United States Department of the Interior

BUREAU OF OCEAN ENERGY
MANAGEMENT, REGULATION AND ENFORCEMENT

Washington, DC 20240

January 28, 2011

The Honorable Edward J. Markey
Ranking Member, Committee on Energy and Environment
House of Representatives
Washington, D.C. 20515

Dear Congressman Markey:

Thank you for your January 7, 2011, letter regarding the forensic examination of the *Deepwater Horizon* blowout preventer (BOP) stack.[1] We are taking all appropriate steps to preserve the integrity of the forensic examination of the BOP stack being performed by Det Norske Veritas (DNV) and, more generally, to ensure the credibility of the investigation being conducted by the Joint Investigation Team (JIT) of the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) and the United States Coast Guard (USCG).

BOEMRE's Investigations and Review Unit (IRU) has launched an investigation into (1) DNV's failure to properly disclose its intention to use Transocean employee Jim Owen McWhorter to act at the direction of DNV employees in conducting the forensic examination; (2) McWhorter's activities and their effect (if any) on the integrity of the forensic examination; (3) the use of any other Cameron or Transocean employees to perform work on behalf of DNV; (4) the role (if any) of the JIT, BOEMRE, USCG, or Department of the Interior (DOI) personnel in allowing McWhorter (or anyone else) improper access to the BOP; and (5) generally, whether DNV has taken steps to ensure that it discloses any and all potential conflicts of interest, as it is required to do under its contract with BOEMRE.

To date, the IRU has reviewed a number of relevant documents and conducted eleven interviews of DNV, BOEMRE, DOI, and USCG personnel. The IRU's investigation has not been concluded.

While it would be premature to draw any final conclusions prior to the completion of the IRU's investigation, we can at this time provide a significant amount of information regarding the concerns you have raised. First, we provide some factual context necessary to understand why personnel from BP, Transocean, and Cameron are involved in the forensic examination of the BOP stack. Second, we describe the closely coordinated activities of the JIT, other Federal agencies, and other entities to recover the

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[1] In this letter, the term "BOP stack" refers collectively to both the blowout preventer and the lower marine riser package (LMRP).

BOP stack and to prepare it for forensic analysis. Third, we explain why, based upon the information gathered to date, we believe that the forensic examination of the BOP stack has not been compromised. Fourth, we will state the steps that have been taken to address the concerns that have been raised by the Chemical Safety Board (CSB).

The BOEMRE/USCG Joint Investigative Team

The BOEMRE/USCG Joint Investigation was convened by the Secretaries of DOI and Homeland Security (DHS) on April 27, 2010, under the authority of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1348, as well as 14 U.S.C. § 141 and 46 U.S.C. §§ 6301 *et seq*., and implementing regulations. DOI and DHS coordinate their investigative authority through a 2009 Memorandum of Agreement (MOA) between BOEMRE (then the Minerals Management Service) and the USCG. In relevant part, and consistent with each Department's respective statutory authority, the MOA assigns BOEMRE responsibility for investigating incidents associated with exploration and drilling operations for hydrocarbons on the Outer Continental Shelf, and assigns the USCG responsibility for investigating deaths, injuries, property loss, and environmental damage arising from such incidents. In this instance, the Secretaries relied on the MOA to appoint the JIT to jointly investigate the marine casualty, explosion, fire, pollution, and sinking of the mobile offshore drilling unit *Deepwater Horizon*.

Since its inception, the JIT has worked closely with the Unified Area Command (UAC) and has continuously consulted with both the Civil and Criminal Divisions of the U.S. Department of Justice. This coordination has been critical to adequately respond to the incident, to ensure the thorough investigation of root causes, and to protect and preserve relevant evidence for future legal proceedings.

The JIT also recognized the important role of the companies and individuals involved in any effort to determine the root causes of this disaster. Relevant statutes and regulations governing USCG investigations, which, together with BOEMRE authorities, are applicable to the JIT, provide a specific and defined role for parties that could be affected by the investigation.[2] These individuals and entities are defined as "parties in interest" (PIIs) and are, by law, granted rights to participate in the investigation. *See* 46 U.S.C. § 6303; 46 C.F.R. §§ 4.03-10, 4.07-35, 4.09-15.

Under applicable USCG rules, the JIT is required to formally designate certain PIIs and may designate others in the exercise of its discretion. These rules are aimed at facilitating the discovery of relevant and reliable evidence. The Coast Guard Marine Safety Manual provides that "the role of the Parties in Interest is to serve the purposes of

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[2] The JIT Convening Order explains that both Coast Guard and BOEMRE statutes and regulations govern the JIT, but that the JIT's public hearings must follow Coast Guard authorities governing Marine Boards of Investigation.

the investigation."[3] For this investigation, the JIT designated BP, Halliburton, Transocean, Cameron, other organizations and certain individuals as PIIs. This designation means that Transocean, Cameron, and the others have been given a formal role in facilitating the JIT's investigation, which includes the examination of all evidence.[4]

Judge Carl J. Barbier, who presides over the Deepwater Horizon multi-district litigation (MDL) in New Orleans, has recognized the importance of involving PIIs in various phases of the investigation. In a September 2010 hearing, Judge Barbier described the parties' involvement as "reasonable" and stated that, " … in terms of the longer-term issues of preservation, forensic testing analysis and forensic examination, again, from what I've heard here, there will be opportunity for consultation and input from the interested parties."[5]

Preparing for the Forensic Testing of the BOP Stack

In July 2010, the JIT began a search for a third party expert capable of performing a forensic examination of the BOP stack. Because the BOP stack was oilfield equipment and not a marine apparatus, the JIT determined that BOEMRE, in coordination with DOJ, would take the lead on identifying experts qualified to perform this forensic work. [6]

Though it was not yet clear where the forensic examination would be conducted, the contracting team prepared a statement of work and circulated it for review by JIT members, BOEMRE and USCG personnel and counsel, and DOJ representatives from both the Civil and Criminal Divisions. BOEMRE also conducted detailed market research into potentially qualified forensic examiners. After intensive efforts to locate an acceptable facility to host the examination that was both secure and accessible to marine transport, the JIT, in close consultation with DOJ and USCG, determined that the

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[3] USCG Marine Safety Manual, Volume V: Investigations and Enforcement, Chapter Five: Levels of Effort and Types of Investigation, H.2.a and g.

[4] Other government investigators, such as the National Transportation Safety Board (NTSB), have similar processes. The involvement of the parties with more direct access to facts and technical knowledge is, thus, thought by a number of investigators to benefit an investigation, particularly where highly specialized technology is involved. For instance, the *NTSB Investigation Manual* provides that an NTSB investigation "typically extends party status to those organizations that can provide the necessary technical assistance to the investigation" and expressly includes operators and manufacturers of equipment, as warranted. In NTSB investigations, technical representatives of these parties are directly involved in evidence recovery, review and evaluation.

[5] Transcript of Motion Proceedings Heard before the Honorable Carl J. Barbier United States District Judge, Sept. 3, 2010.

[6] The Justice Department stated that "to ensure that [evidentiary] standards are met, any recovery, testing or analysis of evidence should be done with the concurrence and observation of the United States Department of Justice through the Deepwater Horizon Criminal Investigation Team." August 5, 2010 correspondence from H. Stewart, DOJ/ENRD to W. Lewis, DOI, and Capt. D. Fish, USCG.

National Aeronautics and Space Administration (NASA) Michoud Assembly Facility in New Orleans met the criteria. Other accident evidence was already being stored on site at Michoud under USCG and Federal Bureau of Investigation (FBI) guard, and USCG had an ongoing lease at Michoud and existing relationships with the relevant NASA units there.

With close coordination among JIT, UAC, USCG, BOEMRE, U.S. Navy, DOJ and the FBI Evidence Recovery Team (ERT), the BOP stack was retrieved from the Macondo well on September 4, 2010, and short-term preservation procedures were executed at the recovery site. The BOP stack was then transported by barge to the Michoud facility, where a team that included representatives of the JIT, USCG, BOEMRE, NASA, DOJ, FBI, and the Environmental Protection Agency (EPA), had prepared the test site. Site preparation activities included constructing a test pad capable of supporting the 360-ton BOP stack with heavy lift capability, obtaining environmental containment equipment, and the erection of a temporary structure to house the BOP stack.

Extensive security measures in place at the BOP site were developed and implemented in close coordination with DOJ and FBI to preserve the integrity of the evidence. The JIT installed a security zone around the harbor area where the BOP stack is located and initiated a 24/7 site security system that included strict controls on access, as well as continuous monitoring of the area by security officers and the FBI ERT.

On September 2, 2010, BOEMRE contracted with DNV Columbus, Inc. (DNV), an experienced forensic failure analysis and materials science firm, to perform a forensic examination of the BOP stack and prepare a report of its findings to the JIT. Under its contract with BOEMRE, DNV was required, with input from others, to prepare a forensic test plan for approval by the JIT. On September 14, DNV conducted a test plan workshop in Houston with technical representatives of the PIIs and MDL plaintiffs, DOJ and others, and relied on their combined input as well as DNV's own expertise to prepare a draft BOP testing protocol for review by the interested organizations and parties. After the test plan workshop, the draft testing protocol was distributed to the participants of the workshop and other organizations including CSB, the National Academy of Engineering, and the Presidential Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling. DNV received, reviewed, and in many instances adopted more than 200 comments and suggested revisions to the draft testing plan—including some submitted by the CSB—and submitted a final BOP testing protocol for review and approval by the JIT.

To further benefit the investigation, the JIT, in consultation with DNV, DOJ and other interested parties, formed a technical working group (TWG) to provide DNV with technical support and expertise as DNV conducted its forensic examination.[7] On

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[7] The 360-ton BOP stack is a complicated piece of equipment that had been significantly modified by the operator after delivery from the manufacturer. Thus, technical consultation from both the manufacturer and the operator was deemed critical for both the effectiveness of the examination and for the safety of the examiners.

Monday, November 1, the JIT selected the six-member TWG, which included one expert each from Cameron, Transocean and BP, an expert working for DOJ, an expert representing the plaintiffs in the MDL, and an expert nominated by CSB. The JIT also determined that a controlled-access file transfer protocol (ftp) site would be used to facilitate the sharing of photo, video and documentary media captured during the BOP forensic examination and be made available to the TWG participants.

DNV's Failure to Disclose the Work of Jim Owen McWhorter

Early in its efforts to prepare for forensic testing of the BOP stack, DNV began to work with a number of technicians, including a Transocean employee, Jim Owen McWhorter, who is a subsea engineer with specific knowledge of the *Deepwater Horizon* BOP stack. At that time, the JIT and DNV needed to conduct a number of procedures to prepare to lift the BOP off of the barge and onto the test skids at the Michoud site.

Gary Kenney, a sub-contractor working for DNV on the day-to-day forensic testing activities, has told us that DNV needed assistance from someone with detailed technical knowledge of this unique BOP stack. In September 2010, after allowing McWhorter to assist in the UAC's retrieval of the BOP stack from the sea floor, Transocean gave permission to McWhorter to provide assistance to DNV without charging DNV for his services. When DNV's forensic work began on November 15, 2010, DNV continued to allow McWhorter to provide technical assistance. Much of this initial work was focused on identification of different flow lines, valves, circuits, and other BOP stack components.

DNV's contract required DNV to disclose all potential conflicts of interest through prescribed procedures and to provide a mitigation plan for approval by the contracting officer. The relevant contract provisions were written specifically to address the reality that potential conflicts of interest were likely to arise given the web of connections and relationships among firms and individuals in the oil and gas drilling and production business. The contract states the basis for conflicts of interest and specifies that "[e]ntities that have been designated by the JIT as Parties-In-Interest are presumed to have an actual conflict of interest." According to the terms of DNV's contract, in the event of a potential or actual conflict, DNV must propose a mitigation plan and cannot allow a conflicted person or entity to assist in the performance of the contact without written authorization from the BOEMRE contracting officer.

DNV admits that it never disclosed its intention to allow McWhorter to provide technical assistance to the BOEMRE contacting officer or the contracting officer's technical representative. These BOEMRE employees have the responsibility of ensuring contract performance, including the conflict-of-interest provision. Based upon evidence gathered to date, it appears that others working at Michoud (including TWG members and representatives of the JIT, DOJ, and DOI Inspector General's Office) were aware of McWhorter's work with DNV during the week of November 15-19, 2010, and in the following weeks (until December 15, 2010). Some individuals (including DNV

employees and representatives of the JIT) were apparently aware earlier that McWhorter was working with DNV. DNV officials admit that they were at fault for not making the disclosure required under the contract and for allowing McWhorter to work on the BOP stack without written consent of the BOEMRE contracting officer.

Based upon evidence gathered to date, we believe that BOEMRE officials who did not work on-site at Michoud were unaware of McWhorter's work on behalf of DNV and of the fact that DNV had not properly disclosed its intention to work with McWhorter.

BOEMRE's IRU is continuing to investigate this matter. To date, after interviewing 11 individuals involved in the forensic testing of the BOP, the IRU is aware of no evidence that McWhorter's work with DNV affected the integrity of the forensic examination of the BOP stack. At all times, McWhorter conducted his work under the direction and observation of DNV personnel. In addition, other TWG members were able to view all of his actions. All work done on the BOP stack was recorded by a videographics company hired by DNV. There are multiple cameras that are positioned around the BOP stack to capture all activities. When work is done on the top of the BOP equipment, a cameraman is also positioned on a man-lift to record the work. In addition, FBI ERT agents have observed and photographed the work being done on the BOP stack.

DNV has directed its videographer to compile a series of DVDs that will contain all video footage of work done by McWhorter and has agreed to provide copies to BOEMRE. BOEMRE will also ask DNV to provide copies of all raw video footage taken by the videographer, so that it can, if necessary, review work done on the BOP stack by anyone on any particular day. Until the IRU has reviewed the relevant video footage (and all related materials) and otherwise completed its investigation, it will not make any findings on the specific incidents involving McWhorter that were raised in your January 7, 2011 letter.

Other Alleged Conflicts of Interest

Your January 7 letter mentions, quoting a memorandum prepared by a member of CSB's staff, that Transocean's TWG member, Geoff Boughton, has been used as a "consultant" to DNV. BOEMRE's IRU is aware of no facts to support this allegation. While the IRU's investigation continues, it currently believes that Boughton was asked to view the LMRP from a man-lift and to provide guidance on how to remove a retaining ring from the LMRP (after a number of unsuccessful attempts). The TWG members are available to provide this type of communication on highly technical issues. Practical considerations have dictated that, from time to time, DNV personnel have had one-on-one discussions with different TWG members (including with CSB representatives). If this episode is the sole basis of CSB's allegation, it does not appear to support a finding that Boughton has been improperly functioning as a DNV consultant.

Your January 7 letter also mentions, again quoting a memorandum prepared by a member of CSB's staff, that a Cameron employee, Ray Fain, has participated in the BOP stack testing "as a worker." DNV disclosed its intention to use Fain's services on December 21, 2010, to both the BOEMRE contracting officer and to the members of the TWG.[8] DNV needed Fain to connect a specially designed Cameron laptop containing proprietary software – called the Portable Electronic Test Unit (PETU) – so that DNV could test the yellow and blue control pods. Because the PETU uses Cameron proprietary technology, DNV had to rely on someone employed by Cameron to operate it. No TWG members (including CSB) objected at the time to the involvement of Fain. Fain's work was done in close proximity to DNV personnel and TWG members. While the IRU's investigation continues, it does not currently believe that Fain's well-documented and observed work with Cameron's PETU establishes that he has been improperly functioning as a DNV consultant.

DNV's Handling of Potential Conflicts of Interest (Going Forward)

DNV has admitted that it was at fault in failing to disclose McWhorter's role in the forensic work performed by DNV on the BOP stack from October 14 – December 15, 2010. In a series of communications and in-person meetings, on-site DNV personnel have indicated that they are now more aware of their obligations under the contract and will disclose all potential conflicts (along with a mitigation plan) prior to engaging a potentially conflicted person in forensic work on the BOP stack. Further, the BOEMRE contacting officer will provide DNV with a series of clear instructions on the vetting and clearance of personnel with possible conflicts of interest, and the contracting officer's technical representative will maintain a greater presence at the test site to ensure that these instructions are followed.

We will continue to do everything possible to preserve the integrity of the JIT's investigation and of the forensic analysis being performed by DNV. As we have mentioned, the BOEMRE IRU's investigation is ongoing. In addition, we are gathering information responsive to the requests you made in your January 7 letter. We hope to provide you this information promptly.

We appreciate your interest in this important matter. We will continue to provide information and updates when warranted. If you have additional questions, please do not hesitate to contact me at 202-208-3500.

Very truly yours,

Michael R. Bromwich

[8] DNV admitted that it did not, as required by the contract, wait for written authorization from the contracting officer before allowing Mr. Fain to operate the Cameron Portable Electronic Test Unit.