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SHELL SURVIVES MOTION TO DISMISS ITS SUIT SEEKING CONFIRMATION OF BSEE'S APPROVAL OF SHELL'S OIL SPILL RESPONSE PLAN IN THE ARCTIC OCEAN

Earlier this year, Shell took the preemptive step of filing suit in federal court in Alaska against various environmental entities to request a declaration that Shell's Oil Spill Response Plan ("OSRP") for Shell's Arctic Ocean operations was properly approved by the Bureau of Safety and Environmental Enforcement ("BSEE") under the Administrative Procedure Act ("APA"). No suits had been filed to challenge the BSEE approval at the time Shell filed its lawsuit. Shell had previously been awarded leases from the U.S. Government to drill for oil. In connection with its intent to drill on leases in the Chukchi and Beaufort Seas of the Arctic Ocean, Shell submitted an OSRP to BSEE, the agency tasked with reviewing and approving an OSRP for compliance with the Oil Pollution Act ("OPA") and the Outer Continental Shelf Lands Act ("OCSLA"). Shell submitted a series of revised OSRPs to BSEE after public comment period and BSEE review; and BSEE eventually approved the OSRPs.

Shell argued that although none of the environmental entities had challenged the BSEE approval, it was a "virtual certainty" that litigation would ensue and thus a case and controversy existed. Several environmental entities filed motions to dismiss. On June 26, 2012, the court denied the motions to dismiss and held that several of the entities had threatened to challenge BSEE's approval of the Shell OSRPs. The court found that "it is highly likely that such threatened suit is imminent." Additionally, given the stage of the approval process, the entities' only ability to challenge the OSRPs was through an APA challenge, which supported the exercise of jurisdiction in the declaratory judgment action to redress any harm that may come to Shell's property interests. Since the underlying questions regarding the challenge to the BSEE approval were questions of law, the court held that the challenge was ripe for adjudication. Finally, the court noted that a speedy resolution of these issues served the public interest and judicial economy. The court was sensitive to the burden placed upon Shell in waiting until an 11th hour challenge by the environmental entities.

The defendant environmental agencies have asked the court to certify its order for appeal, and this request is still pending before the court. Subsequent to the court's June 26, 2012, ruling, Shell filed an amended suit to ask the federal court also to declare that BSEE's approval of the OSRPs complied with the Endangered Species Act. This second amended complaint is now the subject of additional motions to dismiss filed by the various defendant environmental entities, and these motions have not yet been ruled upon by the court.

On July 10, 2012, the environmental agencies filed a separate lawsuit against Shell in federal court in Alaska to challenge the OSRPs, contending that the OSRPs are deficient, *inter alia*, under OPA given the unique, icy conditions of the Arctic Ocean. This separate case has now been consolidated with the first-filed Shell action. The environmental entities have also asserted that the capping stack associated with the OSRPs should have been tested in icy conditions in the Arctic Ocean. In short, the entities claim that the OSRPs fail to demonstrate that Shell could handle a "worst-case" oil spill in the Arctic Ocean during the winter as required by post Macondo oil spill regulations.

After being heavily involved in the *Deepwater Horizon* litigation and successfully defending one of the named defendants in that multi-district-litigation, Jones Walker's attorneys are uniquely positioned to use their prior OPA and OCSLA experience to provide advice on BSEE regulations governing OSRPs. The issue of what response technology is required for an OSRP continues to evolve, particularly with respect to capping stack technology and the response time



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associated with a capping stack. Specific elements of an OSRP include the emergency response action plan; i.e. the ability to contain and respond immediately to a spill from the facility itself, 30 CFR § 254.21(b)(2); a “worst case discharge scenario” including the operator’s plan to cope with the initial spill volume and support operations for a blowout lasting thirty (30) days, 30 CFR §§ 254.21(b)(3)(iii) & 254.26(d); a dispersant use plan, 30 CFR § 254.21(b)(3)(iv); and an *in situ* burning plan, 30 CFR § 254.21(b)(3)(v). Future Notices to Lessees will likely issue on either a national or regional basis from BSEE, and its three regional offices, to provide further clarification of the post-*Deepwater Horizon* response technology in the context of the submission of OSRPs.

We will continue to monitor the evolution of OSRP requirements under BSEE regulations and the interpretation of response technology by BSEE and its regional offices. Please do not hesitate to contact us if you have any questions.

—[William C. Baldwin](#)



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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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