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BEFORE THE
SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
MAY 17, 2011

Mr. Chairman, thank you for the opportunity to testify before the committee today. It is noteworthy that today's hearing comes exactly one year after my final testimony before the Congress as Commandant of the Coast Guard and National Incident Commander for the Deepwater Horizon oil spill response. To that end, I have included where appropriate excerpts from the testimony I provided to the Committee on Science, Technology, and Commerce chaired by Senator Rockefeller on May 18, 2011.

In regard to the legislation being considered today there are two specific portions of that testimony that are relevant to today's hearing. They are regulation of mobile offshore drilling units (MODU) and regulation of drilling systems used on the continental shelf. Not addressed in the legislation being considered today but equally important is the need for legislation that requires review of oil spill response plans for offshore drilling operations by the United States Coast Guard. I appreciate the concurrent jurisdiction of this committee and the Committee on Science, Technology, and Commerce over the various federal activities associated with the Deepwater Horizon explosion and subsequent spill and I urge the Congress to work to integrate and align legislative efforts.

EXCERPT OF ORAL TESTIMONY OF 18 MAY 2010 BEFORE THE SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TECHNOLOGY

Provided below is a pertinent excerpt of testimony I provided before the Commerce, Science, and Technology Committee chaired by Senator Rockefeller.

In response to a question by Senator Begich regarding needed regulatory changes I responded,

"Senator, I'd like to address three areas, if I could. The first one is an inspection issue, the second one is a Coast Guard regulatory issue and the third one is a response plan issue, if I could.

As it relates to the regulatory responsibilities, MMS has responsibility for the drilling apparatus itself. And in this case, the Coast Guard issues what's called a certificate of compliance for the mobile drilling unit, which is actually a floating ship, connected by the riser pipe.

Regarding the mobile drilling unit itself, we regulate that under Title 46 of the U.S. Code. We have taken a look at the current set of regulations, and we think there are five areas where we might be able to do a better job, with regulatory reform inside the Coast Guard.

I would submit that they are taking a look at the current electrical standards onboard the mobile drilling units, the machinery standards.

Probably a real important one is dynamic positioning reliability. This is the system by which the ship is held in place while the operations are going on. That technology has probably gotten out farther -- ahead of the regulations. We probably need to take a look at certifying the reliability, give a set of standards for dynamic positioning.

And we need to look at the difference between floating production units and mobile drilling units. Floating production units are basically vessels or ships that are involved in production, as mobile drilling units actually are pontoon based, and looking at the standards related to that.

And, finally, lifesaving and firefighting equipment. And we'd like to engage in a conversation about those areas, if we could.

Regarding the actual drilling equipment itself, the blowout preventers that are down there right now are not under any regulatory regime. They're actually built to American Petroleum Institute specifications. There are three that are out there for industry to use. One is the ram operations in the blowout preventer, the choke- and-kill lines, and the control system to control all of that. “

API kind of goes out and issues a license to the manufacturers. They do testing. MMS accepts those licenses in lieu of an inspection.

I think there's an opportunity, moving forward, to take a look at whether or not we need a regulatory regime for the blowout preventers and the control systems associated with that, sir.”

EXCERPT OF WRITTEN TESTIMONY OF 18 MAY 2010 REGARDING MODU REGULATORY COMPLIANCE REQUIREMENTS

In my testimony for the record on 18 May 2010 I stated,

“43 U.S.C. 1331, *et seq* mandates that MODUs documented under the laws of a foreign nation, such as the DEEPWATER HORIZON, be examined by the Coast Guard. These MODUs are required to obtain a U.S. Coast Guard Certificate of Compliance (COC) prior to operating on the U.S. Outer Continental Shelf (OCS).

In order for the Coast Guard to issue a COC, one of three conditions must be met:

1. The MODU must be constructed to meet the design and equipment standards of 46 CFR part 108.
2. The MODU must be constructed to meet the design and equipment standards of the documenting nation (flag state) if the standards provide a level of safety generally equivalent to or greater than that provided under 46 CFR part 108.

3. The MODU must be constructed to meet the design and equipment standards for MODUs contained in the International Maritime Organization Code for the Construction and Equipment of MODUs.

The DEEPWATER HORIZON had a valid COC at the time of the incident, which was renewed July 29, 2009 with no deficiencies noted. The COC was issued based on compliance with number three, stated above. COCs are valid for a period of two years.

In addition to Coast Guard safety and design standards, MMS and the Occupational Safety and Health Administration (OSHA) also have safety requirements for MODUs. MMS governs safety and health regulations in regard to drilling and production operations in accordance 30 CFR part 250, and OSHA maintains responsibility for certain hazardous working conditions not covered by either the Coast Guard or MMS, as per 29 U.S.C. 653 (a) and (b)(1)."

IMPLICATIONS OF THE RECENTLY RELEASED PRELIMINARY FINDINGS OF THE COAST GUARD PORTION OF THE JOINT INVESTIGATIVE TEAM REPORT

Under an agreement between the Department of Interior and Department of Homeland Security, a Joint Investigative Team (JIT) was established to determine the facts associated with the incident and make recommendations. On April 22, 2011 the Coast Guard released a preliminary report of the findings in Volume One.

The findings in Volume One cover five aspects of the disaster – including the explosions on the Mobile Offshore Drilling Unit (MODU) Deepwater Horizon; the resulting fire; evacuations; the flooding and sinking of the Deepwater Horizon; and the safety systems of the MODU and its owner, Transocean. The findings released did not include an analysis of what led to the loss of well control or other aspects of the investigation that fall under BOEMRE jurisdiction. Those findings will be released separately.

A logical next step, in my view, would be a review and revision of current procedures regarding the inspection and certification of MODUs. Specifically, I would recommend a combination of two procedures that are currently used by the Coast Guard to mitigate the risk posed by foreign flagged vessels operating in waters under the jurisdiction of the United States. The current procedure whereby Certificates of Compliance (COC) are issued for MODUs is clearly inadequate to address the recommendations of the JIT.

The first would be a program similar to what is called the Control Verification Examination for cruise ships. For a number of years the Coast Guard has established additional inspection requirements on foreign flagged cruised ships operating from United States ports. This regime involves plan review and inspections of ship under construction and annual and quarterly inspections after that.

The second would be a program similar to what is called the Port State Control program for foreign flagged cargo ships and tank vessels. Under this program foreign flagged

vessel calling in the United States are evaluated on a range of factors including prior safety discrepancies, the history of the flag state, the history of the classification society, and the history of the company involved. These and other facets of vessel performance are used in matrix to identify higher risk vessel and then subject them to more stringent controls up to and including denial of entry or boarding and inspection prior to entry into port.

I believe these two successful practices can form the basis for a framework to implement the various recommendations contained in the preliminary findings of the JIT.

REGULATION OF OFFSHORE DRILLING OPERATIONS

As the Committee is aware, regulation of offshore drilling operations falls under the statutory authority of the Department of Interior and is the primary focus of the legislation being considered today. Accordingly, my comments reflect my personal opinions based on my experience with the Deepwater Horizon response and do not infer any statutory or regulatory role for the Coast Guard or Department of Homeland Security.

That said, I believe at some point it will be necessary to integrate the two separate regimes that regulate shipping and activities on the outer continental shelf. The two regimes have evolved separately under different statutes and committee jurisdictions. We are now managing offshore drilling operations where vessels regulated by the U.S. Coast Guard under domestic law and international treaty are physically attached to drilling systems regulated under laws governing the outer continental shelf by the Department of Interior and Bureau of Ocean Energy Management and Regulatory Enforcement (BOEMRE).

With these comments in mind, it is clear to me personally that, at a minimum, any regulatory scheme for offshore drilling systems should include the following.

1. A hybrid framework of mandatory third party inspection of drilling systems and a "safety case" based process that requires a systemic method to describe the risks associated with a particular drilling proposal and a clear plan to mitigate those risks.

2. Third party inspections should at a minimum include the blow out preventer, control pods, choke and kill lines, and associated alarms and controls.

3. A framework to unify the regulatory regimes for MODUs and drillings systems including clear role definition for the United States Coast Guard and the BOEMRE. A key issue here is role definition between the master operating the MODU and the individual responsible for drilling operations and well control.

4. Integration of oil spill response plan review of all parties involved in oil spill response, most specifically the United States Coast Guard which has the statutory responsibility to direct the response.

ROLE OF THE OIL SPILL LIABILITY TRUST FUND

While not the subject of today's hearing, it is worthwhile to note the pending issue of limits of liability of responsible parties involved in a pollution incident and the role of the Oil Spill Liability Trust Fund (OSLFT). To that end I am providing the following excerpt from my testimony of May 18, 2011.

I stated in my written testimony,

"The Oil Spill Liability Trust Fund (OSLTF), established in the Treasury, is available to pay the expenses of federal response to oil pollution under the Federal Water Pollution Control Act (FWPCA)(33 USC §1321(c)) and to compensate claims for oil removal costs and certain damages caused by oil pollution as authorized by the Oil Pollution Act of 1990(OPA) (33 USC §2701 et seq). These OSLTF uses will be recovered from responsible parties liable under OPA when there is a discharge of oil to navigable waters, adjoining shorelines or the Exclusive Economic Zone (EEZ).

The OSLTF is established under Revenue Code section 9509 (26 USC §9509), which also describes the authorized revenue streams and certain broad limits on its use. The principal revenue stream is an 8 cent per barrel tax on oil produced or entered into the United States(see the tax provision at 26 USC §4611). The barrel tax increases to 9 cents for one year beginning on January 1, 2017. The tax expires at the end of 2017. Other revenue streams include oil pollution-related penalties under 33 USC §1319 and §1321, interest earned through Treasury investments, and recoveries from liable responsible parties under OPA. The current OSLTF balance is approximately $1.6 billion. There is no cap on the fund balance but there are limits on its use per oil pollution incident. The maximum amount that may be paid from the OSLTF for any one incident is $1 billion. Of that amount, no more than $500 million may be paid for natural resource damages. 26 USC §9509(c)(2).

OPA further provides that the OSLTF is available to the President for certain purposes (33 USC §2712(a)). These include:

> Payment of **federal removal costs** consistent with the NCP. This use is subject to further appropriation, except the President may make available up to $50 million annually to carry out 33 USC §1321(c) (federal response authority) and to initiate the assessment of natural resource damages. This so-called "emergency fund" amount is available until expended. If funding in the emergency fund is deemed inadequate to fund federal response efforts, an additional $100 million may be advanced from the OSLTF when the emergency fund is inadequate subject to notification of Congress no later than 30 days after the advance. See 33 USC §2752(b). Additional amounts from the OSLTF for Federal removal are subject to further appropriation.

Payment of **claims for uncompensated removal costs and damages**. Payments are not subject to further appropriation from the OSLTF. 33 USC §2752(b).

Payment of federal administrative, operating and personnel costs to implement and enforce the broad range of oil pollution prevention, response and compensation provisions addressed by the OPA. This use is subject to further appropriation to various responsible federal agencies.

National Pollution Funds Center (NPFC) Funding and Cost Recovery

The NPFC is a Coast Guard unit that manages use of the emergency fund for federal removal and trustee costs to initiate natural resource damage assessment. The NPFC also pays qualifying claims against the OSLTF that are not compensated by the responsible party. Damages include real and personal property damages, natural resource damages, loss of subsistence use of natural reosources, lost profits and earnings of businesses and individuals, lost government revenues, and net costs of increased or additional public services that may be recovered by a State or political subdivision of a state.

In a typical scenario, the FOSC, Coast Guard or EPA accesses the emergency fund to carry out 33 USC §1321(c), i.e., to remove an oil discharge or prevent or mitigate a substantial threat of discharge of oil to navigable waters, the adjoining shoreline or the EEZ. Costs are documented and provided to NPFC for reconciliation and eventual cost recovery against liable responsible parties. Federal trustees may request funds to initiate an assessment of natural resource damages and the NPFC will provide those funds from the emergency fund as well.

Claims for OPA removal costs and damages that have been denied or not settled by the responsible party after 90 days may be presented to the NPFC for payment from the OSLTF. State claims for removal costs can be presented directly to the NPFC against the OSLTF. General claims provisions are delineated in 33 USC §2713 and the implementing claims regulations for claims against the OSLTF in 33 CFR 136.

OPA provides that all claims for removal costs or damages shall be presented first to the responsible party. Any person or government may be a claimant. If the responsible party denies liability for the claim, or the claim is not settled within 90 days after it is presented, a claimant may elect to commence an action in court against the responsible party or to present the claim to the NPFC for payment from the OSLTF. OPA provides an express exception to this order of presentment in respect to State removal cost claims. Such claims are not required to be presented first to the responsible party and may be presented direct to the NPFC for payment from the OSLTF. These and other general claims provisions are delineated in 33 USC section 2713 and the implementing regulations for claims against the OSLTF in 33 CFR Part 136. NPFC maintains information to assist claimants on its website at www.uscg.mil/npfc.

NPFC pursues cost recovery for all OSLTF expenses for removal costs and damages against liable responsible parties pursuant to federal claims collection law including the

Debt Collection Act, implementing regulations at 31 CFR parts 901-904 and DHS regulations in 6 CFR part 11.

Aggressive collection efforts are consistent with the "polluter pays" public policy underlying the OPA. Nevertheless, the OSLTF is intended to pay even when a responsible party does not pay. "

CONCLUSION

Mr. Chairman, I appreciate the leadership demonstrated by the Committee in moving to improve the safety of offshore drilling and address the hard lessons learned in the explosion of the Deepwater Horizon.