



Little-Noticed Provision in BSEE's Well Control Rule May Have a Major Impact on Risk Reduction

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In recent years, the U.S. Department of the Interior, acting through the Bureau of Safety and Environmental Enforcement (BSEE), has undertaken significant reforms in the oversight of offshore oil and gas operations. A cornerstone of those reforms is the final "Blowout Preventer Systems and Well Control Rule" (Well Control Rule), which BSEE published in the Federal Register on April 29, 2016. While much has been made of the potential impacts of the Well Control Rule's drilling margin requirements (among other provisions), another provision of the Rule—section 250.107(a)(3)—has not received much attention, but may create challenges for industry by mandating that companies conducting offshore operations affirmatively address and mitigate risks.

Section 250.107(a)(3) states that "[y]ou must protect health, safety, property and the environment by utilizing recognized engineering practices that reduce risks to the lowest level practicable when conducting design, fabrication, installation, operation, inspection, repair, and maintenance activities." 30 CFR 250.107(a)(3). Notably, section 250.107(a)(3) applies to all offshore operations and is much broader in scope than most of the other provisions contained in the Well Control Rule.

While many companies have long worked diligently to assess and mitigate risks associated with offshore oil and gas operations, until now there has been no affirmatively-stated legal obligation to do so. Accordingly, section 250.107(a)(3) may create new legal risks that companies should manage and plan for prior to engaging in offshore operations. This alert provides a brief overview of the impetus for section 250.107(a)(3) and frames how the provision fits within the federal government's efforts to hold offshore operators accountable for incidents that occur on the outer Continental Shelf (OCS). This alert also discusses how BSEE's new section 250.107(a)(3) might impact offshore operations and offers some observations on how industry might address those risks.

The concept of lowest practicable risk is not a new one - it is central to the United Kingdom's "safety case" approach to oversight of offshore oil and gas operations. The formulation of this performance-based standard in the UK is slightly different - as low as reasonably practicable (ALARP).

The preamble to the Well Control Rule does not offer much to explain the impetus behind the addition of section 250.107(a)(3); but it is consistent with BSEE's move to what it calls a "hybrid" regulatory approach, which has been described as a combination of performance-based and prescriptive regulatory standards.

This shift in oversight policy was recommended in a Report to the President, issued in 2011 by the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (Presidential Commission), which stated:

Government agencies that regulate offshore activity should reorient their regulatory approaches to integrate more sophisticated risk assessment and risk management practices into their oversight of energy developers operating offshore. They should shift their focus from prescriptive regulations covering only the operator to a foundation of augmented prescriptive regulations, including those relating to well design and integrity, supplemented by a proactive, risk-based performance approach that is specific to individual facilities, operations, and environments. This would be similar to the "safety case" approach that is used in the North Sea, which requires the operator and drilling rig owners to assess the risks associated with a specific operation, develop a coordinated plan to manage those risks,

integrate all involved contractors in a safety management system, and take responsibility for developing and managing the risk management process.

BSEE Director Brian Salerno, in a November 2015 article in *FuelFix*, described how BSEE's oversight approach was shifting as recommended by the Presidential Commission by stating that "the Well Control Rule is a critical part of BSEE's overall efforts to improve and modernize existing outdated regulations. . . . We must continue to be vigilant to ensure that offshore operators are appropriately assessing, mitigating, and eliminating risks."

Other federal agencies have similarly flagged risk reduction as a central goal of effective oversight. In an April 2016 report, the Chemical Safety Board (CSB) issued a number of recommendations focused on enhancing federal offshore oversight to achieve "a more robust risk management regulatory framework that embodies key regulatory attributes found in other global offshore regions, including but not limited to systematic analysis and documentation by the responsible companies that risks have been reduced to ALARP and barriers are effective to manage major accident hazards." Though the CSB report did not appear to fully consider section 250.107(a)(3), the CSB's recommendations indicate that there is support across federal agencies for requiring companies to proactively mitigate risks.

Another initiative that shows the federal government's focus on offshore operational risks is the Department of Justice (DOJ)-led initiative on worker endangerment. In a series of speeches and memoranda, the DOJ signaled that it would pursue companies that ignored risks and endangered the lives of workers (including offshore workers). One of the first prosecutions announced after the launch of this initiative was a criminal action against multiple parties following a November 2012 explosion on a Black Elk-operated facility that resulted in three fatalities.

Suggestions for Complying with BSEE's New Mandate

1. Promptly Address Significant Safety and Environmental Risks

Section 250.107(a)(3) may create additional legal risks for offshore companies and executives that fail to take action to address and mitigate significant safety and environmental risks. Once such risks are identified and documented, a company will be on notice that unsafe and possibly illegal conditions may exist. A failure to address significant, documented operational risk stands in direct contrast to the affirmatively-stated obligation to reduce risks to the lowest level practicable. If significant operational risks are ignored and a serious incident occurs, the company and any company officials who did not act to address those risks may be exposed to civil and perhaps even criminal liability.

Given this potential legal exposure, companies should empower their workers to begin efforts to address significant operational risks promptly after such risks have been identified.

2. Evaluate the Effectiveness of Your SEMS Program

The new emphasis on driving down operational risks may increase the legal risks resulting from an ineffective Safety and Environmental Systems Management (SEMS) plan. Previously, during the first few years following the enactment of the SEMS Rule, legal exposure was largely limited to situations in which a company was completely ignoring its obligations to maintain a SEMS program.

In a recent article, BSEE's SEMS Section Chief writes that the link between SEMS and risk reduction is best explained by noting that "[SEMS] [e]ffectiveness will also grow when workers are provided a say in how to best mitigate the recognized hazards in the context of their operations, an ability to measure the success of risk management via performance indicators, and a willingness to continually learn from past experiences so that risks may be eliminated or mitigated during future evolutions."

Now that companies have a legal obligation to both maintain an effective SEMS plan and to reduce risk to the lowest level practicable, a SEMS plan that ignores or does not effectively assess and mitigate operational risks may have more severe legal consequences. And if a serious incident was to occur, BSEE and potentially other federal enforcement agencies may investigate whether the Company effectively

reduced risk through implementation of a SEMS plan and whether an ineffective SEMS plan was a contributing cause of the incident.

Given this possibility, companies are advised to evaluate the overall effectiveness of their SEMS plans in assessing and reducing risks. If possible, company procedures should allow workers to have direct input on how to promptly mitigate recognized risks and hazards.

3. Carefully Analyze the Safety and Compliance Record of Contractors

Companies should be vigilant in evaluating the safety and compliance record of their contractors and should take action to address risks created by unsafe or non-compliant activities. BSEE and other government agencies are likely to look at selection, management, and oversight of contractors as part of their overall evaluation of whether a company has reduced risk to the lowest level practicable.

4. Ensure Risk Mitigation Efforts Are Documented

Last but not least, if the company acts to mitigate operational risks, it should clearly document all such efforts to develop a record of risk reduction practices. Ideally, documents associated with the company's SEMS program would reflect how the risks were identified, the steps taken to eliminate or mitigate the risks, and any precautions taken to help ensure that similar types of operational risks do not reoccur in the future.

There may be additional steps companies can take to achieve the type of risk reduction called for in Section 250.107(a), depending on the nature and extent of the operational risks identified. A spot-check of the company's SEMS program and how risks are assessed and mitigated might also help to identify potential legal exposure.

For more information

Van Ness Feldman LLP is available to assist clients in understanding the impacts of section 250.107(a)(3) of the Well Control Rule in navigating implementation of other provisions of that rule. If you have any questions on the Final Rule or any of BSEE's regulatory activities, please contact [Michael Farber](#), [R. Scott Nuzum](#), or [Jonathan Simon](#) at 202-298-1800.

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