

NOIA Presentation

Paul B. Smyth, Of Counsel
Robert P. Thibault, Partner

Administrative Agency and Regulatory Developments

- A perfect storm of regulatory changes, for the whole industry, but especially service companies:
 - BSEE formed primarily as an enforcement agency
 - Growing use of NTL's without public notice or comment
 - BSEE's self-announced extension of jurisdiction over service companies

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

-- Secretary of Interior Salazar

September 30, 2010

Division of MMS into Three Agencies

- May 2010: BOEMRE
- Oct. 2011: Final Rule splits BOEMRE into:
 - Bureau of Ocean Energy Management – "BOEM"
 - Bureau of Safety and Environmental Enforcement – "BSEE"

Division of MMS into Three Agencies (cont.)

- BSEE's mission: *Enforcement*
 - Generally, to enforce safety and environmental regulations.
 - All field operations: permitting and research, inspections, offshore regulatory programs, oil spill responses, training and environmental compliance.
 - *co-responsibility* for *both* BSEE and BOEM for several subparts and individual regulations and subsections

NTL's and Other Means Without Public Notice and Comment

- APA has limited exceptions
- NTL'S are to be restricted to non-substantive effect
- *Yet*, most NTL's – especially Post-Macondo – are intended to achieve substantive effect
- Purely as a matter of administrative law, subject to subsequent challenge

NTL's and Other Means Without Public Notice and Comment (cont.)

- NTL'S have substantive and procedural problems: unstructured lengthy narrative
- Susceptible to *post hoc* variances, inconsistencies and revisionist interpretations in actual application by the agency

Extension of BOEMRE's Regulatory Powers to Service Companies

- May 2, 2011 – In a speech to the Offshore Technology Conference and the accompanying press release, Director Bromwich announced BOEMRE would extend its regulatory authority directly over service companies
- No citation of statutory authority

BSEE Takes Action

- October 10, 2011 – BSEE issued INCs – "Incidents of Non-Compliance" – to Halliburton and Transocean arising from the Macondo incident

BSEE expressly recognized it was the first time Interior issued INCs directly to a contractor that was not the well's operator

The Obvious Shortcomings

- No statutory authority
- No standards or definition of who is covered
- Standards for performance – regulations and NTL's – drafted for Lessees and are incomplete, inapplicable or ambiguous as to Service Companies
- Open to *post hoc* and revisionary interpretation
- No standards for connection or privity with BSEE
- No standards for exercise of jurisdiction and thus no limits

The Impacts of BSEE Extension

Until rescinded or overturned by courts, all service companies in the OCS must:

- Consider impact on all aspects of operations and corporate governance
- Review or implement regulatory compliance programs

The Impacts of BSEE Extension (cont.)

- Publicly held companies should consider adequacy of filings with the SEC
- Review their insurance agreements
 - Check for lack of coverage
 - Check if coverage could be now denied
- Review their service contracts
 - Prices
 - Risk sharing and indemnification

What can be done: **Possible Push-Back Action**

- A direct challenge to the extension of BSEE's jurisdiction.
- Begin with a written demand to BSEE's Director to revoke any and all manifestations of the extension

Push-Back Action (cont.)

- Provide BSEE the opportunity to do the correct thing.
- If BSEE refuses, the refusal should constitute a final agency action subject to appeal to a federal district court.

Push-Back Action (cont.)

- Benefits:
 - Present to both Congress and, if necessary, the courts the single, focused question of unlawfulness of extension
 - Simple and clean challenge
 - Free from entangling with alleged wrongdoing in the context of an appeal of an INC

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