

House and Senate Leadership Unveil Oil Spill Bills

By Jonathan Simon and Jennifer Owen

With more than 40 hearings and multiple Committee mark-ups completed since the April 20, 2010 explosion of the *Deepwater Horizon* mobile offshore drilling unit in the Gulf of Mexico, Congressional leaders this week detailed their plans for reforming the regulation of oil and gas production on the Outer Continental Shelf (OCS). The House looks to complete action on its legislation Friday or Saturday before adjourning for a six-week recess, while the Senate may begin debate this week and potentially dual-track the legislation next week with floor debate on the nomination of Elena Kagan to the Supreme Court. The Senate is expected to recess on August 6, and Senate Majority Leader Harry Reid has expressed his intention to have a final vote on the oil spill provisions, which are now paired up with a handful of other energy-related provisions, prior to the recess.

Both the House and Senate majority legislative proposals provide for the restructuring and reform of the Department of Interior's Minerals Management Service (MMS), consistent with the Secretary's May 19 Order splitting the MMS into three new offices. Both bills also would make sweeping changes to the Outer Continental Shelf Lands Act (OCSLA), create new safety and environmental requirements for OCS oil and gas exploration, development, and production, and invest in spill prevention and response research. The House bill would go even further, addressing revenue provisions, alternative energy permitting on the OCS, and federal spill response requirements, among other issues. Major provisions of each bill are summarized below.

H.R.3534, CONSOLIDATED LAND, ENERGY, AND AQUATIC RESOURCES ACT OF 2010

The House package combines provisions reported from the Natural Resources, Energy & Commerce, and Transportation & Infrastructure Committees. The base vehicle is H.R. 3534, Chairman Nick Rahall's Consolidated Land, Energy, and Aquatic Resources Act of 2010 (CLEAR Act). The House Committee on Natural Resources reported a version of the CLEAR Act on July 15 that included reforms to the onshore and offshore leasing program and royalty structure, as well as significant changes relating to onshore and offshore alternative energy development. However, in an effort to focus attention on the *Deepwater Horizon* incident, the legislation that will be considered by the full House will include largely reforms to the offshore program, removing most of the language related to onshore oil and gas activities, as well as alternative energy production.

Additionally, the combined bill includes new regulatory standards for blowout preventers and well design, taken from the Blowout Prevention Act of 2010 reported by the Committee on Energy & Commerce, and new spill response reforms from the Committee on Transportation & Infrastructure's Oil Spill Accountability and Environmental Protection Act of 2010. The bill also would impose a new conservation fee of \$2 per barrel of oil, or 20 cents per mmBtu of natural gas, from all new and existing onshore and offshore leases. The Congressional Budget Office estimates that this new fee will raise approximately \$22 billion between 2011 and 2020.



Provisions of the House package that will be considered by the full House this week include the following:

- MMS restructuring, splitting the Service into a Bureau of Energy & Resource Management, a Bureau of Safety & Environmental Enforcement, and an Office of Natural Resources Revenue;
- New requirements for the OCS leasing program, including a policy shift towards balancing energy development with environmental protection, an expanded role for environmental factors in the Department of the Interior's 5-year leasing plans, robust new safety regulations, and increased civil and criminal penalties for violations of the OCSLA;
- Elimination of the \$75 million cap on liability for damages related to offshore discharges of oil and gas, currently in the Oil Pollution Act of 1990 (OPA);
- Increased requirements for demonstration of financial responsibility under OPA, including a requirement that offshore facilities provide evidence of \$300 million in financial responsibility;
- Prohibition on submitting a bid, applying for a permit to drill, or obtaining a lease, easement, or right of way, unless the company can certify that all due diligence requirements are being met, any obligations as a responsible party under OPA are fulfilled, and there have been no major violations of health, safety, or environmental laws in the last seven years;
- Requirement that offshore facilities be U.S.-flagged vessels owned by U.S. citizens, that offshore facilities be built in the U.S., and that workers on such facilities be US citizens, subject to certain exceptions;
- Elimination of categorical exclusions for exploration plans and development and production plans, requiring environmental assessments or environmental impact statements for such plans for National Environmental Policy Act compliance, as well as elimination of the exemption that Gulf of Mexico oil and gas leases currently enjoy from development and production planning requirements;
- New safety requirements, promulgated by the Department of the Interior, for blowout preventers and well design, including a requirement for independent third-party review;
- New safety requirements, promulgated by the Department of Homeland Security (DHS), for mobile offshore drilling units;
- Elimination of the regular royalty-in-kind program for offshore leases, as well as termination of the deepwater and Alaskan OCS royalty relief provisions from the Energy Policy Act of 2005;
- Increased OCS planning and coordination, including regional planning councils that include state and local



governments; and

- Full funding for the Land and Water Conservation Fund (LWCF), the Historic Preservation Fund (HPF), and the Oceans Resources Conservation and Assistance Fund (ORCA).

The House Rules Committee is scheduled to meet at 4 p.m. on July 29 to establish the terms of debate and amendments in order for the CLEAR Act. In addition to the CLEAR Act, on Friday the House will also consider H.R. 5851, the Offshore Oil and Gas Worker Whistleblower Protection Act of 2010, offered by George Miller, chairman of the House Education and Labor Committee. That bill would extend federal whistle-blower protection to workers on the OCS.

S. 3663, THE CLEAN ENERGY JOBS AND OIL COMPANY ACCOUNTABILITY ACT OF 2010

On July 28, Sen. Reid filed the text of a new Senate leadership oil spill package, which includes four components: oil spill provisions, including a response to *Deepwater Horizon* and reforms to the oil and gas leasing program; incentives for residential energy efficiency retrofits; natural gas and electric vehicle provisions; and funding for the Land and Water Conservation Fund. The bill's provisions related to the oil spill and offshore drilling programs are derived from multiple bills reported out of the Energy & Natural Resources, Commerce, Environmental & Public Works, and Judiciary Committees. Major oil spill and offshore drilling provisions in the Reid bill, many of which are similar to those in the House bill, would:

- Restructure MMS to separate revenue collection from other elements of the leasing program, and authorize the creation of up to two bureaus for leasing, safety and environmental components of the oil and gas leasing program;
- Eliminate the \$75 million cap on liability contained in OPA, and modify the OPA's claims processing procedure;
- Require detailed oil spill response plans, under the Clean Water Act, that attempt to reduce both the economic and environmental impacts of a spill;
- Disqualify from bidding on new leases any company that is failing to meet its obligations as a responsible party under OPA or is not meeting due diligence, safety, or environmental requirements on other leases;
- Create a new interagency research effort focused on oil spill prevention and response;
- Establish new requirements for the OCS leasing program, including a policy shift towards balancing energy development with environmental protection and increased planning, safety, and environmental requirements for offshore energy exploration, development, and production;
- Require the U.S. Sentencing Commission to review and amend sentencing guidelines for criminal violations of



the Clean Water Act;

- Modify liability provisions in various maritime and admiralty laws, including overturning *Exxon Shipping Co. v. Baker*, retroactive to April 19, 2010, the day prior to the *Deepwater Horizon* explosion;
- Expand the authority of the National Oceanic and Atmospheric Administration (NOAA) to develop oil spill response, restoration, and damage assessment capabilities;
- Require DHS, Interior, and the Environmental Protection Agency to validate oil spill containment and removal methods and technologies;
- Increase the ability of the Coast Guard to prepare for and respond to oil spills; and
- Grant subpoena power to the Presidential commission investigating the *Deepwater Horizon* incident.

While Senate floor debate on the package may begin this week, the majority of the Senate's work on the legislation will take place next week or perhaps even later. Although there is general support in the Senate for legislation responding to the oil spill, significant concerns have been raised regarding removal of the \$75 million liability cap and the bill's provisions that are unrelated to offshore drilling. Proponents of a federal renewable electricity mandate are clamoring for inclusion of renewable energy standard (RES) provisions, while some in the natural gas industry are objecting to the last-minute inclusion of language relating to hydraulic fracturing, used in onshore natural gas production.

Moreover, while no formal agreement has been reached on the terms of the Senate debate, or amendments that may be offered, rumors continue to circulate that Sen. Reid will seek to use parliamentary procedures to block amendments and attempt to limit the debate so that the chamber might move to final passage by the end of next week. As already indicated by top Senate Republicans, any such efforts by the Majority Leader to bring the bill to a vote without allowing amendments will lessen the likelihood of a compromise and complicate prospects for passage of an energy and oil spill response package in the Senate before the August recess.

FOR ADDITIONAL INFORMATION

For energy and financial sector clients interested in following the ongoing federal regulatory and policy developments relating to the Gulf of Mexico oil spill, Van Ness Feldman offers significant depth of experience and capabilities. Over half of the firm's 80 lawyers and policy advisors have worked as congressional staff, or at the U.S. Departments of the Interior and Energy, the U.S. Environmental Protection Agency, and the White House (including the Council on Environmental Quality). We have formed a dedicated Oil Spill team that is monitoring developments and providing strategic advice to a range of clients. For more information, please contact Bob Szabo (rgs@vnf.com), Rick Agnew (raa@vnf.com), John Iani (lji@vnf.com), Sam Kalen (smk@vnf.com), Curt Moffatt (jcm@vnf.com), or Jon Simon (jxs@vnf.com), or your usual Van Ness Feldman point of contact at 202.298.1800 in Washington, D.C. or



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