

Management and oversight of offshore oil and gas—the need for change

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In April 2010, the *Deepwater Horizon* drill rig exploded and sank in the Gulf of Mexico. The explosion killed eleven people and injured seventeen others. President Obama called the resulting oil spill—likely the largest accidental release of oil and natural gas in history—“the worst environmental disaster America has ever faced.” The *Deepwater Horizon* spill substantially affected the communities, wildlife, and local and state economies of the Gulf of Mexico. It has also brought national attention to the serious deficiencies associated with planning for, and oversight of, offshore oil and gas activities.

Predictably, the *Deepwater Horizon* disaster has already triggered a suite of reactions from Washington, D.C. The Department of the Interior (DOI) has restructured and renamed the agency that regulates oil and gas planning, leasing, and operations on the outer Continental Shelf (OCS), and implemented a temporary moratorium on certain offshore drilling operations. President Obama created a National Commission to help determine the cause of the disaster and develop options to guard against future offshore oil spills. Concurrently, Congress is considering potential legislative responses. Ultimately, the *Deepwater Horizon* spill has sparked a national reconsideration of the way we approach offshore operations in the Gulf of Mexico and other regions, most notably the Arctic Ocean, which is the only other OCS area in which offshore oil and gas activities are imminent in the United States.

As a foundation to understanding the proposed changes, this article reviews the current management framework for offshore oil and gas activities, the requirements for spill response plans, the way in which those affected by oil spills are compensated, and some of the flaws inherent in those frameworks.

Planning and oversight

The Outer Continental Shelf Lands Act (OCSLA) (43 U.S.C. § 1331, *et. seq.*) governs federal offshore oil and gas activities in the United States. In its statement of congressional policy, OCSLA calls for “expeditious and orderly development, subject to environmental safeguards.” It has been left to DOI to effectuate those competing objectives. DOI implements OCSLA through its Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEM)—formerly Minerals Management Service. Under the act, oil and gas planning and activities occur in four main stages.

First, the Secretary of the Interior develops a nationwide leasing program, which sets forth a five-year schedule of proposed lease sales. During this stage, OCSLA instructs the Secretary to indicate, “as precisely as possible, the size, timing, and location of leasing activity which . . . will best meet national energy needs.”

Second, DOI must evaluate and conduct individual lease sales. The agency offers lease tracts in sales that often cover tens of millions of acres and generally sells these tracts through a competitive bidding process. Successful bidders obtain a conditional right “to explore, develop, and produce the oil and gas contained within the lease area.”

Third, DOI evaluates exploration plans submitted by lessees. Once an exploration plan is submitted and deemed complete, DOI has thirty days to approve, request modification of, or deny the plan. If DOI grants all the necessary approvals, oil companies may drill exploratory wells on lease tracts purchased during the second phase. In addition to exploration drilling, companies may apply to conduct seismic and other activities. Such activities are subject to approvals separate from the exploration plan process.

Fourth, DOI reviews and approves or denies proposals for development and production. OCSLA establishes requirements governing the scope and content of development and production plans, and operators must carry out their activities in conformance with approved development and production plans.

The OCSLA framework suffers from a number of shortcomings. It allows the government to make decisions about oil and gas development on the OCS without a comprehensive national energy plan and perpetuates an ineffective, sector-by-sector approach to ocean management. The act also contains few effective, enforceable standards that require baseline scientific information or ensure protection of the marine environment, species, or habitats.

In addition, the staged nature of OCSLA has allowed DOI to avoid conducting thorough environmental analyses under the National Environmental Policy Act (NEPA). For example, DOI does not prepare environmental impact statements (EISs) at the exploration plan stage. Instead, it relies on programmatic EISs from prior stages, many of which purport to analyze potential impacts over huge swaths of the ocean (tens of millions of acres). At that scale, meaningful site-specific analysis is impossible.

OCSLA also fails to ensure that DOI managers access and use external expertise when deciding whether, when, where, and how to drill in the OCS. Other government agencies—including the National Oceanic and Atmospheric Administration, the Environmental Protection Agency, the Coast Guard, and DOI’s own Fish & Wildlife Service—have responsibilities and knowledge that are not adequately incorporated into the decision-making process. Similarly, OCSLA lacks an effective mechanism to ensure significant community involvement in the decision-making process.

Spill response

When companies get to the third and fourth OCSLA stages—exploration and development—they must prepare spill response plans to address potential discharges. That obligation comes from the Oil Pollution Act of 1990 (OPA 90), which was passed in the wake of the *Exxon Valdez* spill and which mandates regulations requiring operators of offshore facilities to have “a plan for responding, to the maximum extent practicable, to a worst case discharge.” (33 U.S.C. § 1321(j)(5)(A)(i)). Although OCSLA contains a statement of congressional policy that offshore operations be conducted “in a safe manner by well-trained personnel using technology, precautions, and techniques” to prevent spills and other accidents, it contains no substantive requirement

for spill prevention or preparation.

The Clean Water Act requires that spill plans “identify, and ensure . . . the availability of, private personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge (including a discharge resulting from fire or explosion), and to mitigate or prevent a substantial threat of such a discharge.” 33 U.S.C. § 1321(j)(5)(D) (iii). It directs the president to “approve any plan that meets” those requirements but does not establish specific requirements or measures that must be met for approval. By executive order and subsequent memorandum of agreement, the responsibility for implementing this provision with respect to offshore oil and gas drilling has been delegated to DOI.

Nothing in the Clean Water Act, OCSLA, or DOI’s implementing regulations requires an operator to demonstrate that its spill response plan will be effective. There is no obligation for the government to verify that the technologies proposed for use have been shown to work or that coordinated efforts will be successful. Nor is there a requirement that the government verify the assumptions on which the operator bases its description of the worst-case discharge. Absent substantive requirements, including demonstrated response capability, neither federal agency officials nor the general public can appropriately measure the risk to our oceans, let alone determine how to mitigate it.

Damage assessment and restoration

OPA 90 makes clear that the responsible party is liable for both removal costs and damages resulting from a spill. A responsible party may fulfill its obligation to “remove” oil by taking action to “contain[] and remove[]” that oil, or by “the taking of other actions as may be necessary to minimize or mitigate damage.” There is no limit on the amount a responsible party pays for these removal costs.

A responsible party is liable for damages, including damages to natural resources, real or personal property, subsistence use, revenues, profits and earning capacity, and public services. Subject to certain exceptions, liability for damages is capped at \$75,000,000 for spills originating from offshore facilities. Assuming those exceptions do not apply, BP’s liability for the *Deepwater Horizon* spill under OPA 90 could be capped at “the total of all removal costs plus \$75,000,000.”

OPA 90 sets out a specific process for assessing damages to natural resources. Natural resource damages (NRDs) include: “(A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources; (B) the diminution in value of those natural resources pending restoration; plus (C) the reasonable cost of assessing

those damages.” These damages can be collected by the federal government, state governments, and Indian tribes. OPA 90 requires the designation of trustees, who must develop and implement a restoration plan for the natural resources for which they are responsible. This process occurs in three phases: a preliminary assessment phase, which determines whether there is jurisdiction under OPA 90 and whether to proceed to restoration planning; restoration planning, which is divided into “injury assessment” and “restoration selection”; and restoration implementation, in which the restoration options are carried out. In the Gulf of Mexico, trustees are designing and implementing studies to assess the scope of the natural resource damages so that they can evaluate restoration options.

The NRD assessment process in the Gulf of Mexico has brought to light significant problems. While OPA 90 requires public participation in the development on restoration plans, it does not provide for public involvement, transparency, or accountability in the injury assessment phase. Instead, the government and the responsible party negotiate behind closed doors. In this situation, the responsible party has a disincentive to conduct thorough studies—the less harm that is found, the less money it will have to pay. Similarly, the government has an interest in agreeing with the responsible party about the scope of the studies because doing so prevents the government from having to pay for the studies initially and then fight about payment—potentially in court—with the responsible party. Further, independent of the assessment mechanism, NRDs to fishermen, communities, tourism operators, the federal government, and others far exceed the \$75 million liability cap, and it is not clear how courts will interpret the cap or whether BP will seek to use it to avoid paying claims under state and common law.

The *Deepwater Horizon* tragedy is a stark reminder of the risks inherent in OCS drilling and the need to transition toward sustainable sources of energy. We must reform the administration of offshore oil and gas activities and plan for our oceans and future, rather than prioritizing development at the expense of sustainability.

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