

U.S. House of Representatives
Committee on Natural Resources
Washington, DC 20515

January 7, 2011

Mr. Michael Bromwich
Director
Bureau of Ocean Energy Management, Regulation and Enforcement
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

Dear Director Bromwich:

I write to raise additional serious concerns regarding the manner in which the Joint Investigation Team (JIT) chaired by the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) along with the U.S. Coast Guard (USCG), is conducting its testing of the Deepwater Horizon blowout preventer (BOP). While I appreciate your December 23, 2010 response¹ to my December 21, 2010 letter² and subsequent discussions that your staff had with mine on January 5, I am concerned that your response, as well as statements made by BOEMRE personnel to members of the media, contain significant inaccuracies which, if uncorrected, could raise questions regarding the credibility of the investigation. I remain deeply concerned that this vital investigation could be compromised by decisions to allow inappropriate corporate access to the testing while simultaneously barring independent government investigators the access they require and are due.

I am particularly troubled by statements made by you and your staff that 1) federal investigators had been unaware that Mr. Owen McWhorter, a Transocean employee who served as the Subsea Supervisor for the Deepwater Horizon in the weeks leading up to the accident, had been involved in actual testing and manipulation of the BOP on behalf of the JIT and 2) that other employees of Cameron or Transocean, which have both been named as defendants in the Deepwater Horizon case brought by DOJ, are not permitted to engage in "hands-on participation in testing". Neither statement appears to be true.

In light of the seriousness of the situation, I urge you to take all necessary steps to 1) immediately remove all personnel whose participation in formal, contractual or advisory roles in the BOP testing efforts presents perceived or actual conflict-of-interests, 2) ensure that any employees of companies such as Cameron and Transocean whose technical input the JIT may need on occasion are barred from engaging in any hands-on or unsupervised testing activities, 3) immediately ensure that the Chemical Safety Board (CSB), which is conducting an independent

¹ See http://markey.house.gov/docs/12-23-10_bromwich_to_markey.pdf

² See <http://markey.house.gov/index.php?option=content&task=view&id=4180&Itemid=125> for a link to the correspondence and attachments.

investigation, is given the unhindered access to the site and timely access to documents it requires to conduct its job and 4) investigate (and take necessary steps to remedy) the conduct of all JIT and BOEMRE staff who were responsible for the decisions to allow Cameron and Transocean employees improper access to the BOP and those who made inaccurate statements regarding these matters.

My December 21 letter raised several concerns, which included issues related to allegations that:

- The JIT (or its contractor, Det Norske Veritas (DNV)) has employed and may still be employing employees of companies who have been named as defendants in the Deepwater Horizon case brought by DOJ as technical consultants to the testing process. In particular, Mr. Owen McWhorter, a Transocean employee who actually served as the Subsea Supervisor for the Deepwater Horizon in the weeks leading up to the time of the accident, has been involved in actual testing and hands-on manipulation of the BOP on behalf of the JIT.
- The BOP Technical Working Group Participation Agreement³ (the Agreement) limited each party (BP, Transocean, Cameron, DOJ, the civil plaintiffs and the CSB) to one participant inside “Level 3,” the restricted area closest to the BOP. However, it is my understanding that while the JIT has prohibited CSB personnel from accessing Level 3, it has *also* allowed more than one employee from Cameron and Transocean into this area.

In your December 23 response⁴, you addressed some of these matters, and additionally, Melissa Schwartz of your staff has made certain statements to members of the media regarding them. Regrettably, your response and these press statements contain significant omissions and inaccuracies. I summarize these below:

1) Assertion: The JIT was unaware of Transocean’s Owen McWhorter’s involvement in the investigation

A December 23 article in the Associated Press⁵ states that BOEMRE spokeswoman Melissa Schwartz maintained “that DNV, the firm handling the testing, allowed [Transocean’s Owen] McWhorter to do that work unbeknownst to federal investigators. She said McWhorter was removed from the process within days.” This appears to be untrue.

As you must know, the JIT quickly identified Mr. McWhorter, who previously served as Subsea Supervisor for the Deepwater Horizon in the weeks leading up to the time of the accident, as a person of interest to the investigation. In fact, according to the JIT Deepwater Investigation website⁶, the JIT invited Mr. McWhorter to testify at its July 21 hearing, but had to cancel that hearing because neither Mr. McWhorter nor the other Transocean witnesses complied with their subpoenas.

³ See Attachment 1 at <http://markey.house.gov/index.php?option=content&task=view&id=4180&Itemid=125>

⁴ See http://markey.house.gov/docs/12-23-10_bromwich_to_markey.pdf

⁵ See “Fed Board: Keep Companies From Oil Spill Evidence,” Associated Press, December 23, 2010

⁶ <http://www.deepwaterinvestigation.com/go/doc/3043/673655/&printerfriendly=1>

Additionally, the Agreement clearly states that all personnel seeking access to the site must be pre-authorized and must sign in each day. Finally, the Site Access Protocols⁷ states that the names of all those with access to Level 3 need to be on a daily access list, and that “the DNV-designated site manager will monitor all personnel with Level 3 access at all times.”

It is also my understanding⁸ that BP officials raised a concern about Mr. McWhorter’s involvement directly to USCG Captain Suzanne Englebert (one of the principal government officials in charge of the BOP investigation) late last year.

Finally, I have been informed⁹ that on November 19, a member of CSB’s staff raised its concerns with access to Level 3 by representatives of Cameron and Transocean to Captain Englebert and David Dykes (the JIT Board Co-Chair and BOEMRE official). According to this staff member:

“During a conversation on November 19th with Captain Englebert and David Dykes (JIT Board Co-Chair), when I raised my first objection about Cameron having two employees simultaneously in Level 3, Captain Englebert told me the second employee was a technician contracted with DNV and that Transocean had a similar arrangement. After Captain Englebert informed me of the second Transocean employee, it took me over a day to identify Owen McWhorter. As I previously communicated via e-mail, Mr. Dykes expressed hostility to objections raised that day. His comment was “if you don’t like it, take us to court”.

Silvia Murphy (DOI Solicitor) stated to me via e-mail (11/19/2010) about the Cameron technician and Owen McWhorter, “They work at the direction and under the direct supervision of DNV on behalf of the JIT. This process is provided for in DNV’s contract with the JIT and is distinctly different from the Technical Workgroup.” From the subject of her e-mail “Phone conference with JIT cochair”, I believe she involved Mr. Dykes in the discussion. USCG LCDR Jeff Bray is a JIT attorney and he was copied on that e-mail as well.”

Given all this, for a BOEMRE official to assert that the JIT either didn’t know of Mr. McWhorter or of his involvement with the investigation is patently absurd.

2) Assertion: Representatives of companies such as Transocean and Cameron are not allowed to engage in “hands-on participation in testing.”

Your response¹⁰ states that DNV recognizes that “hands-on participation in testing” by parties to the Agreement such as Transocean or Cameron is not allowed. Additionally, in

⁷ See <http://markey.house.gov/docs/jitsiteaccessprotocolsfinal.pdf>

⁸ January 5, 2011 memo from CSB’s Dan Tilemma to Daniel Horowitz, http://markey.house.gov/docs/csbbmemo_tillema_to_horowitz_final.pdf

⁹ January 5, 2011 memo from CSB’s Dan Tilemma to Daniel Horowitz, http://markey.house.gov/docs/csbbmemo_tillema_to_horowitz_final.pdf

¹⁰ See http://markey.house.gov/docs/12-23-10_bromwich_to_markey.pdf

December 23 articles in the Washington Post and Houston Chronicle¹¹, BOEMRE spokeswoman Melissa Schwartz is reported to have said in an email that "the companies have been permitted to provide technical expertise through an agreement reached with the court, for the sole purpose of answering any technical questions the DNV personnel performing the examination may have. Representatives from these companies are observers only and are not involved in the examination."

However, a December 23 letter¹² written by Dr. Rafael Moure-Eraso, Chair of the CSB to you contains photographic evidence showing December 21 images of Cameron employees operating the hydraulic control units for the BOP (known as PODs) and a Transocean employee acting alone in directing DNV workers. The December 13 letter from Dr. Moure-Eraso contains a November 24 image of Transocean's Owen McWhorter working to remove the drill pipe from the Lower Marine Riser Package, a November 23 image of him working with the hydraulic fluid on the Lower Marine Riser Package and a December 10 image of him removing the upper pipe ram of the BOP.

Additionally, I have learned¹³ that the manner in which both Mr. McWhorter and other Transocean and Cameron officials participated in these hands-on activities could not possibly have been misinterpreted or overlooked. According to a member of CSB's staff:

"From my personal observations of the BOP testing, Mr. McWhorter acted more as a worker than a "consultant". We have multiple photographs (taken from Level 1) of Mr. McWhorter actually performing work on the BOP. In fact, during the time period when Mr. McWhorter was at the testing site, he appeared to be one of the primary workers for the BOP testing. If there was hands-on work to be done on the BOP, Mr. McWhorter was typically among the personnel performing the work. From my perspective, it is not plausible that JIT representatives overseeing the BOP testing were not fully aware that Mr. McWhorter was present and participating in a "hands-on" capacity.

Following the departure of Owen McWhorter from the BOP testing after the CSB protested the "hands on" participation of Cameron and Transocean personnel the "hands on" role of these companies in the testing was not terminated. Instead, the Transocean Technical Working Group (TWG) representative, Geoff Boughton served as both the Transocean TWG representative and a consultant to DNV. In this capacity, Mr. Boughton has unique one on one discussions with DNV personnel, providing him with direct influence on the testing. This provides Transocean more leverage and influence than what other members of the TWG possess.

Cameron also has an employee who has participated in the BOP testing as a worker rather than a consultant. During the week of December 20th – 23rd, Ray Fain participated in the BOP testing activities related to the Blue and Yellow pods. Mr. Fain operated the

¹¹ "Arrangement with firms taints probe of Deepwater oil spill, U.S. agency alleges," Washington Post, and "Agency says integrity of BOP testing jeopardized," Houston Chronicle, December 23, 2010

¹² http://markey.house.gov/docs/12-23-10csbletter_response_to_bromwich.pdf

¹³ January 5, 2011 memo from CSB's Dan Tillema to Daniel Horowitz, http://markey.house.gov/docs/csbmemo_tillema_to_horowitz_final.pdf

Portable Electronic Test Unit (PETU) used to function the Blue and Yellow pods for the flushing activities conducted that week. Rather than acting as a consultant and informing DNV how to operate the PETU in a “hands off” capacity, Mr. Fain operated the PETU himself, thereby directly controlling the sequencing of the various pod components. CSB Investigator Kelly Wilson was at the site and directly witnessed this activity.”

During a January 5 discussion between your staff and mine, your staff indicated that BOEMRE was looking into some of these matters, and I urge you to complete your investigation in as expeditious and thorough a manner as possible.

3) Assertion: There can be no independent photography of the BOP examination.

Your response¹⁴ also states that “there can be no independent photography of the BOP examination.” However, the Site Access Protocols¹⁵ state that photography is not allowed inside the BOP Stack Forensic Test Site – and that area by definition does not include Level 1. All of the photographs taken by CSB investigators were taken from Level 1. I also understand¹⁶ that on November 15 2010, all parties to the Agreement were verbally instructed by USCG Captain Suzanne Englebert that photography from Level 1 was allowed. Additionally, your response asserts that photography of the live video feed of the BOP examination inside Level 3 has always been prohibited. However, it is my understanding¹⁷ that this direction was first provided on December 6, 2010 – and that CSB staff have abided by it since then.

4) Assertion: CSB personnel are afforded the same access to Level 3 as everyone else, except when safety considerations require changes.

Your response¹⁸ states that the only exception to the rule guaranteeing any party to the Agreement one representative inside the most sensitive Level 3 area is when safety reasons dictate deviations are necessary. However, while your response explained that activities involving “high pressure” necessitated the inclusion of *more than one* representative from Transocean and Cameron, it did not explain why *no* representative from CSB was allowed to access the area.

I request that you please provide me with the following documents and responses to questions:

1. Please provide me with a copy of the contract between the Department of Interior (or the JIT, as appropriate) and DNV establishing the terms of DNV’s work in the BOP examination.
2. Please provide me with a list of all non-DNV personnel (including the employer of each such individual) that have been formally or informally engaged by the JIT or the DNV to

¹⁴ See http://markey.house.gov/docs/12-23-10_bromwich_to_markey.pdf

¹⁵ See <http://markey.house.gov/docs/jitsiteaccessprotocolsfinal.pdf>

¹⁶ Private communications with CSB staff

¹⁷ Private communications with CSB staff

¹⁸ See http://markey.house.gov/docs/12-23-10_bromwich_to_markey.pdf

assist with the BOP examination. For each such individual who is employed by a defendant in the Deepwater Horizon case brought by DOJ, please additionally provide me with 1) records documenting the conflicts of interest review performed and 2) documentary evidence establishing that the formal or informal engagement has now been terminated on the grounds that it constitutes the same sort of conflict of interests posed by the engagement of Mr. McWhorter. If no such evidence exists, please explain why not.

3. Please fully describe all steps you have taken (or plan to take) to investigate (and take necessary steps to remedy) the conduct of all JIT and BOEMRE staff who were responsible for the decisions to allow Cameron and Transocean employees improper hands-on access to the BOP and those who made inaccurate statements to members of the media regarding these matters. If no such steps have been or plan to be taken, why not?
4. The Agreement requires that all Level 3 participants must sign in at the security entrance each day. Additionally, the Site Access Protocols¹⁹ state that all those that require access to Level 3 need to be on a daily access list, and that “the DNV-designated site manager will monitor all personnel with Level 3 access at all times.” For each day that work was performed on the BOP, please provide copies of the sign-in sheet and Level 3 daily access list, ensuring that each individual’s name and employer is also provided.
5. Your response²⁰ states that DNV recognizes that “hands’ on participation in testing” by parties to the Agreement such as Transocean and Cameron is not allowed, but photographic evidence indicates that DNV (and the JIT, which is overseeing these efforts) has evidently ignored this rule on more than one occasion. What are you doing to investigate the extent to which employees of defendants named in DOJ’s Deepwater Horizon case (including but not limited to Transocean or Cameron) have engaged in hands-on manipulation of the BOP or other components? Please provide a list of all such instances, which includes the names and employers of such individuals, the type of hands-on manipulation they engaged in, the date on which such activities occurred, any documentation of any changes to the BOP or its control systems made as a result of these manipulations, and the reason such activities were allowed by DNV and the JIT.
6. According to Dr. Moure-Eraso’s December 23 letter²¹ to you, on December 21, DNV allowed the last minute substitution of a POD function test protocol written by Cameron for one that had been previously circulated to parties to the Agreement. How can the independent credibility of the protocols used to examine the evidence of the Deepwater Horizon accident be assured when the JIT allows them to be developed by a subject of the investigation without allowing independent parties to see them in advance and provide technical input as needed? Please provide me with copies of all documentation related to this function test protocol and any review of such protocol by DNV or JIT personnel.

¹⁹ See <http://markey.house.gov/docs/jitsiteaccessprotocolsfinal.pdf>

²⁰ See http://markey.house.gov/docs/12-23-10_bromwich_to_markey.pdf

²¹ See http://markey.house.gov/docs/12-23-10csbletter_response_to_bromwich.pdf

7. According to Dr. Moure-Eraso's December 23 letter²² to you, the JIT has continued to insist that the CSB sign a separate non-disclosure agreement before it will receive access to any of the photographic, video or other technical materials associated with the investigation. However, CSB's statutory authority²³ enables it to obtain information relevant to its investigations, its employees are governed by the Trade Secrets Act and its contractors are bound by strict confidentiality agreements, all of which render additional non-disclosure agreements unnecessary. In fact, it is my understanding that all other parties (including Cameron and Transocean) that have responded to CSB's subpoenas for materials related to its Deepwater Horizon investigation have been satisfied with the manner in which CSB protects proprietary information. On what basis does the JIT continue to insist that CSB sign such an agreement?
8. Please clarify the protocols related to photography of the BOP testing process.
 - a. Is photography from Level 1 allowed? If not, on what basis and in what document is that prohibition contained? Please provide me with copies of any such documentation.
 - b. Is it true that the JIT first announced that photography of the video feed was prohibited on December 6? If not, when and in what document was this direction first provided? Please provide me with copies of any such documentation.

Please provide me with your written response to this letter as well as your assurance that these problems have been remedied no later than Friday January 28, 2011. If you have any questions or concerns, please have your staff contact Dr. Michal Freedhoff of my staff at 202-225-2836.

Sincerely,



Edward J. Markey
Ranking Democratic Member
House Committee on Natural Resources

²² See http://markey.house.gov/docs/12-23-10csbletter_response_to_bromwich.pdf

²³ See 42 U.S.C. § 7412(r)(6)(Q)