

BSEE Enforcement of SEMS Regulations

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Background

So, what is SEMS and where did it come from? On October 15, 2010, the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) published the Final Rule for Safety and Environmental Management Systems (SEMS), in the Federal Register [30 CFR Part 250 Subpart S] – [75 FR 63610]. This Final Rule incorporates by reference, and makes mandatory, the American Petroleum Institute's (API) Recommended Practice 75, Third Edition, May 2004, reaffirmed in May 2008, also referred to as API RP 75. The SEMS compliance deadline was November 15, 2011, approximately 90 days ago.

The SEMS regulations require systems to be developed and implemented that are similar to (1) the Occupational Safety and Health Administration's (OSHA) Process Safety Management (PSM) program that has been in place for onshore refining and chemical manufacturing facilities since 1992 and (2) the Environmental Protection Agency's (EPA) Risk Management Programs (RMP) which have been in place in those same industries since 1996.

The SEMS program is intended to be a nontraditional, performance-focused tool for integrating and managing offshore operations. Its purpose is to enhance the safety and cleanliness of operations by reducing the frequency and severity of accidents. According to BSEE, there four principal SEMS objectives, (1) focus attention on the influences that human error and poor organization have on accidents, (2) continuous improvement in the offshore industry's safety and environmental records, (3) encourage the use of performance-based operating practices and (4) collaborate with industry in efforts that promote the public interests of offshore worker safety and environmental protection.

Many people believe that the SEMS regulations were promulgated in response to the BP Macondo incident. In fact, SEMS has its origins going back to the 1990 finding of the National Research Council's Marine Board that the Minerals Management Service's (MMS) prescriptive approach to regulating offshore operations had forced industry into a compliance mentality. In response to the Marine Board findings in May 1993, the API, in cooperation with the MMS, developed Recommended Practice 75 - Development of a Safety and Environmental Management Program for Outer Continental Shelf Operations and Facilities ("SEMP" or "API RP 75").

In 1994, the MMS published a Notice in the *Federal Register* that recognized implementation of API RP-75 as meeting the spirit and intent of a SEMS concept. The API RP-

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75 was updated in July 1998 to focus more on contract operations, including operations on mobile offshore drilling units (“MODUs”).

On May 22, 2006, the MMS, published an Advance Notice of Proposed Rulemaking (ANPR) in the Federal Register (71 FR 29277), to seek comments and information on how to improve the regulatory approach to safety and environmental management for operations conducted in the OCS. After a three year period of information gathering, on June 17, 2009, the MMS published a Notice of Proposed Rule (NPR) in the Federal Register (74 FR 28639) based on industry and public feedback from the 2006 ANPR. In response to several requests, the MMS convened a public meeting on September 2, 2009, in New Orleans, Louisiana, to discuss the proposed rule. Finally, on October 15, 2010, the BOEMRE published the Final Rule for the SEMS program. So, in reality, the development of the SEMS program occurred over a 20 year period.

As most of you are aware, on October 1, 2011, the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), formerly the Minerals Management Service (MMS), was replaced by the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE) as part of a major reorganization.

However, before BOEMRE was split and dissolved, it proposed revisions to the SEMS Rule on September 14, 2011, which has been dubbed SEMS II and "Son of SEMS." The proposed SEMS II Rule requires (1) procedures to authorize any and all employees on the facility to implement a Stop Work Authority (SWA) program when witnessing an activity that creates a threat of danger to an individual, property, and/ or the environment, (2) clearly defined requirements establishing who has the ultimate authority on the facility for operational safety and decision making at any given time, (3) a plan of action that shows how operator employees are involved in the implementation of API RP 75, (4) guidelines for reporting unsafe work conditions related to an operators SEMS program, that provide all employees the right to report a possible safety or environmental violation(s), (5) guidelines for employees to request a BSEE inspection of the facility if they believe there is a serious threat of danger or their employer is not following BSEE regulations, (6) revisions that require operators with SEMS programs to engage independent third party auditors to conduct all audits of operators’ SEMS programs and that the independent third party (IP3) auditors must meet certain specific the qualification criteria and (7) additional requirements for conducting a Job Safety Analysis.

Lars Herbst, BSEE’s Gulf of Mexico Regional Director, spoke in Houston on Thursday February 2 and indicated that SEMS II could be published as a final rule in March or April of this year. He indicated that he does not see a change in the IP3 qualifications and supports the philosophy.

As of November 16, 2011, the BSEE has been able to perform comprehensive audits of SEMS programs for several OCS operators. BSEE also has a program to conduct unannounced drills to test spill response preparedness of operators in the Gulf of Mexico. The OCSLA (43 U.S.C. 1348(c)) requires BSEE to conduct onsite inspections to assure compliance with lease terms, NTL's, and approved plans, and to assure that safety and pollution-prevention requirements of regulations are met. These inspections involve items of safety and environmental

concern. As you would expect, BSEE is undergoing an organizational culture change moving from the MMS's highly compliance orientated organization to a new performance based culture.

SEMS Audit Triggers

Now that we have a SEMS regulatory scheme in place with a compliance deadline that is 90 days old, how does BSEE decide who it should audit first? Some of BSEE's audit triggers include (1) poor performers (operator or contractor) based on historical enforcement action metrics (e.g., INCs), (2) accident panel investigations for the prior year where one or more SEMS elements was found to be the root cause of the accident, (3) monthly operator compliance and (4) random selection.

Will operators know when they are to be targeted for SEMS Audit? Typically, (1) full audits will be announced, (2) partial audits can but do not have to be unannounced, (3) some audits will be done in the field on a platform or in the operator's office and (4) some audits will be performed both in the field and in the operator's office.

Incident Investigations

On April 17, 2006, the MMS published a Final Rule (71 FR 19640) that revised their incident reporting requirements to more clearly define which incidents must be reported, broadens the scope to include incidents that have the potential to be serious, and requires the reporting of standard information for both oral and written reports. Certain categories of incidents must be to the District Manager immediately via oral communication and require a written follow-up report within 15 calendar days after the incident and others types of incidents only require a written report within 15 calendar days after the incident

BSEE reviews all incidents reported to determine whether or not they will be investigated. Whether an incident is investigated and the degree to which it is investigated is based upon the following factors, (1) the actual and potential severity of the incident, (2) the complexity of the incident and (3) the probability of similar incidents occurring. BSEE conducts an initial onsite investigation for many of the reported incidents. Formal investigations are then conducted for the more serious or significant incidents, based on the criteria noted above.

BSEE conducts two types of formal investigations. First are District Investigations, which are conducted by a team appointed by the District Manager of the office with responsibility for the location of the incident. The teams are primarily composed of District office personnel, but may involve other BSEE or non-BSEE personnel. Occasionally, the District Manager may appoint an individual to conduct an investigation, rather than a team.

Second are Panel Investigations, which are conducted by a team appointed by the Regional Director of the office with responsibility for the location of the incident. A panel leader is designated to direct the work of the team. Teams are primarily composed of Regional and District personnel, but may involve other BSEE or non-BSEE personnel. Panel investigations are usually conducted when a more in-depth investigation is needed and may involve more comprehensive investigation techniques such as formal hearings.

In his talk on February 2, Mr. Herbst stated that there have been some serious near-misses since the Macondo incident so it is reasonable to anticipate that the number of investigations will increase.

BSEE Enforcement Team

So, who is in charge of the BSEE enforcement team? Charles Barbee is the Environmental Enforcement Division Chief in Washington. He has more than 20 years of experience with the U.S. Coast Guard and, most recently, was the Coast Guard's program manager for both marine investigations and environmental crime. His background has been in oil spill contingency planning, pollution investigation and response, marine inspections and marine casualty investigations. Mr. Barbee graduated and received his commission from the U.S. Coast Guard Academy and earned a Master's Degree in Organizational Management from the University of Phoenix.

Interestingly, while the District Field Operations, Regional Field Operations and Production and Development personnel all report to the Gulf of Mexico Regional Director, the Environmental Enforcement personnel housed at the Regional Office in New Orleans that are responsible for conducting SEMS audits report directly to Washington. In addition, the Oil Spill Response personnel housed at the Regional Office in New Orleans also report directly to Washington.

Training of the Enforcement Team

BSEE's had a budget of 1.5 million dollars to launch its new National Offshore Training & Learning Center (NOTLC), which has been providing National Offshore Inspector courses, accident investigation courses, and SEMS training to its inspectors. Chris Barry is the training director at the National Offshore Training & Learning Center. His duties include establishing national training strategies and formulating training policy related to inspections and compliance functions and programs. Mr. Barry earned a dual Bachelor of Arts degree in Art History and Special Education and a Master of Instructional Systems Design.

Between July 2010 and November 2011, BOEMRE/BSEE hired 37 new inspectors and had commitments from 9 additional inspectors to come on board by January 1, 2012. That means BOEMRE/BSEE increased its inspections corps by close to 80% in 18 months. As of November 2011, BSEE had put two groups of new inspectors through a core curriculum in offshore inspections at its new National Offshore Training & Learning Center. Further, BSEE has equipped its inspectors with new equipment and tools, including handheld computers, in an effort to make their inspections process more efficient and effective.

What Does BSEE Look For During a SEMS Audit?

Before discussing what BSEE looks for during a SEMS Audit, you should understand some basics regarding the types of enforcement actions that BSEE issues. Upon detecting a violation, BSEE issues an Incident of Noncompliance (INC) to the operator. INCs take the form of either a Warning INC or a Shut-in INC, depending on the severity of the violation. If the violation is not severe or threatening, a Warning INC is issued. If the violation is more severe or

poses a threat to safety or the environment, the shut-in INC may be for a portion of the facility (a Component Shut-in INC) or for the entire facility (a Facility Shut-in INC).

BSEE has prepared a 24 page list of Potential Incidents of Noncompliance or “PINC” that will be evaluated during SEMS audits. This list includes fourteen broad categories of SEMS compliances issues. I have provided a list of the PINC - SEMS categories that are ranked by the number of subcategories within each category and indicated the types of INCs that each category includes.

- **12** - Subcategories of **Environmental Compliance** Issues
 - They are all Warning INCs
- **9** - Subcategories of **Safe Work Practices** Issues
 - Two are Component Shut-In INCs for one or more employees that do not understand or cannot perform the assigned duties safely.
 - The remainder are Warning INCs
- **6** - Subcategories of **SEMS Elements Audit** Issues
 - They are all Warning INCs
- **6** - Subcategories of **Records and Documentation** Issues
 - They are all Warning INCs
- **5** - Subcategories of **Mechanical Integrity** Issues
 - One is either:
 - A Component Shut-in INC for any piece of equipment or system that is not designed, fabricated, installed, tested, inspected, monitored, or maintained in a manner not consistent with appropriate service requirements or
 - A Facility Shut-In INC if the mechanical integrity of its critical equipment indicates that is not fit for service or poses a risk to safety, the facility, or the environment.
 - The remainder are Warning INCs
- **4** - Subcategories of **Hazard Analysis** Issues
 - A Facility Shut-In INC if during an audit of the operator’s SEMS program the operator does not provide the necessary hazard analysis documentation.
 - The remainder are Warning INCs
- **4** - Subcategories of **Management of Change** Issues
 - They are all Warning INCs
- **3** - Subcategories of **Safety** Issues
 - One is a Facility Shut-In INC when the unsafe situation poses an immediate danger to the entire facility or personnel and the specific piece of equipment

or location cannot be shut-in without affecting the overall safety of the facility.

- The remainder are Warning INCs
- **3** - Subcategories of **Training** Issues
 - They are all Warning INCs
- **3** - Subcategories of **Investigation of Incidents** Issues
 - They are all Warning INCs
- **3** - Subcategories of **General** Issues
 - A Facility Shut-In INCs for no SEMS program
 - The remainder are Warning INCs
- **2** - Subcategories of **Operations Procedures** Issues
 - They are all Warning INCs
- **2** - Subcategories of **Emergency Response and Control** Issues
 - They are all Warning INCs
- **1** - Subcategory of **PreStartup Review** Issues
 - Can be a Warning INC but can also be a Component Shut-in INC for any piece of new or modified equipment or system that is not designed, fabricated, or installed in a manner consistent with the application for which they will be used.

As you can see by looking at this list, the Environmental and Safety Categories are among BSEE's top priorities.

Types of SEMS Audits

Pre-Compliance Deadline Audits

On October 1, 2011, BSEE, along with the U.S. Coast Guard and the State of Louisiana, completed the first unannounced oil spill drill since the reorganization of the former MMS. The table-top drill tested Stone Energy Corporation's ability to assess a subsea well control situation and mobilize the proper subsea containment/intervention equipment in a timely manner. Currently, no information is available regarding what issues were noted during that audit.

In early November 2011, BSEE performed its first SEMS virtual audit exercise remotely using the Internet to evaluate Black Elk Energy, LLC's SEMS Program documentation, implementation and records evaluation protocol. Personnel from BSEE, Black Elk and SEMPCheck participated in this inaugural virtual audit, providing a well-versed wealth of expertise and experience for the assessment session. Again, no information is available regarding what issues were noted during that audit.

Post-Compliance Deadline Audits

Since we are 90 days into the SEMS compliance period, we expected to hear about how many SEMS audits have been conducted so far, the number of operators found to have no SEMS programs, the number of Shut-in INCs issued, the most common SEMS violations being discovered, the number of civil penalty notices issued and the number of criminal actions that have been referred to the Department of Justice. To date, however, BSEE has been very guarded about disclosing any of the above information outside of the Bureau.

One of my contacts in BSEE's headquarters told me that she could not give me any details yet and they have been instructed to convey what BSEE's Public Affairs Office is officially saying, which is: "BSEE is actively working to implement the SEMS program. Inspectors and other staff have undergone training. Operator coordinator contact information is being collected through an NTL. BSEE's Gulf of Mexico Region is preparing a target list for partial audits, which will cover specific elements of the program. The target list will be reviewed and approved by the National SEMS Coordinator."

However, on February 2, Mr. Herbst indicated that BSEE had performed one SEMS audit off the coast of California. He stated that the California SEMS audit was a "learning curve" for the BSEE inspectors. However, we have an unconfirmed report from a fairly reliable source that one operator had 15 of its Gulf of Mexico platforms audited by BSEE but there was no information available regarding what was found or what kind and the number of enforcement actions that were issued. So, we are not sure how accurate that information actually is. It may be that the California SEMS audit is complete and that the Gulf of Mexico SEMS audits performed to date are still under review.

Mr. Herbst made it clear that SEMS audits are about to get started. I'm sure we will hear more in the coming weeks and months about those. In the 1980's when EPA was implementing major environmental programs, they typically conducted inspections right after the compliance dates and, as they ran across ambiguous or confusing regulatory requirements from an implementation perspective, they published "technical corrections" in the Federal Register. It would not be surprising to see BSEE do some technical corrections with regard to the SEMS regulations.

Mr. Herbst did indicate that the MMS decision to "generalize" their inspectors for inspection purposes several years ago was not working well for the SEMS audits and that they were looking at having to re-train their inspectors to become "specialists" on certain of the SEMS program elements. Mr. Herbst also acknowledged that BSEE personnel are on a learning curve regarding the sophisticated data collection and management technologies used offshore, like SCADA, and "abstract" management concepts such as "management of change." He also stressed the importance of "hazard analysis," which is probably an indicator of one area they will be focusing on. I previously mentioned the OSHA PSM program that has been effective since 1992. That program has focused on management of change and hazard analysis since its inception 20 years ago so the BSEE inspectors really do have a significant learning curve ahead of them.

Civil Enforcement Actions

As noted above, with regard to SEMS enforcement actions, BSEE will typically issue an Incident of Noncompliance (INC) to the operator using one of two main enforcement actions: (1) Warning INCs or (2) Shut-in INCs, depending on the severity of the violation. The Shut-in INCs will be one of two types: (a) a Component Shut-in INC, or (b) a Facility Shut-in INC. Warning INCs are issued if the violation is not severe or threatening and must be corrected usually within 14 days. However, for either type of Shut-in INC, the violation must be corrected before the operator is allowed to continue the activity in question.

With brand new regulations and new inspectors that have to be trained in a highly technical, “real world” environment, I suspect that BSEE is being very cautious about how it is interpreting its findings and, hopefully, is doing a thorough job of evaluating the evidence before issuing any enforcement actions. The last thing BSEE wants right now is to be challenged on a large number of the enforcement actions they issue because their own inspectors are inexperienced at understanding how their own regulations are supposed to be implemented by the operators.

Civil and Other Penalties

In addition to the enforcement actions discussed above, as of June 30, 2011 [76 FR 38294], BSEE can assess a civil penalty of up to \$40,000 per violation per day for violations of the OCSLA if (1) the operator fails to correct the violation in the reasonable amount of time specified on the INC or (s) the violation resulted in a threat of serious harm or damage to human life or the environment. BSEE can also initiate probationary or disqualification procedures from serving as an OCS operator if the SEMS program is not in compliance.

BSEE is working on its process by which it imposes civil penalties more rational and efficient. Under its current process, it can take up to a year to determine whether civil penalties should be imposed after the issuance of INCs. BSEE has publically stated that it currently believes a top fine of \$40,000 per day, per incident, “is NOT a meaningful deterrent in an industry in which operators pay between \$500,000 to \$1 million per day for a rig” and, to that end, is working toward increasing that civil penalty amount.

Criminal Enforcement Actions

If the violation is serious enough and is found to be a knowing and willful violation, BSEE may recommend that the matter be referred to the Department of Justice for criminal prosecution. Under Section 24(c) of the Outer Continental Shelf Lands Act [(OCSLA or the Act) (43 U.S.C. 1350(c))], criminal violations for knowing and willful violations of the SEMS regulations may be pursued, as well. Criminal violations are those that are knowing and willful and may include violations of (1) any provision of the OCSLA, (2) any lease term, license, or permit pursuant to the Act or (3) any regulation or order issued under the Act designed to protect health, safety, or the environment or to conserve natural resources

Criminal violations may also include (1) any false statement, representation, or certification in any application, record, report, or other document filed or required to be maintained under the Act, (2) falsifying, tampering with, or rendering inaccurate any monitoring

device or method of record required to be maintained under the Act and (3) a disclosure of any data or information required to be kept confidential by the Act.

As if we don't have enough agencies conducting inspections offshore, the Office of Inspector General is also authorized to investigate violations of OCSLA [under Section 2 of the IGA (5 U.S.C. App §§ 2 and 4 (1998))].

Appeal of Civil Enforcement Actions or Penalties

If serious enough, shut-in INCs or civil penalties may be appealed to the Interior Board of Land Appeals (IBLA) within 60 days of their receipt. After filing the appeal, the appellant has 30 days to file a Statement of Reasons for the appeal, if one was not filed with the appeal and BSEE has 30 days to file an Answer responding to the Statement of Reasons. The IBLA will grant one automatic extension, not to exceed 30 days. The appellant may file a reply brief within 15 days of receiving the Answer.

Either party may request a hearing to present evidence on an issue of fact. The request must be filed within 30 days after the answer is due. If the IBLA grants a hearing, the appeal will be referred to an administrative law judge. If the parties agree, they may request that the dispute regarding violations or penalties be administered within the IBLA Alternated Dispute Resolution (ADR) Program.

Credit Note: Much of the information contained in this paper came from or was gleaned from materials published by either BOEMRE, BSEE or the IBLA and from communications directly with/from BSEE personnel.