



NAVIGATING A NEW COURSE

WHY THE DEEPWATER HORIZON ECOLOGIC DISASTER SHOULD SPUR CLEAN ENERGY PROGRESS

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On April 20, 2010, the BP Deepwater Horizon oil rig exploded 40 miles off the coast of Louisiana. The explosion killed 11 crewmembers and injured 16 more. By the time the rig was capped nearly three months later, 4.9 million barrels of crude oil (nearly nine times the size of the Exxon Valdez spill in 1989) had escaped into the Gulf of Mexico and surrounding waters. The result was 580 miles of oiled shoreline, and extensive damage to marine and wildlife habitats, and the Gulf's fishing and tourism industries. The spill marked the worst environmental disaster in U.S. history and the largest spill the world has ever seen.

INITIAL REGULATORY RESPONSE

In the days and months following the explosion, there was a flurry of political, legislative, environmental, and industry activity. On May 21, 2010, the White House created the bipartisan National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (National Commission) to determine the root cause of the spill and to offer options on safety and environmental precautions. A week later, the U.S. Department of the Interior (DOI) issued a moratorium on all deepwater offshore drilling on the outer continental shelf (OCS), which was later rescinded, reinstated, and rescinded again. Dozens of committee hearings were held in Congress and the Senate, and the White House unsuccessfully pushed a legislative package to increase funding for regulatory oversight, raise liability limits on the parties responsible for environmental disasters, and in-

crease the tax on the oil industry to pay into the federal oil liability trust fund.

One of the most significant changes, however, was the abolition of the Minerals Management Service (MMS). The DOI created the MMS in 1982 to regulate offshore drilling and production in U.S. waters. The MMS had been under fire for perceived conflicts of interest and other improprieties prior to the Gulf spill and the attacks intensified in the wake of the spill. The result was the replacement of the MMS with the transitory Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), which, by October 2011, was replaced by three distinct administrative bodies: Bureau of Ocean Energy Management (responsible for administering the development of mineral resources on the OCS), Bureau of Safety and Environmental Enforcement (responsible for promulgation and enforcement of regulations), and Office of Natural Resources Revenue (revenue collection).

Prior to its dissolution, BOEMRE developed and implemented safety rules designed to prevent another offshore catastrophe. The first rule, the Drilling Safety Rule, created stringent new standards for well design, casing, and cementing, and well control procedures and equipment, including blowout preventers. The rule also required operators, for the first time, to obtain certification of their proposed drilling process by a qualified engineer. A second rule, known as the Workplace Safety Rule, requires operators to develop a comprehensive safety and environmental management program that identifies the potential haz-

ards and risk-reduction strategies for all phases of activity. At its core, the rule seeks to reduce the human and organizational errors that lie at the heart of many accidents and oil spills.

FAILURE TO ACHIEVE A LONG-TERM POLICY "FIX"

Beyond such stopgap measures, long-term policy solutions have been lacking. To be certain, the moratorium on offshore drilling has ended, and development is poised for a comeback. While it is unlikely any political conventions will swell with the chorus "drill baby drill" this election cycle, the vast sums of offshore oil wealth cannot be denied. Offshore wells provide 15 percent of America's domestic natural gas production and 27 percent of America's domestic oil production. In fact, the OCS contains an estimated 85 billion barrels of oil in technically recoverable resources – more than all onshore resources and those in the shallower state waters combined.

For this reason, offshore drilling is now back on line. On February 28, 2011, BOEMRE announced that it approved the first deepwater drilling permit since the Deepwater Horizon explosion, noting that it approved the permit because "the operator successfully demonstrated that it [could] drill its deepwater well safely and that it [was] capable of containing a subsea blowout if it were to occur."¹ Since that time, the agency has continued to approve deepwater drilling applications.

However, even with permits now being issued, the larger policy issues remain unre-



solved. Not surprisingly, in this political climate, legislative progress has been lacking. Despite a flurry of proposals, Congress has not been able to agree on any one legislative “fix.” Initially, in 2010, two proposed bills that promised to bring major change to oil spill liability and safety failed: the House passed the Consolidated Land, Energy and Aquatic Resources Act (CLEAR), which would add restrictions on offshore drilling and increase response safety and liability provisions in current law. However, following a grueling health care vote, the Senate failed to ever address the bill. The Senate also drafted a similar bill, the Clean Energy Jobs and Oil Company Accountability Act of 2010, which similarly died in the halls of Congress. More recently, the House voted to revoke President Obama’s five-year plan for offshore drilling, replacing it with its own plan that calls for more ambitious oil and gas development off the U.S. coast. The House’s plan will likely go nowhere in the Senate and would be vetoed by the current administration.

Opponents of offshore drilling have also tried their hand in court. In the Southern District of Alabama, the

Defenders of Wildlife (DOW) filed suit challenging BOEMRE’s approval of a Shell deepwater exploration permit off the coast of Alabama. The claims included violation of National Environmental Policy Act for failing to perform an Environmental Impact Statement before approving the permit and violation of the Endangered Species Act for not suspending the bid approval process before consulting with the expert agencies and performing a supplemental analysis of the environmental effects of the drilling operations. However, in a May 8, 2012 decision, the court granted summary judgment in favor of BOEMRE and dismissed DOW’s claims.

A NEW HORIZON FOR CLEAN OFFSHORE ENERGY?

In the midst of the national debate on offshore drilling, many have questioned why we do not use the Deepwater Horizon catastrophe as an opportunity to shift our energy course altogether. In fact, on October 6, 2010 – only 6 months after the Deepwater Horizon oil rig exploded – Secretary of the Interior Ken Salazar and the Cape Wind Associates, LLC president James Gordon signed the nation’s first lease for commercial wind energy development on the OCS. The Cape Wind project comprises 46 square miles on the Nantucket Sound in Massachusetts, and consists of 130 3.6 megawatt (MW) wind turbine generators.² On average, the turbines are expected to generate 170 MW of electricity, about 75% of the average electricity demand for Cape Cod, Martha’s Vineyard, and Nantucket island combined.

As attorney Todd Griset noted in his well-reasoned article, *Harnessing the Ocean’s Power: Opportunities in Renewable Ocean Resources*, the “Earth’s oceans contain vast stores of energy, much of which can be harnessed to create usable power in the form of electricity.”³ Consider, for example, that the National Renewable Energy Laboratory has estimated that the gross wind resource of United States waters approaches 4,150 gigawatts of power – approximately four times the nation’s total electric installed capacity in 2010. Similarly, the United States has a wave or tidal power capacity that would meet

more than half of the country’s electric power demand.⁴ Why not, then, maximize the potential for clean, renewable energy?

One impediment, as Mr. Griset notes, is the fragmentation of our laws and regulations. For instance, renewable energy ocean projects are subject to the regulations of a whole host of federal agencies, including the Environmental Protection Agency, Fish and Wildlife Service, National Park Service, NOAA’s National Marine Fisheries Service, Federal Aviation Administration, Department of Defense, and United States Coast Guard. In addition to this complex web of federal regulation, states also have broad discretion to regulate projects. Thus, in order for clean energy development to take hold, there must be a streamlining and simplification of the “patchwork of regulatory regimes” governing renewable ocean energy projects.⁵

Another obstacle is political will. It is for this reason that commentators have lamented that the Deepwater Horizon tragedy was a missed opportunity to galvanize support for a clean energy future.⁶ In fact, the administration’s offshore drilling plan warns that if no additional offshore lease sales are offered between 2012 and 2017, then to compensate, government may need to “favor alternative vehicle fuels such as ethanol or methanol, vehicles with greater fuel efficiency, or alternative transportation methods such as mass transit,” “might mandate increased reliance on... wind-generated electric power,” and “might give more emphasis to programs encouraging more efficient electricity transmission and more efficient use of gas and electricity in factories, offices and homes.” As some might add, this is “just the point.” These are precisely the policy actions that are needed.⁷



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¹ Andrew Hartsig, *Shortcomings And Solutions: Reforming The Outer Continental Shelf Oil And Gas Framework In The Wake Of The Deepwater Horizon Disaster*, 16 OCEAN & COASTAL L.J. 269, 294-95 (2011).

² Todd J. Griset, *Harnessing the Ocean’s Power: Opportunities in Renewable Ocean Energy Resources*, 16 OCEAN AND COASTAL L.J. 395, 429-30 (2011).

³ *Id.* at 396.

⁴ *Id.* at 399, 403.

⁵ *Id.* at 414-15, 432.

⁶ Richard G. Steiner, *Deepwater Horizon’s Missed Lessons*, CLEV. PLAIN. D., Jan. 16, 2012, available at http://www.cleveland.com/opinion/index.ssf/2012/01/deepwater_horizons_missed_less.html.

⁷ *Id.*