

**UNDERSTANDING THE LAW WITH RESPECT TO OFFSHORE
PERMITS AND HOW TO STAY OUT OF JAIL**

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INTRODUCTION

In today's complex regulatory environment, the risk of failing to follow and comply with all applicable rules and regulations can result in significant penalties including large fines and even jail time. The situation is further complicated by the multi-jurisdictional nature of the requirements that can result in both duplication and occasionally conflicting regulations. The purpose of this paper is to provide an overview of how regulations are promulgated, some of the principle permitting requirements for the offshore oil and gas industry as well as a description of how the different agencies interact, along with some suggestions on how to attain and maintain compliance.

REGULATIONS

The way regulations usually evolve the federal government passes a statute to address an environmental situation or political concern (real or imaginary). The statute specifies which federal agency has the responsibility for developing the regulations to enact the requirements of the law. In most instances the federal government encourages the States to apply for primacy to run the program. This has the advantage to the federal government of not having the cost of implementing the rules. For the States it not only transfers the control from central government, but also the federal agency usually provides funds to help the State implement the program.

In order to receive primacy, the State must pass enabling legislation and the associated rules and regulations. These regulations must be at least as stringent as the federal ones. In most cases they can be more stringent, although usually most States tend to pass ones that are equivalent. In some instances the federal statute prohibits the States from passing rules that are more stringent.

JURISDICTIONAL ISSUES

Unfortunately the statutes do not always specify which agency has jurisdiction, or gives the responsibility for implementing the program to several different groups at once. This can lead to duplication and conflicting requirements. For example, when the government passed the Oil Pollution Act of 1990 (OPA) it specified that all affected facilities would have to develop Facility Response Plans (FRP) that followed the format designated by the jurisdictional agency. This presented two problems, first there were four different federal agencies (Environmental Protection Agency (EPA), Research and Special Programs Administration (RSPA) of the Department of Transportation, Minerals

Management Service (MMS) and the United States Coast Guard (USCG)) each of which developed individual formats for the plans. Secondly facilities could fall under more than one jurisdiction. For example, the RSPA looked after all affected onshore pipelines, the MMS took care of everything in water (including, unusually, state waters), the USCG was responsible for any over water transfers, and the EPA got everything else. There are also some Memorandum of Understandings (MoUs) to straighten out illogical jurisdictions such as the MMS being responsible for inshore lake production operations, because the wellhead was in water. The multi-jurisdictional situation means that the facilities potentially have to prepare a number of different FRPs. The initial plans had to be in place by a date that was specified in the federal statute, but none of the agencies had developed final plan formats by the implementation date. In fact, only the USCG had even published final guidance on how to approach the plan development. To make matters even more interesting, several states also passed their own FRP requirements, for example in the Texas the General Land Office (GLO) required plans that met its format.

Until a state has been granted primacy to run a federal program, the federal agencies continue to have jurisdiction. The states often also exercise control over the activities. This can result in double control and duplicative permitting requirements. For example, it is against the law to have a point source discharge of pollutants into waters of the United States of America. The federal program that regulates such emissions is the National Pollutant Discharge Elimination System (NPDES) permitting program that is under the jurisdiction of the EPA. Most states have applied for and received primacy to run the program. For example, Texas has applied for and received primacy, however this primacy does not cover all situations. The group that applied for and received the authorization to implement the program was the Texas Natural Resource Conservation Commission (TNRCC) an agency that recently changed its name to the Texas Commission on Environmental Quality (TCEQ). However, the TCEQ does not have jurisdiction over point source discharges from oil and gas exploration and production activities in Texas and in Texas State Waters. Those discharges are under the control of the Texas Railroad Commission (TRRC). The TRCC has never applied for primacy. Consequently, any E&P operation with a point source discharge onshore Texas or in state waters has to get both a federal and a state discharge permit.

Next, add in whether an offshore operation is in federal or state waters. If it is in federal waters, the state does not have jurisdiction and so federal agencies will control the activities. When in state waters, the operator is subject to both federal and state controls.

REGULATORY FRAMEWORK

The regulations cover all environmental aspects of offshore activities including air, water and waste emissions, protection of flora and fauna, in particular threatened and endangered species, and the protection of archeological resources. In addition there are Coastal Zone Management (CZM) issues. Much of the driving force for environmental regulations comes from the National Environmental Policy Act (NEPA). NEPA is the foundation of environmental policy making in the United States. The NEPA process is intended to help public officials make decisions based on an understanding of

environmental consequences, and take actions that protect, restore, and enhance the environment. In addition, to NEPA there are a number of laws and Executive Orders that regulate offshore activities these include the:

- Endangered Species Act (ESA)
- Marine Mammal Protection Act (MMPA)
- Coastal Zone Management Act (CZMA)
- Clean Air Act (CAA)
- Clean Water Act (CWA)
- Toxic Substances Control Act (TSCA)
- Resource Conservation and Recovery Act (RCRA)
- National Historic Preservation Act (NHPA)
- Fishery Conservation and Preservation Act (FCPA)
- Executive Order 12114 Environmental Effects Abroad
- Executive Order 12898 Environmental Justice
- Executive Order 13007 Indian Sacred Sites
- Executive Order 13089 Coral Reef Protection

The system is further complicated by the fact that the regulatory agency themselves are often required to comply with federal statutes. In addition, as previously mentioned, there are a large number of jurisdictional agencies that may be involved. These can include, for example:

Federal

- Minerals Management Service (MMS)
- Environmental Protection Agency (EPA)
- US Coast Guard (USCG)
- US Army Corps of Engineers (CoE)
- US Fish and Wildlife Service (FWS)
- Research and Special Programs Administration (RSPA) of the Department of Transportation (DoT)
- Federal Energy Regulatory Commission (FERC)
- Occupational Safety and Health Administration (OSHA)

State

- State Department of Environmental Quality eg Texas Commission on Environmental Quality (TCEQ)
- State Oil and Gas Board e.g. Texas Railroad Commission (TRRC)
- Coastal Zone Management Agency, e.g. Texas General Land Office
- State Emergency Response Commission
- Local Emergency Planning Committee
- Police Department
- Department of Health

COPING STRATEGIES OR HOW TO STAY OUT OF TROUBLE

There are a number of steps that a prudent operator can take to help ensure compliance and reduce the risk of non-compliances and associated enforcement action.

Education

One of the most important things to actions to attain and maintain compliance in a cost-effective manner is to become an educated operator. The more that you know and understand, not just what the rules are but how they are developed, the better you can comply with them.

Unfortunately, one of the challenges is that the regulations are constantly changing and developing. This means that considerable effort has to be invested in staying up to date with these changes and also the proposed regulations and emerging issues. For example, there is currently a study underway because of the concern over the potential for mercury, and specifically methylmercury, contamination of marine life and seafood associated with offshore platforms in the Gulf of Mexico.

Fortunately, in these days of the internet and websites, the data are available. The problem comes because of the volume of information that is out there, and the limited time and resources available to review them.

Determine who has jurisdiction

In order to be certain that all the appropriate permits have been obtained and that the facility can operate in compliance, it is necessary to determine whose jurisdiction the activities fall under, remembering that it can be multi-jurisdictional. In the case of offshore operations it has to first be decided whether the facility is located in federal or state waters. This is important because the State does not typically have control over activities in federal waters. However, a facility in federal waters can, for example, transfer the production via a pipeline that passes through state waters.

Missionary Work

Talk to the agencies, get to know their staff and learn what are their particular concerns and issues. This is also a good way of staying informed about emerging issues and changes in the rules and regulations. By developing a good working relationship it becomes easier to implement and maintain compliance without invoking enforcement action.

Determine which programs and regulatory requirements apply

Make certain that you clearly define which regulations apply. This involves carefully following through on all the regulatory references and exemptions. For example, in the case of air permitting, there are more stringent permits for Major Sources. However, the

definition of Major Source varies depending on the air quality of the location and the specific air program involved. This can make a huge difference. For example, for Title V Federal General Operating Permit (GOP) requirements the limits can be 100 tons per year of Carbon Monoxide, and for Prevention of Significant Deterioration (PSD) purposes the limit is 250 tons per year.

Review Draft Permits

If the agency issues a draft permit, make certain that you review it carefully and provide comments on any inconsistencies, mistakes or changes that you would like addressed. Too often operators end up in an enforcement situation because they are out of compliance with a condition that is based on an error.

Review Permit and Know and Understand the Requirements

As obvious as it sounds, it is essential to read, know and understand all conditions in the permits and regulations that apply to your activities, including testing, recordkeeping and reporting requirements. For example, make certain that all testing is done in compliance with the specified methods, and in a timely fashion.

Create a Regulatory Requirement Tracking System

There are usually so many permits and requirements affecting offshore operations, that it is easy to have some items drop through the cracks. Creating a regulatory requirement tracking system is an extremely helpful method of helping ensure compliance.

SUMMARY

In today's complex environmental regulatory requirements there is a real potential for having a regulatory non-compliance. However, by taking a proactive stand, becoming educated about the requirements and developing an effective regulatory tracking system it is possible to attain and maintain compliance without spending a fortune, developing ulcers or going to jail.