Affairs, U.S. Department of the Interior
- Deputy Director, Bureau of Land Management

DC Policymakers Typically React to Events



“A Lonely Bill on Capitol Hill” and New Regulations

One Reaction

- 18-months after the Macondo incident, BSEE issued Incidents of Non-Compliance (INCs) to Halliburton and Transocean in addition to the operator.
- “This is the first time the Department of the Interior has issued INCs directly to a contractor that was not the well’s operator.”
- “I know it is a new view for this industry, but I am convinced it is the right view.”
- Contractor INCs: 2 in 2011, 0 in 2012, 7 in 2013.
- CBO informally told to expect ½ of civil penalty revenue to come from INCs by contractors.

History of Application

- Director of BOEMRE Press Release
- Inquiry from NOIA
- Congressional Letters of Inquiry
- BSEE (Watson) Response to NOIA and Congress
- Guidance to Employees
- Administrative Appeal/Legal Challenge

First Administrative Challenge to be Briefed

- In March, 2013 Island Operating Co., Inc. is INC'd
- Among other things, Island is challenging whether the agency has authority to issue such INCs to contractors under the Outer Continental Shelf Lands Act or its existing regulations
- Briefs have been submitted by Island and the Agency
- NOIA and an ally filed an amicus brief

NOIA and an Ally Filed an Amicus Brief

- Issue of first impression for Appeals Board that is important to the industry and the public.
- Recognizes that BSEE wants to insure that the operations conducted pursuant to OCSLA are safe for persons, property and the environment, but asserts that they must do so within legal parameters.
- Asserts that agency's current regulations do not impose liability on contractors.
- Explain that the agency's actions create a minefield where regulations are applied to an entire class of people to whom the application of the regulations was never contemplated.
- If BSEE wants to pursue its goals of imposing liability on contractors, it must engage in the normal legislative and regulatory processes by which such decisions are made in the context of full public debate.

BSEE Position

- “Whenever the regulations in 30 C.F.R. parts 250 through 282 ... require the lessee to meet a requirement or perform an action, the lessee, operator (if one has been designated), and the person actually performing the activity to which the requirement applies are jointly and severally responsible for complying with the regulation.” 30 C.F.R. 250.146(C).
- Section 1334 states that, “notwithstanding any other provision” of OCSLA, any regulations prescribed by BSEE “for the prevention of waste and conservation of the natural resources” of the OCS “shall ... apply to all operations conducted under a lease issued or maintained under the provisions...of OCSLA.”

Amicus

- “It shall be the duty of any holder of a lease or permit ... to ... maintain all operations within [the] lease area or within the area covered by [the] permit ... in compliance with regulations intended to protect persons, property, and the environment.”
43 U.S.C. § 1348(b)(2).
- Regulations require that “you” must protect health, safety and operations by performing all “operations in a safe and workmanlike manner,” and the regulations define “you” to only include: 1) the lessee; 2) owners or holders of operating rights; 3) designated operators or agents of a lessee; 4) pipeline right-of-way holders; and 5) State lessees granted a right-of-use and easement.

Obvious Issues

- Any individual employee of both operators and contractors could be **personally** liable for compliance.
- To be “jointly responsible” typically means that one is responsible for an action even if one does not take the action himself. Thus, individuals and contractors would be, in effect, guarantors that lessees and operators would comply with BSEE’s regulations, even though they have no control whatsoever over how lessees and operators perform their duties.
- Which duties that have been applied only to lessees apply to both employees and contractors? Equipment maintenance? See. Section 250.108.

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