"*LOST IN THEIR OWN STREETS*" AND AT SEA: THE NEW REGULATORY REALITY POST-MACONDO

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THEY WERE NEW GYPSIES . . . WHO KNEW ONLY THEIR OWN LANGUAGE . . . IN AN INSTANT THEY TRANSFORMED THE VILLAGE. THE INHABITANTS OF MACONDO FOUND THEMSELVES LOST IN THEIR OWN STREETS, CONFUSED BY THE CROWDED FAIR . . .

. . . THAT MACONDO FORGOTTEN EVEN BY THE BIRDS, WHERE THE DUST AND THE HEAT HAD BECOME SO STRONG THAT IT WAS DIFFICULT TO BREATHE . . . A FEARFUL WHIRLWIND OF DUST AND RUBBLE BEING SPUN ABOUT BY THE WRATH OF THE BIBLICAL HURRICANE

- GABRIEL GARCÍA MÁRQUEZ, ONE HUNDRED YEARS OF SOLITUDE

I. "*A Fearful Whirlwind of Dust and Rubble*" - The April 20, 2010 Macondo Disaster

The April 20, 2010 blowout of BP's Macondo well and the ensuing explosion and sinking of the Transocean DEEPWATER HORIZON semi-submersible drilling rig resulted in the death of eleven personnel and the largest environmental disaster in the history of the United States, dwarfing the prior benchmark for environmental damage resulting from operations in the energy sector, the grounding of the Exxon *Valdez* off the coast of Alaska in 1989. In the wake of the disaster, it became clear that there had been critical breakdowns in the regulatory oversight of deepwater exploration activities in the Gulf of Mexico. Among the more glaring and well-publicized gaffes, it quickly came to light that BP's 2009 response plan for its Gulf of Mexico operations - which had been vetted and approved by the former Mineral Management Services (MMS, the branch of the Department of the Interior formerly in charge of permitting and oversight of oil and gas exploration on the Outer Continental Shelf (OCS) - identified a certain Professor Peter Lutz (who had *died in 2005*) as a national wildlife expert, and included *arctic* species (walruses, sea otters, sea lions and seals) among the "sensitive biological resources" considered by the plan *for the Gulf of Mexico*.[1] This relatively innocuous (if disconcerting) foible

[1] Holbrook Mohr, Justin Pritchard, Tamara Lush, *BP's gulf oil spill response plan lists the walrus as a local species. Louisiana Gov. Bobby Jindal is furious* (June 9, 2010) *available at* http://www.csmonitor.com/From-the-news-wires/2010/0609/BP-s-gulf-oil-spill-response-plan-lists-the-walrus-as-a-local-species.-Louisiana-Gov.-Bobby-Jindal-is-furious.

soon gave way to more insidious indications of corruption and defalcation within the MMS, which over the years had essentially delegated its regulatory duties to the very industry it was supposed to be regulating.[2] A final report issued by the successor agency to the MMS after its investigation of the blowout recognized the regulatory shortfalls that contributed to the disaster.[3]

The United States Coast Guard (USCG) - the other major federal regulatory presence overseeing the oil and gas industry on the OCS - did not escape scrutiny either. Prior to the Macondo disaster, MMS and the USCG were jointly tasked (pursuant to a Memorandum of Understanding (MOU) and subsequent series of Memoranda of Agreement (MOAs)) with enforcement of safety and environmental regulation of operations on the OCS, with the MMS focusing on structures/operations specific to drilling/production activities and the USCG focusing on vessel-specific concerns (although the USCG, somewhat confusingly, retained jurisdiction over "drilling systems" on MODUs and other floating rigs).[4] However, the USCG was criticized in post-Macondo congressional hearings for failing to more aggressively monitor foreign-flagged mobile offshore drilling units (MODUs) like the DEEPWATER HORIZON, which was flagged in the Marshall Islands and thus subject to less comprehensive regulations than those required of

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[2] *See* Juliet Eilperin and Scott Higham, *How the Minerals Management Service's partnership with industry led to failure* (Aug. 24, 2010) *available at* http://www.washingtonpost.com/wpdyn/content/article/2010/08/24/AR2010082406754.html.

[3] *See, e.g.,* The Bureau of Ocean Energy Management, Regulation and Enforcement, *Report Regarding The Causes Of The April 20, 2010 Macondo Well Blowout*, p. 7 (Sept. 14, 2011) (hereinafter "BOEMRE Final Macondo Report") ("Although the Panel found no evidence that MMS regulations in effect on April 20, 2010 were a cause of the blowout, the Panel concluded that stronger and more comprehensive federal regulations might have reduced the likelihood of the Macondo blowout. In particular, the Panel found that MMS regulations in place at the time of the blowout could be enhanced in a number of areas, including: cementing procedures and testing; BOP configuration and testing; well integrity testing; and other drilling operations. In addition, the Panel found that there were a number of ways in which the MMS drilling inspections program could be improved. For example, the Panel concluded that drilling inspections should evaluate emergency disconnect systems and/or other BOP stack secondary system functions. BOEMRE has already implemented many of these improvements.") *available at* http://docs.lib.noaa.gov/noaa_documents/DWH_IR/reports/dwhfinal.pdf.

[4] *See, e.g.*, 43 U.S.C. §1348. *See also* 64 Fed. Reg. 2660 (Jan. 15, 1999).

American-flagged MODUs.[5] In the end, the USCG acknowledged the failure of its own regulatory authority in its final report regarding the Macondo blowout:

> The Coast Guard conducted limited safety examinations of DEEPWATER HORIZON in 2008 and 2009, but did not identify safety concerns. Given the flag state's oversight deficiencies, the Coast Guard's regulatory scheme, which defers heavily to the flag state to ensure the safety of foreign-flagged MODUs, is insufficient.
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> * * *
>
> Systematic failures in the Safety Management System of Transocean and DEEPWATER HORIZON rendered the system ineffective in preventing or responding to the flow of hydrocarbons in the riser and the subsequent explosion and fire. The Safety Management System failed to provide proper risk assessment, adequate maintenance and materiel condition, and process safety adherence. The Flag State and USCG did not identify these system failures in time to ensure the safety of the vessel.[6]

II. "*New Gypsies*" in the Village - The Post-Macondo Regulatory Response

On June 10, 2010, with the Macondo well still gushing untold millions of barrels of oil into the Gulf, and in the midst of an unprecedented six-month deepwater drilling moratorium prompted by the blowout, President Obama made it clear that the post-Macondo regulatory world would be a very different place:

> One place we've already begun to take action is at the agency in charge of regulating drilling and issuing permits, known as the Minerals Management Service. Over the last decade, this agency has become emblematic of a failed philosophy that views all regulation with hostility -- a philosophy that says corporations should be allowed to play by their own rules and police themselves. At this agency, industry insiders were put in charge of industry oversight. Oil companies showered regulators with gifts and favors, and were essentially allowed to conduct their own safety inspections and write their own regulations.

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[5] Kim Geiger & Tom Hamburger, *House committee scolds Coast Guard for lax inspection of Deepwater Horizon* (June 17, 2010) *available at* http://articles.latimes.com/2010/jun/17/nation/la-na-oil-inspections-20100618.

[6] United States Coast Guard *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*, p. xviii & 112 (hereinafter "USCG Final DWH Report") *available at* https://homeport.uscg.mil/cgibin/st/portal/uscg_docs/MyCG/Editorial/20130416/DeepwaterHorizon_ROI_USCG_Volume%20I_20110707_redacted_final.pdf?id=8fc84bbe475b7a6cacd8f895f1b7fae48020d327&user_id=2a47d4dbfd24ce2da39438e736cab2d6.

> When Ken Salazar became my Secretary of the Interior, one of his very first acts was to clean up the worst of the corruption at this agency. But it's now clear that the problem there ran much deeper, and the pace of reform was just too slow. And so Secretary Salazar and I are bringing in new leadership at the agency -- Michael Bromwich, who was a tough federal prosecutor and Inspector General. And his charge over the next few months is to build an organization that acts as the oil industry's watchdog -- not its partner.
>
> **So one of the lessons we've learned from this spill is that we need better regulations, better safety standards, and better enforcement when it comes to offshore drilling**.[7]

In fact, the process of overhauling the regulatory framework had already begun before President Obama's June 15 Oval Office speech. On May 19, 2010, Ken Salazar, the acting Secretary of the Interior, announced the separation of the responsibilities performed by the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) (the entity that had replaced the disgraced MMS in June of 2010 by order of Secretary Salazar) into three new separate organizations: Office of Natural Resources Revenue (ONRR, an entirely separate office under the Assistant Secretary for Policy, Management responsible for revenue and royalty concerns), Bureau of Ocean Energy Management (BOEM), and Bureau of Safety and Environmental Enforcement (BSEE).[8] Michael Bromwich headed BOEMRE from its inception through its bifurcation into BSEE and BOEM, and then continued to head BSEE until November of 2011. Under Bromwich's leadership, many of the changes discussed in this paper were put in place and/or set in motion.

These latter two bureaus - BOEM and BSEE - are now the federal authorities for permitting and enforcement of oil and gas operations on the OCS:

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[7] President Obama, Oval Office Speech of June 15, 2010 *available at* http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill.

[8] Reorganization of Title 30: Bureaus of Safety and Environmental Enforcement and Ocean Energy Management, 76 Fed. Reg. 64432, 64432 (Oct. 18, 2011).

- BOEM Mission: Responsible for managing development of the nation's offshore resources in an environmentally and economically responsible way.

- BOEM Functions include: Leasing, Plan Administration, Environmental Studies, National Environmental Policy Act (NEPA) Analysis, Resource Evaluation, Economic Analysis, and the Renewable Energy Program.

- BSEE Mission: Enforce safety and environmental regulations.

- BSEE Functions include: All field operations including Permitting and Research, Inspections, Research, Offshore Regulatory Programs, Oil Spill Response, and newly formed Training and Environmental Compliance functions.[9]

In short, BOEM handles preliminary leasing, permitting, and pre-project plan vetting, and BSEE handles oversight and enforcement of drilling operations on the OCS, including emergency/spill response.

Nonetheless, as before, the OCS continues to be a shared regulatory space between and among BOEM, BSEE, and the USCG; however, given the aggressive regulatory response after Macondo, the scope and practical realities of that shared authority remains confusing both to industry actors and to the agencies themselves. In this context, and perhaps most importantly, BSEE has recently - and arguably without authority - extended its regulatory authority to include not only lease holders and designated operators on the OCS, **but also oilfield contractors (including in some instances those utilizing vessels)** engaged and/or assisting with exploration and production activities on the OCS. This unprecedented extension of BSEE's authority has caused significant concern (and practical problems) among the myriad oilfield contractors who ply their trades in the offshore oil industry.[10]

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[9] *Id*.

[10] *See, e.g.*, G. Allen Brooks, *Musings: Aggressive Regulation and BSEE's Unlimited Powers*, Apr. 10, 2012, *available at* http://www.rigzone.com/news/article.asp?a_id=116792; National Ocean Industries Association, March 2012 Letter to BSEE regarding Extension of Jurisdiction (copy on file with authors); *IADC (International Association*

Like the villagers of Macondo in García Márquez's novel, who "found themselves lost in their own streets, confused by the crowded fair" with the arrival of the "new gypsies . . . who knew only their own language," the OCS is subject to a new and revamped regulatory regime under BSEE and the USCG - complete with a new "language" of regulations, MOUs, and MOAs - which promises to transform the oil and gas industry on the OCS. Indeed, industry actors who do not become familiar with the new regime will be find themselves "lost . . . [and] confused by the crowded fair" of regulatory requirements and pitfalls that now apply on the OCS.

The aim of this paper is to attempt to explain the current (and continuously evolving) parameters of this "new regulatory normal" in OCS regulations and regulatory authority, and to point out some of the particularly problematic, confusing, and/or red-flag issues for industry actors engaged in offshore operations.

III. "*Their Own Language*" - USCG & BSEE Memoranda of Understanding/Agreement

As a starting point, the USCG and BSEE have entered five MOUs/MOAs since the post-Macondo reorganization of the MMS. These agreements provide a bird's-eye view of how the USCG and BSEE view their roles in regulating OCS activities - but also highlight the inherent confusion in the new regulatory regime.

1) BOEMRE/USCG MOA: OCS-06 (effective 27 July 2011) - Offshore Renewable Energy Installations on the Outer Continental Shelf[11]

The purpose of this initial post-Macondo MOA is "to identify and clarify the roles and responsibilities of [BOEMRE (now BOEM and BSEE) and the USCG] for the issuance of leases and approval of Site Assessment Plans (SAPs), General Activity Plans (GAPs) and Construction

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of Drilling Contractors) Criticizes BSEE Policy for Citing Drilling Contractors (Aug. 17, 2012), http://www.businesswire.com/news/ home/20120817005670/en.

[11] http://www.uscg.mil/hq/cg5/cg522/cg5222/docs/mou/MOA%20OCS%2003_FINAL_Signed_3APR12.pdf.

and Operations Plans (COPs) for offshore renewable energy installations (OREIs) on the Outer Continental Shelf (OCS)." The MOA clarifies BOEMRE's (now BOEM) authority for permitting on the OCS (leases, easements, right of ways) and preparing environmental assessments/plans under NEPA; coordination, with USCG input, for "maritime safety, maritime security, maritime mobility (management of maritime traffic, commerce, and navigation), national defense, and protection of the marine environment," and general navigational risks. Likewise, the MOA notes the USCG's authority to regulate "OCS facilities, mobile offshore drilling units (MODUs) and vessels engaged in OCS energy and mineral development activities, including, but not limited to, tank vessels, offshore supply vessels, and other vessels involved in the transfer of certain cargoes." However, the MOA expressly recognizes that **the USCG and BOEMRE (now BSEE) share regulatory authority** for safety and environmental regulation on OCS facilities, including vessels**:**

> BOEMRE and the USCG agree to work cooperatively to avoid overlapping and duplicative regulatory regimes with regard to vessels involved with, or servicing, OREIs.
>
> **For vessels inspected and certificated by the USCG, the participating agencies agree that the safety of vessel-related systems and equipment on those vessels will be regulated by the USCG if the USCG has an applicable regulation. If BOEMRE has a regulation or safety management system requirement applicable to a vessel system for which there is no USCG regulation, the participating agencies agree that BOEMRE regulation or safety management system requirement will apply unless the USCG objects to such application**. In cases where the USCG objects, BOEMRE and the USCG agree to coordinate and collaborate on any regulatory amendments necessary to ensure vessel safety. The parties agree to collaborate early on in the OREI project review process to identify which vessels involved in the construction, operation, and maintenance of the OREI will be inspected and certificated by the USCG, and which ones will not.

As is apparent from the above-quoted language, **this MOA expressly acknowledges that BSEE and the USCG will have <u>shared</u> authority over certain vessels and structures on the OCS**.

Stated more bluntly, industry actors are *expressly warned* that they are potentially subject to two regulatory masters in an "if-not-us-then-them" regulatory framework.

2) BSEE/USCG MOA: OCS-03 (effective 3 April 2012) - Oil Discharge Planning, Preparedness, and Response[12]

This April 2012 MOA focuses on clarifying BSEE and the USCG's roles/responsibilities with regard to preparedness for and response to oil spills on the OCS, and in this sense does not address the issue of day-to-day regulatory authority for OCS operations. Essentially, BSEE has authority for all efforts at source control in a blowout scenario; the USCG has authority for all response efforts and removal of hydrocarbons, as well as mitigation of environmental damages. This MOA focuses mostly on summarizing BSEE's inspection procedures, including unannounced drills at OCS facilities, as well as random equipment inspections (including discharge response and subsea containment (i.e. blowout preventers, BOPs) equipment).

The most recent BSEE regulatory activity falls within the ambit of this MOA. Specifically, BSEE issued a Notice of Proposed Rulemaking on August 22, 2013 to overhaul Subpart H of the BSEE regulations, which govern "Oil and Gas Production Safety Systems" (i.e. systems for production activities, as opposed to exploration):

> This proposed rule would amend and update the Subpart H, Oil and Gas Production Safety Systems regulations. Subpart H has not had a major revision since it was first published in 1988. Since that time, much of the oil and gas production on the OCS has moved into deeper waters and the regulations have not kept pace with the technological advancements.
>
> These regulations address issues such as production safety systems, subsurface safety devices, and safety device testing. These systems play a critical role in protecting workers and the environment.[13]

[12] http://www.uscg.mil/hq/cg5/cg522/cg5222/docs/mou/MOA%20OCS%2003_FINAL_Signed_3APR12.pdf.

[13] 78 Fed. Reg. 52239, 52240 (Aug. 22, 2013).

Perhaps most critically, these new proposed regulations include "[i]n addition to Subpart H revisions, [revisions to] the regulation [30 C.F.R. §250.107] in Subpart A requiring best available and safest technology (BAST) to follow more closely the [OCSLA] statutory provision for BAST, 43 U.S.C. 1347(b)."[14] This general and very broad BAST provision "is often cited [by BSEE] as the basis for issuing INCs to operators—and [as discussed further below] recently contractors."[15] The proposed regulation gives BSEE broad (and apparently highly discretionary) authority to dictate when and whether operators (and apparently their contractors) must use a certain BAST, presumably on penalty of regulatory enforcement actions:

> Proposed Sec. 250.107(c) would provide that wherever failure of equipment may have a significant effect on safety, health, or the environment, an operator must use the BAST that BSEE determines to be economically feasible on all new drilling and production operations, and wherever practicable, on existing operations. Under this proposed provision, BSEE would specify what is economically feasible BAST. This could be accomplished generally, for instance, through the use of NTLs, or on a case-specific basis. To implement the exception allowed by the Act, proposed Sec. 250.107(c)(2) would allow an operator to request an exception from the use of BAST by demonstrating to BSEE that the incremental benefits of using BAST are clearly insufficient to justify the incremental costs of utilizing such technologies.[16]

The extensive scope of these proposed regulations (beyond the expansive BAST revision) is readily apparent: Subpart H currently includes eight numbered sections; the proposed rule *would expand it to over ninety*. In response to industry's demands for additional time to provide comments to these expansive proposed rules, BSEE has extended the comment period (formerly set to close on October 21, 2013) through December 5, 2013.[17]

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[14] *Id*.

[15] Glenn Legge & Andrew Stakelum, *BSEE's Proposed Rules on Safety Systems Raise New Questions and Invite Comment From Industry* (Aug. 2013), *available at* http://www.leggefarrow.com/Newsletter%20-%20Proposed%20Rule%20on%20Safety%20Systems.pdf.

[16] 78 Fed. Reg. 52239, 52243 (Aug. 22, 2013).

[17] 78 Fed. Reg. 59632 (Sept. 27, 2013).

3) Memorandum of Understanding between BSEE and the USCG -27 November 2012 BSEE/USCG[18]

In the wake of the inherently problematic and confusing statement in the July, 2011 MOA regarding the overlapping jurisdiction of the USCG and BSEE, the agencies issued an MOU in November of 2012 to "promote interagency consistency in the regulation of [OCS] activities, facilities, and units under the[ir] respective jurisdiction[s] . . . minimalize duplication of effort, and aid the participating agencies in the successful completion of their assigned missions and responsibilities." Despite its stated intent to clarify and promote consistency, this MOU immediately adds another layer of confusion and inconsistency because BSEE oversees "facilities" (which includes all installations and fixtures permanently or temporarily attached to the OCS), whereas, the USCG regulates "units" which includes most facilities (as defined by BSEE), as well as vessels, which BSEE does not regulate:

> BSEE describes the scope of its jurisdiction by using the terms "facility," which encompasses all installations and devices permanently or temporarily attached to the seabed. The term "facility" is defined in BSEE regulations 30 C.F.R. 250.105 (2011). The USCG's regulatory use of the term "unit" encompasses the vessels, vehicles and structures over which the USCG exercises jurisdiction on the OCS. As used in this MOU, the term "unit" includes most "facilities" as BSEE defines the term, but also includes certain vessels and vehicles over which BSEE has no jurisdiction.

This rat's nest of overlapping regulatory definitions and jurisdictions begs a myriad of questions as to which agency has authority over which actors and operations.

For example, the November 2012 MOU ostensibly gives both BSEE and the USCG joint authority to regulate and investigate "[p]ollution events involving facilities on the OCS; [i]ncidents occurring on jack up or semi-submersible rigs or drill ships that are attached to the

[18] http://www.uscg.mil/hq/cg5/cg522/cg5222/docs/mou/BSEE_USCG_MOU_NOV_2012.pdf.

OCS via conductors or risers; and [v]essel allisions with OCS platforms."[19] Likewise, the potential overlapping of the terms "unit" and "facility" raises questions as to which agency has jurisdiction over drillships, which by definition are both vessels and "facilities" capable of and designed to perform drilling and downhole operations;[20] (coil tubing jobs performed from lift boats (in which equipment from a support vessel/USCG "unit" may be attached to a BSEE "facility" and thus part of that "facility"); plug-and-abandonment (P&A) work and/or maintenance work on platforms performed from vessels;[21] well stimulation operations from vessels; vessel-to-platform crane operations[22] (particularly those involving heavy-lift vessels), including decommissioning work (a growth area in the Gulf of Mexico in the wake of 2010 "idle iron" regulations);[23] and the list goes on.

To further illustrate the point, in a March 2011 informational session, a BOEMRE representative indicated initially that liftboats were under the jurisdiction of the USCG, but later stated that liftboats *performing activities covered under a Safety and Environmental Management System* (SEMS) *plan* are under BOEMRE's jurisdiction (the intricacies of the SEMS regulations

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[19] Glenn Legge & Andrew Stakelum, *Federal Agency Cooperation in the Post Macondo Era - the BSEE and USCG Issue New Memorandum of Understanding* (Nov. 2012) *available at* j http://www.leggefarrow.com/Newsletter%20-%20USCG%20BSEE%20MOU.pdf.

[20] A recent high-profile example of one of these potentially dually regulated vessels is the Shell KULLUK drillship, which grounded off the coast of Alaska on New Year's Eve, 2012 while en route to its overwintering harbor from drilling operations in the Alaskan arctic. Interestingly, although the grounding occurred while the vessel was being towed back to harbor and was not involved in any drilling operations at the time of the incident, the USCG took the lead in the post-incident investigation, with BSEE "participat[ing] and support[ing] the investigation as technical advisers." *See, e.g.*, Karen Boman, *Coast Guard to Investigate Kulluk Grounding* (Jan. 8, 2013), http://www.rigzone.com/news/oil_gas/a/123284/Coast_Guard_to_Investigate_Kulluk_Grounding.

[21] *See SEMS Enforcement – Sorting Out Who Is in Charge Offshore* (Sept. 6, 2011), http://pecpremier.wordpress.com/2011/09/06/sems-enforcement-sorting-out-who-is-in-charge-offshore/.

[22] *See Sorting Out Who Is In Charge Offshore – Harder Than It Seems* (Feb. 1, 2012), http://pecpremier.wordpress.com/2012/02/01/sorting-out-who-is-in-charge-offshore-harder-than-it-seems/.

[23] *See* Susan Buchanan, *Push Is On To Declutter Gulf of Idle Iron* (Aug. 21, 2012), http://www.marinelink.com/news/declutter-push-gulf347104.aspx.

are discussed further below in Section III(4)).[24] Likewise, as an additional example of the confusion inherent in these overlapping jurisdictions, BSEE issued an Incident of Non-Compliance (INC) to a lessee on June 22, 2012 related to a trip-and-fall incident in which a third-party contractor fell aboard a jackup rig; however, BSEE *later rescinded the INC* (on written request of the lessee) on the basis that the rig "was jacked-up on [the lessee's] lease performing only construction and maintenance activities," *not well operations*.[25] This is a stark example of how BSEE's own uncertainty can lead to headaches, not to mention lost time and money, on the part of industry actors subject to overlapping BSEE and USCG oversight.

The USCG for its part has also recognized the inherently confusing nature of this overlapping jurisdiction. For example, in its most recent notice of proposed rulemaking in this area (discussed further below in Section III(4), regarding the USCG's recent vessel-specific SEMS proposal), the USCG acknowledged that for certain OCS support vessels (i.e. heavy-lift boats, downhole-capable OSVs) "[n]o SEMS [regulations promulgated by BSEE] directly [apply] but [the vessels] **may or may not be subject** to a designated lease operator's SEMS."[26]

In short, the November 2012 MOU created many, many more questions than it answered. In fact, in lieu of attempting to sort out the myriad problems arising from the express recognition of overlapping jurisdictions, the remainder of the November 2012 MOU essentially establishes an inter-agency cooperative process for issuance of future BSEE/USCG MOAs to address specific areas of regulatory concern. Thus, the November 2012 MOU is really just a roadmap for future agreements focused on discrete problems. In the interim, two more focused MOAs have issued,

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[24] *Supra* n. 21.

[25] *See* BSEE Accident Investigation Report Re: June 22, 2012 INC issued to Tarpon Operating and Development, L.L.C. (Aug. 9, 20122) *available at* http://www.bsee.gov/uploadedFiles/BSEE/Enforcement/Accidents_and_Incidents/20Jun2012TarponSM50.pdf.

[26] 78 Fed. Reg. 55230 (Sept. 10, 2013).

although these too offer nothing more than broad brush strokes instead of precise guidance to the industry.

4) BSEE/USCG MOA: OCS-07 (effective 30 April 2013) - Safety and Environmental Management Systems (SEMS) and Safety Management Systems (SMS)[27]

The April 30, 2013 MOA between BSEE and the USCG addresses what has been perhaps the most controversial/game-changing aspect of the new post-Macondo regulatory reality - namely, the requirement that OCS operators - and, ostensibly, their contractors and sub-contractors - adopt mandatory SEMS plans for all OCS operations. Specifically, the April 30, 2012 MOA provides for joint "evaluations/boardings/inspections" by BSEE and the USCG, and generally calls for the following:

> The agencies' shared regulatory goal is for all parties involving in OCS operations to develop a comprehensive approach to **safety and environmental management** that provides for the necessary organizational structures, systems of accountability, and commitments to continual improvement.
>
> The purpose of this MOA is to:
>
> 1. Establish a process to determine areas relevant to safety and environmental management within jurisdiction of both the USCG and BSEE where joint policy or guidance is needed;
>
> 2. Ensure that any future OCS safety and environmental management regulations do not place inconsistent requirements on industry; and
>
> 3. Establish a process to develop joint policy or guidance on safety and environmental management systems.

BOEMRE promulgated the initial Final Rule for SEMS on October 15, 2010, enacting 30 C.F.R. 250, Subpart S and mandating "the American Petroleum Institute's Recommended Practice 75, Development of a [SEMS] Program for Offshore Operations and Facilities, with respect to

[27] http://www.uscg.mil/hq/cg5/cg522/cg5222/docs/mou/MOA-OCS-07.pdf.

operations and activities under the jurisdiction of BOEMRE [now BSEE]."[28] The SEMS rule marked a sea-change in the way the offshore industry is regulated by converting what had previously been a voluntary compliance regime to a prescriptive one.[29] The original SEMS rule required that all operators (and/or other entities covered by Subpart S) have a fully compliant SEMS program in place by November 15, 2011. Thereafter, BSEE promulgated a second set of SEMS regulations - officially referred to as SEMS II, and colloquially identified as "Son of SEMS" - on April 5, 2013 to "revise and add several new requirements to regulations for [SEMS]" focusing on stop-work authority, reporting of unsafe conditions, and employee participation (among others).[30] SEMS II had an effective date of June 4, 2014 except for certain auditing provisions (requiring an accredited third-party audit of all SEMS programs), which do not require compliance until June 5, 2015.

Critically, the SEMS II audit requirements **specifically require** proof that all contractors (except catering/steward service providers) on an OCS operation have their own safety practices and are properly trained, and further require OCS operators to vet the safety and environmental records of all contractors on a project.[31] BSEE has made this point clear: "[o]perators and contractors must document an agreement on appropriate contractor safety and environmental policies and practices before the contractor begins work at an operator's facilities."[32] In this regard, the regulations explicitly recognize the validity of "bridging agreements" or "SEMS

[28] 75 Fed. Reg. 63609 (Oct. 15, 2010).

[29] *See* Joanne Liou, *SEMS rule marks new beginning in environmental, safety practices,* Drillingcontractor.org (Drilling Contractor - the Official Magazine of the IADC) (Nov. 8, 2011) (hereinafter "Liou Article") *available at* http://www.drillingcontractor.org/sems-rule-marks-new-beginning-in-environmental-safety-practices-11639.

[30] 78 Fed. Reg. 20423 (Apr. 5, 2013).

[31] 30 C.F.R. §250.1914.

[32] 78 Fed. Reg.20,426 (Apr. 5, 2013).

mapping agreements," which have been a previously standard practice in this industry in terms of satisfying SEMS: "Contractors may adopt appropriate sections of [an operator/leaseholder's] SEMS program" as their own to satisfy the SEMS requirements.[33] These requirements are yet another indication that BSEE intends to reach contractors through its regulations one way or another, albeit *indirectly* in the case of these specific SEMS regulations regarding bridging agreements and operator/leaseholder audits. However, as previously mention and as discussed at further length below, whether and to what extent BSEE's SEMS regulations apply *directly* to contractors on the OCS remains an open and extremely fraught question.

In this same vein, since the rollout of the SEMS mandate, the issue of whether and when BSEE's SEMS regulations apply to vessels on the OCS has remained opaque and difficult to answer. While the SEMS regulations state explicitly that "[n]othing in this subpart affects safety or other matters under the jurisdiction of the" USCG,[34] this is far from clear. As noted earlier (in Section III(2)), there are instances in which vessels will constitute BSEE-regulated "facilities" (i.e. when vessels are engaged in OCS operations and/or connected to/working on other OCS facilities), and thus be subject to BSEE's SEMS requirements; in fact, in a February 28, 2012 presentation by BSEE to an industry compliance group, BSEE expressly recognized that SEMS applies to vessels as and when they are attached to OCS facilities:

> SEMS applies when facility is installed . . . when it touches the seabed.
>
> Once the facility touches the seabed then those contractors on the facility need to be covered by SEMS **and any contractors on a motor vessel also need to be addressed in the operators SESM [sic] if such motor vessel is tethered, moored or attached to the facility**.

[33] *Id*.

[34] 30 C.F.R. §250.1900(b).

While this statement at least on the surface indicates only *indirect* regulation of vessels by BSEE (through an operator's SEMS), it nonetheless proves the practical point that BSEE will require SEMS compliance for vessels in certain scenarios. Moreover, as discussed below, BSEE's broad claim of jurisdiction over OCS contractors could snag vessels within its net. Further, BSEE (through its predecessor MMS) has a track record of overstepping its jurisdictional bounds and regulating vessels otherwise under USCG auspices:

> BSEE may still require Operators to evaluate vessels on safety-related procedures, safe work practices, training and Mechanical Integrity under their SEMS plans, even though these are under [USCG] authority. How can this be? Well, BSEE (in its previous incarnation as MMS) has a long history of blurring the lines between the agencies. Just last month, BSEE and BOEM released JOINT NTL No. 2012-G01, telling vessel crews how to avoid hitting marine mammals. The industry agrees on the importance of avoiding collisions with marine mammals, but what could be more clearly a matter of [USCG] authority than vessel collisions? Yet BSEE appears to be taking the lead on this issue.[35]

With this background in mind, the April 2013 MOA addresses coordination between BSEE and the USCG to create efficiencies (both logistical and substantive) with regard to inspections, boardings, and evaluations relevant to SEMS and the USCG's charge to protect life, property, and the environment within its sphere of jurisdiction on the OCS. Again, the April 2013 MOA explicitly recognizes the possibility of "inconsistent requirements on industry," and thus ostensibly seeks to "[e]stablish a process to determine areas relevant to safety and environmental management within the jurisdiction of both the USCG and BSEE where joint policy or guidance is needed."

Notably, BSEE regulations provide that "BSEE will inspect OCS facilities and any vessels engaged in drilling or other downhole operations," including "facilities under jurisdiction of other Federal agencies [e.g. the USCG] that [BSEE] inspect[s] by agreement," to verify compliance

[35] *Supra* n. 22.

with both BSEE regulations "**and other applicable law and regulations**."[36] This vague, catch-all reference to "other applicable laws and regulations" raises the possibility - as hinted at in the April 2013 MOA - that BSEE inspections may subsume certain areas of regulatory oversight that might otherwise technically fall under the USCG's jurisdiction.

Further, the April 2013 MOA goes on to provide that "[t]he USCG and the BSEE will review and discuss all OCS-related regulatory projects related to safety management . . . [to] help ensure that both organizations are aware of regulatory projects before the responsible agency completes them." Perhaps as a result of this coordinated approach to SEMS, the USCG has recently issued its own "Advances Notice of Proposed Rulemaking" to seek comment on a proposed rule that would require all "vessels engaged in OCS activities" - **including both domestic and foreign-flagged vessels -** "to develop, implement, and maintain a vessel-specific [SEMS program] that incorporates [API RP 75] . . . to be . . . compatible with a designated lease operator's SEMS required under [BSEE] regulations."[37] This Proposed Rule is presumably a reaction to the inherent problem exhibited in the original July 2011 BOEMRE-USCG MOA - namely the inherently confusing "if-not-us-then-them" gap-filler approach to regulating BSEE "facilities" and USCG "units." Under the proposal, however, if OCS vessels are subject to identical USCG SEMS requirements as BSEE facilities on the OCS, any problems of inconsistent/conflicting regulatory overlap vis-à-vis SEMS will be solved (as suggested in the April 30, 2013 MOA).

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[36] 30 C.F.R. §250.130 (emphasis added).

[37] 78 Fed. Reg. 55230 (Sept. 10, 2013). The proposed rulemaking notice points out that while "[s]ome of these vessels implement a S[afety] M[anagement] S[ystem] based on the ISM Code . . . this Code assumes a vessel's mission is international transportation of cargo, not OCS activities." *Id*. at 55232.

This Proposed Rule, therefore, amounts to an "if you can't beat them, join them" approach by the USCG to solving the problems inherent in overlapping jurisdictions, and BSEE's apparent and historic pattern of asserting regulatory jurisdiction over vessels. That said, the USCG Proposed Rule also notes that many vessels (approximately 185) currently operating on the OCS subject to compliance with the Safety Management System (SMS) standards of the International Safety Management (ISM) Code (as applicable under USCG regulations at 33 CFR Part 96). Thus, the USCG is seeking comments in particular regarding whether the ISM SMS standards (or even others issued by the IADC or International Standards Organization) could constitute an alternative means of satisfying API RP 75. The comment period on the Proposed Rule closes on December 9, 2013.

It bears noting that this new USCG Proposed Rule - which would make BSEE SEMS regulations applicable to USCG-regulated vessels - is another apparent indicator that the new regulatory reality on the OCS will extend *not only* to operators and lease holders, but also to their contractors, such as vessel owners. Again, the issue of extension of regulatory authority to contractors is treated below.

As a final note, BSEE and USCG's joint oversight and inspection partnership detailed in the April 2013 MOA has been put into practice in a remarkably expansive way. In a 2011 interview, then-BSEE director James Watson (the former USCG Director of Prevention Policy for Marine Safety, Security and Stewardship) discussed the joint BSEE-USCG inspection of a drilling rig *bound for Cuban* waters, and noted plans for the regulatory partnership to coordinate with many Caribbean countries to effectively "keep tabs" on the state of the industry throughout the Gulf of Mexico and its Caribbean environs:

> BSEE personnel found that the [Cuba-bound] rig generally conforms to U.S. safety standards, and that the blowout preventer passed the tests performed on it,

> including the critical stump test. They did find some minor issues regarding safety items, including alarms, signage, personal protection equipment, and equipment placement that required adjustment before the rig would have fully adhered to U.S. regulations. [The rig owner] indicated that it would address all of those items, and in follow-up conversations they have confirmed that they have done so.
>
> Moving forward, the U.S. is engaging in continued multilateral engagement with countries in the Caribbean – including Mexico, Jamaica, Cuba, and the Bahamas – as a way to share processes and practices related to oversight of private sector drilling activities to facilitate oil spill prevention and response, and gain information on the progress of drilling plans and activities. Sharing of best-practices is the best way for all countries in the Caribbean to ensure safe operations, and is similar to our interactions with other countries that have active offshore drilling programs.[38]

5) BSEE/USCG MOA: OCS-08 (effective 4 June 2013) - MODUs[39]

This most recent BSEE-USCG MOA addresses coordination/overlaps with respect to MODUs. The MOA generally recognizes the USCG's authority over MODUs vis-à-vis vessel inspection and certification issues, but provides that "[w]hen a MODU is temporarily attached to the seabed, BSEE regulates well operations including drilling, completions, workover, production, and decommissioning." Further, in another instance of "if-not-them-then-us" gap-filling, the MOA provides that "[w]here BSEE has specific regulations for MODU systems, or MODU operations, this MOA will serve as a formal agreement by the participating agencies concerning which agency has the lead for regulation, inspection, and oversight of systems on MODUs." Finally, the MOA provides a so-called "MODU System/Sub-System Responsibility Matrix," which is an item-by-item breakdown of what systems are regulated by which entity and when. It bears noting (as discussed in more detail below in Section IV, in the eighth bullet-point), that BSEE's proposed SEMS rules in their original form included a definition of MODU **that was**

[38] http://www.maritimeprofessional.com/Interviews/James-A--Watson.aspx.

[39] http://www.uscg.mil/hq/cg5/cg522/cg5222/docs/mou/BSEE_USCG_MOA_OCS-08_MODUs.pdf.

different from and more expansive than the traditional USCG definition used elsewhere.[40] BSEE removed this problematic definition, but in the same breath essentially re-asserted its belief that the more expansive definition was proper: "it is already clearly understood among operators that MODUs include vessels that are involved in other operations besides drilling."[41] In other words, by removing the more expansive (but specific) definition, BSEE arguably made the issue of what is or is not a MODU even more vague by tying the definition to some kind of unwritten industry understanding.

In any event, while the USCG was formerly in charge of certain "drilling systems" on MODUs under its prior MOA with MMS (*see* Note 4, *supra*), the new MOA allocates <u>*all*</u> authority for "Drilling, Completion, Well Servicing & Workover Systems" on MODUs to BSEE alone. That said, even the detailed and parsing matrix of responsibilities leaves areas of ambiguous overlap. For example, both BSEE and the USCG retain jurisdiction over crane operations *depending on* whether the cranes are considered "marine cranes and lifting systems" or "drilling associated" cranes and lifting systems. BSEE requires compliance with API crane standards (specifically API RP D2),[42] whereas the USCG has its own set of vessel-specific crane regulations.[43] The inherent problem with this dichotomy is that if a vessel is moored to an OCS BSEE-defined facility and is using its crane to assist with operations on that BSEE-facility (e.g., coil tubing operations and/or vessel well stimulation), other BSEE regulations and guidance would consider that vessel a "facility" notwithstanding the ostensible division of crane oversight. In other words, the division of crane responsibilities appears to be incomplete. Notably, the

[40] 78 Fed. Reg. 20423, 20428-29 (Apr. 5, 2013).

[41] *Id*. at 20429.

[42] *See* 30 C.F.R. §250.108.

[43] *See* 46 C.F.R. §107.309, §§107.258-60.

USCG has recently issued a notice of proposed rulemaking to adopt API RD 2 for all vessel-mounted cranes on MODUs and offshore supply vessels, which would solve the dichotomy problem by simply rendering all cranes on the OCS (vessel-mount or rig-mounted) to the same standards.[44] Likewise, as noted above regarding SEMS, the June 2013 MOA underscores the uncertainty as to when SEMS regulations will apply to MODUs; BSEE asserts jurisdiction to enforce SEMS on MODUs attached to the seabed, but cedes jurisdiction to the USCG for MODUs "subject to the [ISM] Code," i.e. foreign-flagged MODUs. That said, the USCG's recent proposal of an across-the-board SEMS requirement for all vessels engaged in OCS activities - which would presumably include MODUs - would solve this quandary.

In this regard, MODU regulation (and OCS-support vessel oversight) has been a particular focus for the USCG in the wake of Macondo and the admitted breakdowns/gaps that led to inadequate inspection of certain safety systems on the foreign-flagged DEEPWATER HORIZON MODU. The USCG issued a document entitled "'Lessons Learned' following Macondo - Safety Enhancement on the U.S Outer Continental Shelf," (hereinafter, "Lessons Learned"), which sets forth prospective areas of focus for the USCG in this regard, including the overarching "need to develop procedures for the risk-based targeting of foreign flagged MODUs operating on the U.S. OCS."[45] The following (non-exclusive) specific areas are of particular note in the context of BSEE/USCG overlaps on the OCS, and the USCG's current and forthcoming regulatory outlook:

- The USCG is considering promulgating **regulations to govern dynamic positioning (DP)systems**. By way of background, the DEEPWATER HORIZON was a state-of-the-art, fifth-generation semi-submersible drilling rig that was fully

[44] *See* 78 Fed. Reg. 27913 (May 13, 2013).

[45] J.G. Lantz, CAPT P.E. Little, CAPT J.P. Nadeau, and CDR J.D. Reynolds, U.S. Coast Guard, *"Lessons Learned" following Macondo - Safety Enhancement on the U.S.Outer Continental Shelf* (paper prepared for presentation at the Offshore Technology Conference held in Houston, Texas, USA, 30 April–3 May 2012) *available at* .http://www.uscg.mil/hq/cg5/cg521/docs/OTC-23436-PP.pdf.

dynamically positioned (meaning that unlike older comparable MODUs, the rig required no tethers or anchors of any kind to maintain its position). As the Lessons Learned acknowledges, despite the widespread use of partial and full DP systems like those used on the DEEPWATER HORIZON, the USCG "has not established regulatory requirements for these often complex [DP] systems." And while the DP system on the DEEPWATER HORIZON did not directly contribute to the Macondo disaster, prior issues with the system were indicative of the potential for catastrophic failures in certain circumstances.[46] To this end, over the last two years, the USCG has issued two calls for comments "regarding a draft policy letter on [DP]Systems, Emergency Disconnect Systems, Blowout Preventers, and related training and emergency procedures on [MODUs]" in light of the potential for catastrophic environmental damage and loss of life in the event of a DP failure on a MODU on the OCS.[47] Thus, the USCG will presumably be issuing some form of regulatory guidance in the near future regarding requirements for DP systems.

In the meantime, however, **BSEE has quietly and vaguely extended the reach of its regulations to DP systems**. Specifically, as part of a so-called Deepwater Operations Plan (DWOP), an operator must provide *for approval by BSEE* "[i]nformation on any active stationkeeping system(s) involving thrusters or other means of propulsion used with a surface system."[48] This subtle provision - which does not give any indication whatsoever as to what standards BSEE will use to consider whether the DP aspects of a DWOP should be approved - is yet another indication of BSEE and USCG oversight becoming hopelessly entangled. Hopefully, the proposed future rulemaking for DP systems by the USCG will definitively identify which agency has authority over these systems.

- Along these same lines, to solve the problem of regulatory gaps in which the USCG does not currently regulate foreign-flagged MODUs, the Lessons Learned proposes a "One Gulf, One Standard" approach (similar to that used in Norway, the United Kingdom, and other European coastal states) requiring that **any vessels and MODUs operating on the OCS be required to satisfy the same standards.**[49] Further, the USCG has posited that this "One Standard" should be the IMO MODU Code, as supplemented by USCG guidance where necessary (i.e. in areas were the IMO Code's non-mandatory provisions require stringent prescriptive provisions, and/or for systems not addressed by the IMO Code) in reliance on industry generated best practice standards (such as those issued by API and others).[50] Building on this approach, the USCG has issued a Policy Letter

[46] *See* USCG Final DWH Report, *supra* Note 6 at p. 107.

[47] 77 Fed. Reg. 26562 (May 4, 2012).

[48] 30 C.F.R. §250.292.

[49] Lessons Learned, p. 4.

[50] *Id*. at p. 5.

indicating that a foreign-flagged MODU compliant with the 2009 IMO MODU Code will be considered compliant "with U.S. coastal state regulations" vis-à-vis 33 CFR §143.207(c).[51]

- That said, the Lessons Learned also notes that for other floating OCS facilities, such as semi-submersibles, tension leg platforms, SPARs, and floating production storage and offloading (FPSO) facilities, "regulations for [such] units have not been updated since the early 1980s," and thus the USCG "should still require that they be classed by an experienced classification society with rules appropriate to the facility type and also apply relevant industry consensus standards."[52] However, some recent decisions call into question whether and to what extent the USCG may have regulatory authority over these kinds of facilities, and SPAR facilities in particular. Specifically, the Fifth Circuit (in the Jones Act/longshore personal injury context)[53] and the Eastern District of Louisiana (in the Commercial Instruments and Maritime Lien Act)[54] have recently held that SPAR facilities *are not vessels*. While the USCG arguably retains authority to inspect SPAR facilities as OCS facilities *per se*,[55] the status of SPARs as non-vessels arguably precludes the USCG from regulating those structures *qua* vessels under traditional USCG parameters (i.e. under Title 46 (Shipping) as opposed to Title 43 (OCSLA)). Further, given that the BSEE regulations specifically include SPARs within BSEE's oversight jurisdiction,[56] the USCG may ultimately take a back-seat role in regulating such facilities. In fact, the April 3, 2012 MOA, gives BSEE sole responsibility (at least from an oil spill preparedness and response standpoint) for SPARs (with the "response" function shared between BSEE and the USCG).[57]

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[51] USCG CG-ENG Policy Letter No. 02-12, *Subj: ACCEPTANCE OF THE 2009 MODU CODE* (May 7, 2012). *See also* u 77 Fed. Reg. 71607 (Dec. 3, 2012) ("The Coast Guard is providing guidance regarding electrical equipment installed in hazardous areas on foreign-flagged [MODUs] that have never operated, but intend to operate, on the [U.S. OCS]. Chapter 6 of the 2009 version of the [IMO MODU] sets forth standards for testing and certifying electrical equipment installations on MODUs. The Coast Guard is considering issuing a rule that will implement Chapter 6 of the 2009 IMO MODU Code and that will be applicable to foreign-flagged MODUs that have never operated, but intend to operate, on the U.S. OCS. In the interim, the Coast Guard recommends that owners and operators of foreign-flagged MODUs that have never operated, but intend to operate on the U.S. OCS, voluntarily comply with Chapter 6 of the 2009 IMO MODU Code.").

[52] Lessons Learned, pp. 4 & 5.

[53] *Mendez v. Anadarko Petroleum Corp*., 466 F. App'x 316, 318 (5th Cir. 2012) *cert. denied*, 133 S. Ct. 979, 184 L. Ed. 2d 760 (U.S. 2013)

[54] *Warrior Energy Servs. Corp. v. ATP TITAN*, 2013 WL 1739378, 2013 A.M.C. 1960 (E.D. La. Apr. 22, 2013).

[55] 33 C.F.R. §140.101.

[56] 30 C.F.R. §250.105.

[57] *See supra* n. 12.

- Interestingly, the Lessons Learned also addresses the issues of BOPs and emergency disconnect systems (EDS) on MODUs; however, it also notes that USCG "regulations contain no EDS requirements and only require the BOPs on U.S. flag MODUs to meet industry guidelines" issued by API.[58] As such, the Lessons Learned recommends that the USCG "work with BSEE to ensure U.S. requirements are revised and reflect the advancements in technology and increasingly complex deepwater drilling operations." However, it should be noted that BSEE arguably holds **exclusive regulatory authority** over such systems under the provisions of the June 2013 MOA. Thus, any cooperation between the USCG and BSEE in this regard will, as a practical matter, likely be a simple and direct regulation by BSEE.

- Recognizing that MODUs are not the only important vessels engaged in OCS operations, the Lessons Learned notes that "[o]ffshore supply vessels [OSVs], the workhorses of the OCS, have increased dramatically in size and complexity over the past decade."[59] To meet industry needs and advancing technologies for such vessels, Congress passed the Coast Guard Authorization Act of 2010, which removed the size limit on OSVs and directed the USCG to implement an interim rule to govern operating parameters for these new, larger vessels. Further, the USCG recognizes that these larger OSVs are not always merely support vessels; they are often integrally involved tools in OCS operations, including well stimulation and well testing activities. Indeed, as discussed earlier, it is these hybrid operations that arguably subject such vessels to both BSEE and USCG jurisdiction. In any event, the USCG "is preparing an interim rule to address design, manning, carriage of personnel, and related topics for OSVs of over 6,000 [gross tons]," although no such rule has yet been promulgated as of this writing.

- The Lessons Learned also briefly notes that the USCG does not currently have any regulations applicable to accommodation vessels supporting OCS operations. These vessels "are typically far offshore, distant from search and rescue assets, located near high risk industrial activities, and may involve large numbers of accommodated personnel, many of whom may not be adequately trained."[60] As such, the Lessons Learned recommends future rulemaking/regulatory guidance for the proper standards for these vessels. In this regard, the most recent USCG Notice of Proposed Rulemaking, which recommends a SEMS requirement for all OCS vessels (as discussed above in Section III(4)), would include these OCS accommodation vessels.

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[58] *Id*. at p.7.

[59] *Id*. at p.3.

[60] *Id*. at p. 8.

IV. "*Confused by the Crowded Fair*" - BSEE's Claim of Jurisdiction over OCS Contractors[61]

As if the above framework were not confusing enough, BSEE has muddied the waters even further by its unilateral, arguably *ultra vires* assertion of jurisdiction over oilfield service contractors working on the OCS in support of the exploration and production operations of "operators" (as designated under the Outer Continental Shelf Lands Act (OCSLA) and BOEM regulations) and "lessees." This unprecedented extension of BSEE authority has sent a shockwave through the oilfield services industry, and has left significant unanswered questions and potential issues for industry actors on the OCS.

1) "*The Inhabitants of Macondo*" - Historical Jurisdiction Extended only to "Operators" and "Lessees"

Under the historical, pre-Macondo regulatory authority of the MMS, the regulations applicable to the OCS were enforced **solely** against "operators" and "lessees" - not against their service contractors - subject to any after-the-fact indemnity arrangements between the parties.[62]

The plain language of the regulations (both historic and current) bears out this approach. Specifically, the vast majority (if not all) of the regulations at 30 CFR 250 apply only to "operators," "lessees," and/or the entities encompassed within the definition of "you" under 30

[61] For purposes of this discussion, the term "contractors" should be distinguished from OCS "designated operators" and/or "lessees" as those terms are defined at 30 C.F.R. §250.105. That is, the term "contractor" refers to companies providing support services *as contractors to* operators and lessees engaged in OCS exploration and production operations.

[62] *See, e.g.*, Decomworld, *The impact of BSEE regulations on decommissioning contractors*, p. 2 ("BSEE's predecessor, the MMS, historically regulated the exploration and production of oil and gas in the Gulf of Mexico through its direct oversight of the companies that leased the rights from the U.S. Government, and their designated operator. While there was some direct regulatory references to drilling contractors, service companies for the most part were not directly regulated by MMS. This top down regulatory oversight placed the burden on the lessee/operator to ensure that its contractors complied with the regulations.") *available at* http://www.leggefarrow.com/The-impact-of-BSEE-regulations-on-decommissioning-contractors.pdf.

C.F.R. Part 250[63] - which in turn only 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) [i.e. the entity designated as the "operator" of a well]."[64] In other words, based on the plain language of the regulations, it would appear that BSEE only has direct jurisdiction over the actions of "lessees" and/or "designated operators or agents of the lessee(s)."

Further, the MMS **expressly disclaimed** regulatory authority over oilfield service contractors in favor of directly regulating the "lessees" and "operators" for whom they work: "The operator is responsible for the performance of its contractors. **MMS will hold the operator accountable for the contractors' performance**."[65] Indeed, BSEE continues even today to generally hold operators/lessees responsible *even when* a contractor's negligence may give rise to a violation.[66]

2) "*In an Instant They Transformed the Village*" - BSEE's Self-Proclaimed Post-Macondo Assertion of Jurisdiction over Oilfield Service Contractors

This historic *status quo* changed dramatically and quickly after the Macondo disaster with BSEE's issuance on October 11, 2011 of INCs (the civil enforcement mechanism for BSEE regulatory violations, which can result in fines of $40,000 per violation per day depending on "the severity of the violations, [the violator's [history of compliance, and [whether the violator] is a

[63] *See, e.g.,* 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 . . . . ") (all emphasis added).

[64] 30 C.F.R. §250.105.

[65] 63 Fed. Reg. 7335 (Feb. 13, 1998).

[66] *See, e.g.*, *Apache Corp*., 183 IBLA 273 (Apr. 17, 2013) (affirming issuance of BSEE INCs issued to platform operator as a result of fire caused at least in part by negligence of painting contractor performing maintenance painting work).

small business"[67]) to Halliburton and Transocean - both *service contractors* of BP, the "operator" of the Macondo well - for violation of various BSEE regulations that contributed to the blowout.[68] A few months earlier, without citing any statutory or regulatory authority for extending BSEE's jurisdiction to oilfield contractors, then-Director Bromwich had declared on May 2, 2011 that 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."[69]

In response to this overnight extension of BSEE's authority, the oilfield services industry quickly sought an explanation and justification from BSEE for this expanded regulatory oversight, particularly in the total absence of any preliminary rulemaking subject to public comment before unilaterally broadening its jurisdiction. In fact, in an October 12, 2011 press release regarding the Macondo INCs, BSEE itself acknowledged the unprecedented nature of its exercise of authority over oilfield contractors in the wake of Macondo:

> 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.[70]

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[67] 30 C.F.R. §250.1470.

[68] The specifics of the Halliburton and Transocean INCs are set forth at length in the BOEMRE final report regarding the Macondo disaster. *See* BOEMRE Final Macondo Report, *supra* Note 3 at p. 173. These INCs included both specific violations (e.g.30 CFR § 250.420(a)(1) and (2) - failing to cement the well in a manner that would "[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") as well as very broad and general violations (e.g.30 CFR §250.401(a), failure to "take necessary precautions to keep [the well] under control at all times").

[69] *BOEMRE Director Discusses the Future of Offshore Oil and Gas Development in the U.S. at Offshore Technology Conference* (May 2, 2011), http;//www.boemre.gov/ooc/press/2011/press0502.htm

[70] *BSEE Issues Violations Following Investigation into Deepwater Horizon* (Oct. 12, 2011), http://www.bsee.gov/BSEE-Newsroom/Press-Releases/2011/press10122011.aspx

In response, the National Ocean Industries Association (NOIA, a leading industry advocacy organization) submitted a four-page letter to BSEE in March of 2012 specifically challenging the bureau'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 the October 2011 INCs to BP's contractors or (at the very least) the commencement of formal rulemaking procedures to enable the industry's input regarding the jurisdictional expansion.[71] BSEE's two-page response merely cited generally to OCSLA and its implementing regulations, and noted the following:

> "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 agency then cited two examples where the regulations apply to "all operations conducted under OCSLA" or "any person [who] fails to comply with any provision of this subchapter, or any regulation or order issued under this subchapter." Based on its interpretation of the statutes BSEE goes on to state, "The 'any person' language of [43 U.S.C. §1350(b)] makes it clear that persons other than lessees and operators can be subject to the Secretary's rules or orders."[72]

The only other piece of regulatory support BSEE cited in support of its extended jurisdiction was 30 CFR §250.146(c), which provides that "[w]henever the regulations in 30 CFR parts 250 through 282 and 30 CFR parts 550 through 582 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."[73] While this language might seem to support an argument for

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[71] *See* G. Allen Brooks, Musings: Aggressive Regulation and BSEE's Unlimited Powers, Apr. 10, 2012, http://rigzone.com/news/article.asp?a_id=116792.

[72] *Id*.

[73] 30 C.F.R. 250.146(c) (emphasis added).

extension of BSEE jurisdiction to contractors, there is a significant problem with this rationale: the proposed rule in which MMS first promulgated §250.146(c) in 1998 **included the express language quoted above indicating that "[t]he operator is responsible for the performance of its contractors [and that] MMS will hold the operator accountable for the contractors' performance**."

As numerous commentators have noted, BSEE's response regarding expansion of its jurisdiction "rests on overly broad statements contained in [OCSLA]."[74] Indeed, even another federal agency (the Chemical Safety Board, which released its preliminary findings regarding the DWH Incident on July 24, 2012) has suggested that the extension of BSEE's jurisdiction to oilfield contractors is questionable.[75]

Further, in October of 2012, Louisiana Senator David Vitter sent a letter similar in substance to that of the NOIA letter, expressing his belief that BSEE's assertion of jurisdiction over contractors constituted a "major, unprecedented departure from past practices on the [OCS]," and that "[t]he guidelines put forward by BSEE in IDP No. 12-07 are still non-specific to their intent and open ended in their application," and have left "the offshore service industry . . . in a quandary as to what liability for contractors will be in the future and what their vulnerability will be to agency actions."[76] Vitter called for proper rulemaking regarding BSEE's asserted jurisdiction over contractors, and emphasized BSEE's lack of any specific analytical explanation for expansion of its jurisdiction: "You declined to provide the Department's legal analysis as 'an internal process to facilitate decision making,' which denies Congress, which has oversight

[74] G. Allen Brooks, Guest Column: The regulatory cloud over the offshore service industry, May 2, 2012, http://fuelfix.com/blog/2012/05/03/guest-column-the-regulatory-cloud-over-the-offshore-service-industry/.

[75] *See* Powerpoint Presentation, Offshore Safety Performance Indicators: Preliminary Findings on the Macondo Incident, July 24, 2012, at Slide #48, http://www.csb.gov/USerFiles/file/MacKenzie%20(CSB)%20PowerPoint.pdf.

[76] IADC, Drilling Contractor (Nov. 2, 2012), http://www.drillingcontractor.org/wirelines-30-19055.

responsibility of the [OCSLA], of any practical understanding of BSEE's rationale for its action."[77]

In short, BSEE to date has not really explained in any specific terms the basis for the extension of jurisdiction to oilfield service contractors; has yet to engage in any proposed rulemaking in this regard; and merely made passing reference to the "severity of the incident" as the justification for the INCs issued after Macondo.

Nonetheless, BSEE has (for its own part) removed any doubt about its newly minted jurisdiction by issuance of an "Interim Policy Document" (IPD) on August 15, 2012 (IDP No. 12-07):

> Any person performing an activity under a lease issued or maintained under the [OCSLA] has responsibility for compliance with regulations applicable to that activity, is obligated to take corrective action, and is subject to civil penalties for a failure to comply. As a general matter, because all operations on a lease must be performed in a safe and workmanlike manner and work areas maintained in a safe condition (30 CPR §§ 250.107(a) (1) and(a) (2)), contractors performing regulated activities can be held responsible for a wide range of conduct.
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> * * *
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> **BSEE will hold lessees and operators directly and fully responsible for all activity conducted under a lease issued or maintained under OCSLA without limiting its ability to pursue enforcement actions against contractors.** While the primary focus of BSEE's enforcement actions will continue to be on lessees and operators, BSEE will, in appropriate circumstances, issue [INCs]to contractors for serious violations of BSEE regulations. The issuance of an INC to a contractor does not relieve the lessees from liability. In fact, in instances in which INCs are issued to a contractor, INCs will also be issued to the lessee or operator.[78]

BSEE will consider four factors in determining whether a contractor's conduct was so "egregious" as to merit BSEE enforcement action: (1) whether the violation implicated health, safety, or environmental concerns; (2) resulting harm or potential harm from violation with respect to

[77] IADC, Drillbits - November 2012 (Nov. 7, 2012), http://www.iadc.org/2012/11/drillbits-nov-2012/#article5.

[78] BSEE Internal Policy Document, "Issuance of an Incident of Non Compliance (INC) to Contractors" (Aug. 15, 2012),

health, safety, and the environment; (3) foreseeability of such harm; and (4) extent of the contractor's involvement in the violation.[79] Remarkably, this amorphous and subjective "egregiousness" standard actually creates even more confusion than would a simple blanket assertion of contractor jurisdiction. Stated differently, BSEE can ostensibly decide on its own - without any definitive, discrete regulatory basis - when and if it will regulate contractors.

Lest any doubts remain, this is not mere rhetoric: since the initial INCs to Halliburton and Transocean, BSEE has issued several INCs to other drilling contractors[80] (not operators/lessees) for a range of incidents, including "failure to determine whether an electricity source was on or off" and inadequate protective gear for personnel; "improper transfer of chemicals using a crane," resulting in a leak and chemical fire; "[n]ot utilizing fall protection," creating a "congested work area," and failing to use tag-lines properly.[81] Further, certain post-Macondo regulations *expressly state* that they apply to "contractors and subcontractors."[82] Likewise, "BSEE is evaluating the possibility of requiring contractors to have a SEMS program while performing operations on the OCS" (presumably precluding the use of "bridging"/"mapping" agreements), and "may address this concept through future rulemaking."[83]

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[79] *Id*.

[80] Karen Boman, *BSEE Cites GOM Contractors for Violations* (Mar. 19, 2013) *available at* http://www.rigzone.com/news/oil_gas/a/125173/BSEE_Cites_GOM_Contractors_for_Violations. Halliburton and Transocean initially took steps to appeal the INCs issued against them to the Interior Board of Land Appeals (IBLA, the entity to which administrative appeals from BSEE decisions are directed), but Transocean's appeal has been mooted by settlement, and Halliburton's appeal has been stayed by agreement pending completion of the MDL liability trial in the Macondo litigation.

[81] These INCs are available for review on BSEE's website, http://www.bsee.gov.

[82] *See, e.g.*, 30 C.F.R. §250.400. Curiously, the Federal Register publication of the Final Rule enacting this section does not mention any public commentary as to this section, which is surprising given the unprecedented nature of this jurisdictional expansion.

[83] 78 Fed. Reg. 20423, 20426 (Apr. 5, 2013) (emphasis added).

As a final note regarding BSEE's extension of authority to contractors, the United States District Court for the Eastern District of Louisiana has held that a contractual knock-for-knock indemnity agreement **cannot, as a matter of law, extend to civil penalties for regulatory violations -** at least in the context of Clean Water Act penalties.[84] However, the same court also deferred any ruling on the question of "whether any penalties or fines under the [OCSLA, i.e. BSEE regulations] are subject to contractual indemnity."[85] Thus, it appears doubtful that OCS contractors can shift potential regulatory liabilities to operators/lessees via contractual indemnity.

V. ***"Lost in their Own Streets*" and at Sea - Areas of Concern in the New Post-Macondo Regulatory Reality**

In light of the byzantine complexities of BSEE and the USCG's overlapping jurisdiction, as well as the additional complicating factor of BSEE's (arguably improper) extension of its jurisdiction to oilfield service contractors, all parties participating in the offshore industry are well advised to familiarize themselves with these new realities and the potential pitfalls that they present. The following is a list of representative, non-exclusive, issues to consider given the "new regulatory normal" on the OCS:

- As an initial, general matter, given the new regimen of potentially applicable BSEE regulations, violation of which can result in INCs and fines, offshore contractors should review their insurance programs to ensure whether and to what extent they have coverage for potential civil fines and penalties resulting from such violations.

- The prospect of Oil Pollution Act (OPA) concerns is also implicated by BSEE's expansion of its jurisdiction to oilfield service contractors. Specifically, as a leading commentator has recognized, if BSEE issues an INC to an oilfield services contractor on the basis (identified in the four-factor egregiousness standard in IPD

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[84] *See In Re Oil Spill By The Oil Rig "DEEPWATER HORIZON" In The Gulf Of Mexico, On April 20, 2010,* MDL No. 10-2179, Rec. Doc. 5446, p. 23 (E.D. La. Jan. 26, 2012) (Barbier, J.).

[85] *In re Oil Spill by Oil Rig DEEPWATER HORIZON in Gulf of Mexico, on April 20, 2010*, 2012 WL 273726 (E.D. La. Jan. 31, 2012) (regarding indemnity dispute between BP and Halliburton *viz.* potential fines resulting from BSEE INCs).

No. 12-07) of "egregious" conduct, this could impact an operator/lessee's ability to limit liability under the OPA:

> [I]f BSEE determines that a contractor acted egregiously in connection with a pollution incident and issues INC's to both the contractor and operator/lessee, could that potentially impair the ability of the operator/lessee (i.e. a Responsible Party) to invoke the liability limitations under [OPA] 33 U.S.C. §2704.? OPA's liability limits do not apply if a Responsible Party or its contractor violates a "federal safety, construction or operating" regulation that proximately causes a pollution incident. See 33 U.S.C. § 2704(c)(1)(B). The proximate cause requirement was reinforced by Judge Barbier's DEEPWATER HORIZON MDL opinion that held absent evidence of a causal connection, the federal government could not rely on violations of general safety regulations to negate OPA's liability limitations. See *In re: Deepwater Horizon*, 844 F. Supp. 2d 746, 755 (E.D. La. 2012).[86]

- With regard to SEMS, "[a]lthough contractors are not required to have a SEMS for their own operations, their cooperation is necessary for operators to be in compliance; therefore, it is in the contractors' best interest to anticipate operators' needs and proactively cooperate with operators."[87] As noted earlier, the SEMS regulations specifically allow contractors to "bridge" or "map" relevant portions of an operator's SEMS program specific to the contracted work (30 C.F.R. §250.1914). Thus, as a practical matter, most contractors will likely be *contractually* required to comply with SEMS (if not as a direct matter of the regulations) in order for their operators to satisfy their own SEMS requirements. As such, **all oilfield service contractors** should be reviewing their MSAs to determine whether and to what extent SEMS programs may be applicable to them as a matter of contractual agreement. Likewise, notwithstanding the apparent non-direct-applicability of SEMs to contractors, BSEE's otherwise blanket assertion of jurisdiction over oilfield contractors raises the potential for BSEE to enforce SEMS directly against contractors if and when the right circumstances arise. Indeed, as noted above, **BSEE has expressly indicated that it is "evaluating" a direct SEMS requirement for oilfield contractors.** Accordingly, contractors should generally familiarize themselves with SEMS as a whole.

- Similarly, vessel operating oilfield contractors should likewise familiarize themselves with SEMS - both from a regulatory standpoint and from the

[86] *See* Glenn Legge & Andrew Stakelum, *BSEE Announces Issuance of INCs to Four Contractors* (March 2013), http://www.leggefarrow.com/Newsletter%20%20BSEE%20Announces%20INCs%20Issued%20to%20Multiple%20Contractors.pdf.

[87] *See* Liou Article, s*upra* Note 29.

standpoint of MSA review - for all the same reasons as other oilfield contractors. Moreover, given the USCG's recent proposed rulemaking regarding a SEMS requirement for all OCS vessels, familiarity with SEMS will put vessel operators ahead of the curve in terms of commercial opportunities.

- As an additional specific caveat for vessel operating oilfield contractors, BSEE's SEMS regulations, as well as other BSEE safety regulations - if they in fact apply directly to contractors as BSEE steadfastly contends - raise new potential bases for invocation of the *Pennsylvania* Rule in maritime tort litigation. By way of a single example, if a heavy-lift vessel causes bodily injury or property damage as a result of a violation of BSEE regulations (which ostensibly apply if the vessel is engaged in operations on or while moored to an OCS facility), the plaintiff may attempt to invoke the *Pennsylvania* Rule presumption of fault as a result of the violation. Alternatively, if a platform owner is in violation of a relevant BSEE regulation (e.g. the decommissioning provisions) and the violation causes an allision, the violation of the regulation may trigger the *Pennsylvania* Rule against the platform owner. *See, e.g.*, *In re Int'l Marine, L.L.C.*, 2013 WL 3293677 (E.D. La. June 28, 2013) (discussing parties' arguments regarding *Pennsylvania* Rule implications vis-à-vis BSEE regulations in an allision involving a partially submerged OCS platform).

- On a similar note, if BSEE regulations will be applicable to vessels in some circumstances, violations of those regulations might potentially affect a vessel owner's right to seek limit liability under the Limitation of Liability Act (LLA, 46 U.S.C. §30501 *et seq.*). Specifically, if a vessel is in violation of a (potentially) applicable BSEE regulation (e.g., a crane regulation applicable to a heavy-lift vessel *qua* OCS "facility"), such a violation may be deemed to be within the "privity and knowledge" of the vessel so as to preclude limitation/exoneration under the LLA (if the violation is causally related to the incident).

- Likewise, violation of a potentially applicable BSEE regulation may render the vessel unseaworthy, thus voiding hull and/or P&I insurance due to violation of an express and/or implied warranty of seaworthiness. In this regard, hull insurance policies include an absolute "**implied** warranty of seaworthiness at the inception of the policy," such that if a vessel is unseaworthy at the time the policy attaches, coverage will be voided *regardless* of whether the insured has knowledge of the unseaworthy condition.[88] Likewise, some hull policies and P&I club rules and policies include an **express** exclusion voiding coverage for losses caused by unseaworthiness.[89] Accordingly, if a vessel is in violation of a potentially

[88] *See Employers Ins. of Wausau v. Occidental Petroleum Corp*., 978 F .2d 1422, 1431 (5th Cir. 1992).

[89] *See Underwriters at Lloyd's v. LaBarca*, 106 F. Supp. 2d 205, 209 (D.P.R. 2000) aff'd, 260 F.3d 3 (1st Cir. 2001) (discussing hull policy with following express seaworthiness exclusion: "It is Warranted by the Insured Person that the Vessel shall be maintained in a seaworthy condition at all times. In the event of a loss or damage affecting the seaworthiness of the Vessel, the Vessel shall be restored to a seaworthy condition as soon as reasonably possible and the Vessel will not be operated pending completion of such repair without Our express written approval."); Skuld, Statutes & Rules, R. 30.1.7 (2013) *available at* http://www.skuld.com/Documents/Library/Statutes-

applicable BSEE regulation, that violation could potentially void coverage under the owner's marine insurance program.

- Further, while BSEE SEMS regulations do not (at least ostensibly) apply across the board to vessels, operators of vessels engaged in workover, completion and well servicing operations (i.e. wireline, coil tubing, well stimulation, and the like) may in fact be directly subject to BSEE's SEMS regulations. Specifically, the BSEE regulatory definition of a regulated OCS "facility" includes "**vessels engaged in drilling or downhole operations**, used for oil, gas or sulphur drilling, production **or related activities**"[90] (for purposes of BSEE's inspection jurisdiction).[91] Although the SEMS regulations themselves do not specifically refer to vessels, it would appear from the definitions and the language of the November, 2012 USCG-BSEE MOA that the SEMS regulations do apply to these types of vessels. This is borne out by BSEE's response to several comments on the initial proposed SEMS rule, which provided a definition of MODU that included certain types of well support vessels. BSEE removed that MODU definition - based in large part on a litany of comments pointing out that BSEE's MODU definition conflicted with the USCG's - but nonetheless made the following somewhat backhanded comment indicating that SEMS would still apply to those support vessels:

> The BSEE removed the definition of MODU from the final rule. The term MODU had been defined to mean a vessel capable of engaging in drilling, well workover, well completion, decommissioning, temporary and permanent abandonment, or well servicing operations for exploring or exploiting subsea oil, gas, or other mineral resources. **The BSEE removed the definition of MODU because BSEE believes it is already clearly understood among operators that MODUs include vessels that are involved in other operations besides drilling**.[92]

Rules/2013/SR_skuld_2013.pdf (excluding coverage for losses "which result from the member knowingly sending the vessel to sea in an unseaworthy condition"); Hanseatic P&I, Shipowner's Liability Insurance Protection and Indemnity - General Insurance Conditions, §29.1.1 ("The Assured is under an obligation to maintain the insured ship(s) in every respect seaworthy . . . at all times") *available at* http://www.hanseatic-underwriters.com/files/5054/upload/service/rules/Hanseatic%20P&I%20-%20Shipowners%20Liability%20-%20GIC%2015-01-2010_rev2.pdf; *St. Paul Fire & Marine Ins. Co. v. Belle of Hot Springs, Inc*., 844 F.2d 550, 552 (8th Cir. 1988) (discussing P&I policy with the following seaworthiness warranty: "Warranted at the inception of this policy the vessel shall be in a seaworthy condition and thereafter, during the currency of this policy, the Assured shall exercise due diligence to keep the vessel seaworthy, and in all respects fit, tight, and properly manned, equipped and supplied.").

[90] 30 C.F.R. §150.105 (emphasis added).

[91] 30 C.F.R. §150.130.

[92] 78 Fed. Reg. 20423, 20429 (Apr. 5, 2013) (emphasis added).

- Moving beyond the SEMS issue, the BSEE regulations include a myriad of contractor-specific provisions that (at least according to BSEE) can be directly enforced against contractors. The following are examples of some of these regulations, and the potential problems they create:

    - 30 C.F.R. §250.400 *et seq.* - Subpart D, Oil and Gas Drilling Operations - In what is perhaps the most clear (if not legally viable) indication of BSEE's extension of authority to contractors, 30 C.F.R. §250.400 (**states unequivocally** that the provisions of 30 C.F.R. Subpart D (relating to Oil and Gas Drilling Operations on the OCS) **apply to contractors and subcontractors**: "The requirements of this subpart apply to lessees, operating rights owners, operators, and their contractors and subcontractors."[93] This provision could on its face ostensibly extend not only to *service providers* but also to any equipment/material suppliers with whom service providers subcontract.[94]

    - 30 C.F.R. §250.108 & 250.1605 - Cranes - BSEE's regulations cover "cranes installed on fixed platforms" and require compliance with API crane standards, but also require that "all other material-handling equipment [must be used] in a manner that ensures safe operations and prevents pollution."[95] This broad catch-all language regarding "safe operations" must be considered in light of the fact (as discussed earlier) that there is some apparent overlap of BSEE's crane jurisdiction with that of the USCG insofar as cranes on vessels *considered to be BSEE "facilities"* (i.e. via connection to or work downhole on platforms). Further, given that other BSEE regulations expressly cover vessels on the OCS, operators providing crane-equipped vessels may be subject to compliance with the relevant API standards, in addition to current USCG crane regulations.[96] That said, the USCG has recently proposed new rules for vessel cranes that would effectively adopt the BSEE standards (in another instance of "if you can't beat them, join them" regulating), and so this overlap issue may ultimately be solved by applying the BSEE standards (i.e. API RP D2) to all cranes on the OCS.

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[93] 30 C.F.R. §250.400.

[94] *See, e.g.*, 30 C.F.R. §250.509 (providing that "[d]erricks, masts, substructures, and related equipment shall be selected, **designed**, installed, used, and maintained so as to be adequate for the potential loads and conditions of loading that may be encountered during the proposed operations," and thus arguably extending to manufacturer/equipment supplier responsible for design of the equipment); 30 C.F.R. §250.514 (similarly providing that "[w]ell-control fluids, equipment, and operations shall be designed, utilized, maintained, and/or tested as necessary to control the well in foreseeable conditions and circumstances," thus arguably implicating mud suppliers).

[95] 30 C.F.R. §250.108 (referencing incorporation of API standards at 30 C.F.R.§250.198).

[96] *See* 46 C.F.R. §107.309, §§107-258-60.

- 30 C.F.R. §250.109-113 - Welding - These regulations require, *inter alia*, a welding plan that must be pre-submitted and pre-approved by BSEE before any welding begins on an OCS lease. The plan must include standards for welders, details on measures to ensure quality welders, practices and procedures for safe welding, measures to prevent sparking (§250.110), and a welding supervisor familiar with the plan (§250.111). Again, while these regulations are directed to operators/lessees, BSEE's newly announced jurisdiction over service contractors effectively means that BSEE will be able to enforce these regulations *directly* against contractors. As such, any companies providing welding services on the OCS need to familiarize themselves with these regulations and begin implementing plans to satisfy their requirements. Further, as a practical commercial matter, taking steps to comply with these regulations may give welding contractors a competitive advantage when it comes time to bid projects for OCS operators/lessees. **However,** there is a significant caveat to compliance with these regulations. Specifically, most comprehensive general liability (CGL) insurance policies contain a "professional services" exclusion omitting coverage for any damages arising out of professional services (such as preparing maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and supervisory, inspection, architectural or engineering activities). Thus, to the extent a welding contractor's preparation of a BSEE-required welding plan may result in liability if there are any errors/omissions from the plan, a standard CGL form policy might not provide coverage.

- ROV Regulations (§§250.442, 449, 517, 617, 1707, 1740) - In the context of regulating BOP requirements, BSEE has included various mandates for remotely operated underwater vehicle (ROV) use, including mandatory testing of ROV-BOP compatibilities. Likewise, §250.442 requires operators to "[m]aintain an ROV and have a trained ROV crew on each drilling rig on a continuous basis once BOP deployment has been initiated from the rig until recovered to the surface," specifically tasked with examining "all ROV related well-control equipment (both surface and subsea) to **ensure that it is properly maintained and capable of shutting in the well during emergency operations**" (emphasis added). Critically, given that emergency ROV-BOP interventions (although hopefully rare) may fall within the four-factor protocol for BSEE's issuance of INCs to contractors in the event of a blowout and ROV failure, ROV contractors should pay close attention to these requirements. Likewise, any "professional services" exclusions in an ROV company's CGL policies should be reviewed to determine whether a violation of §250.442 would void coverage.

- 30 C.F.R. §250.620 - Wireline Operations - Wireline contractors specifically fall within BSEE's jurisdiction with respect to "minimize[ing] leakage of well fluids" and certain pressure testing requirements.[97]

- 30 C.F.R. §§250.1700 *et seq.* - Decommissioning - Subpart Q of the BSEE regulations sets forth provisions regarding decommissioning of wells, which (in the wake of the "idle iron" regulations requiring removal of old platforms in the Gulf of Mexico) has recently become a robust industry on the OCS. While these regulations state that they apply only to lessees and operators,[98] BSEE's blanket assertion of authority over all contractors means that these provisions likely extend to decommissioning contractors, which include many different kinds of service providers, from vessel operators to welders to safety consultants, among others; indeed, BSEE has *expressly stated* that "[d]commissioning is encompassed within the meaning of *operation*" and thus the SEMS regulations apply to decommissioning operations.[99] Many of the provisions in Subpart Q are administrative (and not operationally prescriptive) in nature, but they should nonetheless be reviewed by decommissioning contractors. Further, there are important prescriptive provisions as well. In particular, 30 C.F.R. § 250.1740 provides requirements for permanent P&A and platform removal operations. Further (as discussed below) Subpart Q requires certification of P&A plans by an independent registered engineer. Further, because decommissioning work requires so many different types of contractors (welders, crane operations, safety consultants), many of the BSEE regulations in other subparts may also apply to decommissioning contractors.

- "Registered Professional Engineer" Certification of Various Equipment/ Procedures -30 C.F.R. §250.418; §250 - Further expounding on the problem of the CGL "professional services" exclusion, there are several BSEE regulations that now **expressly mandate** that a domestic "registered professional engineer" certify various design and specification aspects of OCS operations. For example, §250.420 requires "a certification signed by a registered professional engineer that the casing and cementing design is appropriate for the purpose for which it is intended under expected wellbore conditions."[100] Likewise, §250.615 requires third-party verification, defined in part as verification by a "registered professional engineer" for various BOP capabilities. Additionally, and with particular relevance to offshore decommissioning contractors, §250.1712 requires

[97] 30 C.F.R. §250.620.

[98] 30 C.F.R. §150.1701.

[99] 78 Fed. Reg. 20423, 20428 (Apr. 5, 2013).

[100] 30 C.F.R. §250.420.

"[c]ertification by a [domestic] Registered Professional Engineer of the well abandonment design and procedures," including verification of the regulatory compliance of the plugs and the design parameters of the downhole barriers to flow.[101] These certification obligations will likely be passed on contractually from operators to the contractors who are actually performing the work to be certified. As a result, there is little doubt that any liability arising from faulty/negligent certifications in this regard (which could be enormous if certified systems fail, as evidenced by the alleged liabilities facing Transocean and Halliburton for various alleged inadequacies of the DEEWPATER HORIZON and the cement job on the Macondo well), will likely be subject to a coverage fight with underwriters vis-à-vis the "professional services" exclusion. Additionally, it should be noted that any false certifications under these regulations could potentially result in criminal prosecutions for fraud under 18 U.S.C. Chapter 37.

- **30 C.F.R. Subpart O - Training Requirements** - All offshore contractors should become familiar with the regulations under Subpart O (30 C.F.R. §§250.1500-1510), which set forth numerous provisions requiring regulated entities to "ensure that . . . employees and contract personnel engaged in well control, deepwater well control, or production safety operations understand and can properly perform their duties."[102] The provisions of Subpart O are adopted by reference in other sections of the BSEE regulations (*see, e.g.* 30 C.F.R. §250.805, regarding safety device training), and thus contractors need to be fluent in these requirements.

- Contractors should also be aware that any "non-conventional production or completion technologies"[103] that may be deployed in OCS operations are subject to particular scrutiny by BSEE. In particular, an operator's DWOP must include a discussion of any "new technology that affects hydrocarbon recovery systems,"[104] including *inter alia* any "equipment or procedures that . . . [have] not been used previously or extensively in a BSEE OCS Region; [h]ave not been used previously under the anticipated operating conditions."[105] By way of example, the use of foamed cement for the zonal isolation on the Macondo well would likely qualify as a "new technology" under these regulations (insofar as foamed cement had not been used previously or extensively for that application in the Gulf of Mexico).[106] Given that operators will in large part rely on contractors to specify and properly

[101] 30 C.F.R. §250.1712.

[102] 30 C.F.R. §250.1501.

[103] 30 C.F.R. §250.287.

[104] 30 C.F.R. §250.292.

[105] 30 C.F.R. §250.200.

[106] *See, e.g.*, Nat'l Comm'n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Chief Counsel's Report, 2011, p. 113 (copy on file with authors).

identify these kinds of "non-conventional technologies," contractors need to be aware that BSEE will be requiring this type of information for OCS projects.

- As a final, overarching general note, offshore contractors should be aware that the procedural mechanisms of USCG and BSEE investigations differ dramatically in one particular regard: while the USCG allows investigated parties to retain counsel, participate in certain investigative discovery, and cross-examine witnesses called by the USCG in a casualty investigation, *BSEE regulations and procedures do not expressly provide the same access to counsel*.[107] That said there are no BSEE regulations *precluding* investigated parties from retaining counsel and requesting information from BSEE personnel during an investigation, and contractors can and should engage early and often with BSEE during any investigations. Finally, it is critical to note that unlike the majority of USCG investigation reports, which are inadmissible as evidence in any judicial proceedings by statute,[108] there is no similar statutory prohibition against any reports, INCs, or other regulatory documents generated by a BSEE investigation.

VI. CONCLUSION

BP's Macondo well and García Márquez's village of Macondo suffered an eerily similar fate; the well was destroyed in a fiery explosion, and the village was consumed in a *"fearful whirlwind of dust and rubble being spun about by the wrath of the biblical hurricane*." Unlike the village in the novel, however, the "village" of lessees, operators, and contractors populating the OCS has survived - and indeed is thriving - in the wake of the Macondo disaster. That said, the confusing and continuously changing spheres of BSEE and USCG regulation on the OCS leave all industry actors in a quandary as to whether and how they will be regulated. The issues and areas of overlap identified in this paper will hopefully provide at least a partial, preliminary road map for industry participants to get their bearings and seek out further information, guidance, and solutions to the problems so as to avoid becoming (or remaining) "*lost in their own streets, [and] confused by the crowded fair*."

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[107] *See* Glenn Legge & Andrew Stakelum, *BSEE Embarks on an Active Spring: Unannounced Well Containment Exercise Finalizes Safety Culture Policy Statement Signs New Joint Agency Agreement With Coast Guard* (May 2013) *available at* http://www.leggefarrow.com/Newsletter%20-%20BSEE%20Safety%20Culture%20MOA.pdf.

[108] *See* 46 U.S.C. § 6308.