INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS

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4 December 2003

Department of Interior
Minerals Management Service
Mail Stop 4024
381 Elden Street
Herndon, VA 20170-4817

Re: Incident Reporting Requirements

To Whom It May Concern:

The International Association of Drilling Contractors (IADC) is a trade association representing the interests of oil and gas well drilling contractors worldwide. Our membership currently includes all contractors providing contract-drilling services on the U.S. Outer Continental Shelf (OCS). We are pleased to offer the following comments in response to the Notice pf Propose Rulemaking (NPR) on Incident Reporting Requirements published in the Federal Register on 8 July 2003. These comments are submitted without prejudice to any IADC member's right to have or express differing or opposing views.

For many years, the IADC has urged the Minerals Management Service (MMS) and the United States Coast Guard (USCG) to simplify and consolidate their requirements for reporting of incidents and illnesses. In 1981, a study commissioned by the United States Geological Survey, the National Research Council found that:

> "The Department of the Interior, the Coast Guard, and the Environmental Protection Agency should take steps to strengthen the safety information elements of the government's OCS regulatory program. They should:
> - Review and revise existing reporting requirements (e.g., those covering accidental discharges, workplace accidents, and fires and explosions) to ensure that the information gathered for safety purposes is limited to what is really necessary for the regulation of safety and is useful in monitoring and analyzing the safety of OCS activities. "

In May 1984, responding to this report in their joint Report to Congress mandated by section 21 of the Outer Continental Shelf Lands Act Amendments of 1978, the MMS and the USCG stated:

> "A Memorandum of Understanding (MOU), signed on December 18, 1980, between the Geological Survey and the Coast Guard addresses the coordination of accident investigations. This MOU defines the relationship between the MMS and the Coast Guard. The types of incidents addressed involve collisions, fires and explosions, deaths and injuries, pollution, facilities, material, and equipment."

Since that time, both the MMS and the USCG have published rulemaking proposals that have included within their scope their respective reporting requirements. As MMS is aware, IADC expressed concern at the MMS's inclusion of revised reporting and incident investigation requirements in its 13 February 1999 notice of proposed rulemaking (63 FR 1998) at a time when the MMS was well aware that the USCG was preparing a major rewrite of its Outer Continental Shelf Activities Regulations (33 CFR Subchapter N). The USCG published its NPR, including within its scope its own reporting requirements, on 7 December 1999 (64 FR 68416) – this rulemaking is still pending. (A more detailed review of the actions of the MMS and USCG with respect to the development of a coordinated approach to reporting and investigation of incidents is provided in enclosure (1).)

Our simple concern has evolved to disappointment and frustration with the MMS's publication of its 8 July 2003 NPR. While the MMS may have pre-decisional access to the text of the USCG's revision of Subchapter N and its reporting requirements, the regulated public does not. How can the regulated public be expected to respond to a proposed rule that purports to "clarify both MMS and USCG requirements" when it is not clear that the USCG was an active participant in the development of the NPR and provisions of the NPR are within the scope of the USCG's uncompleted rulemaking? There are certain controversial issues (*e.g.*, regarding the applicability of certain requirements to vessels and "vessels engaged in OCS activities") raised within the USCG's December 1999 proposal which are important to our members and are seemingly presented as settled matters only requiring clarification in the MMS's 8 July 2003 NPR.

Since the scope of the 8 July 2003 NPR includes reference to the reporting of injuries and illnesses using "the recording criteria in the Occupational Safety and Health Administration's (OSHA) regulations at 29 CFR 1904" we find it somewhat ironic that no mention is made of OSHA in the NPR. Absent the exercise of regulatory authority over workplace safety and health (including reporting requirements) by MMS or the USCG, OSHA's regulations would apply. OSHA and the USCG have completed Memoranda of Understanding (MOUs) both with respect to "Vessels Certificated and Inspected" by the USCG (48 FR 11365) and "Activities and Facilities" on the OCS (54 FR 39820). We view the existence of these MOUs (and the absence of MMS as a party to the MOUs) as acknowledgment of the primacy of the USCG's regulatory role with respect to occupational safety and health on vessels and OCS facilities. (Further information on the role of OSHA vis-à-vis the USCG is provided in enclosure (2).) Provisions of the 8 July 2003. The actions proposed by the MMS within this NPR seemingly attempt to further displace the USCG from this role.

While we can understand MMS's apparent frustration with the glacial pace of the USCG's rulemaking, we cannot accept a continued lack of coordination, and the resulting duplication if information collection and reporting requirements by the two agencies. IADC would urge MMS to suspend or withdraw this NPR until the MMS and USCG can develop and propose a single, consistent, approach for the reporting of incidents associated with OCS activities.

In whatever action the MMS (hopefully, in association with the USCG) takes on this NPR, we would ask that the following be considered by both agencies:

- Both the proposed rule and the existing reporting requirements of the MMS are of concern to contractors who might be obliged to disclose protected health information. While employers reporting similar information to OSHA and State OSH programs (and, presumably, the USCG) enjoy some degree of protection in reporting such information, we are unaware of any determination that similar protection has been afforded to drilling contractors reporting to the MMS. This is due to the fact such protection as exists is with respect to the employer reporting directly to a regulatory agency that has direct jurisdiction. No protection exists for employers reporting to their clients (*e.g.*, operators) for subsequent reporting to an agency that does not regulate the drilling contractor. A more detailed description of our concerns regarding medical privacy issues is provided in enclosure (3).
- The MMS and the USCG should attempt to reach agreement regarding the placement of responsibility for notifications and reports involving vessels, particularly if a combined reporting system is to be developed. If "notifications and written reports made by the owner, agent, master, operator, or person in charge of a vessel will satisfy the reporting requirements for that vessel," is MMS accepting that the vessel owner, agent, master or person in charge is, in all cases, authorized to act as an agent of the lessee or operator?
- The provisions of 30 CFR 250.196 will need to be amended to include reference to all information received by MMS (even if it is to be directed to the USCG). As the NPR did not include a proposal in this regard, a supplemental notice would seem warranted if this rulemaking goes forward.
- To facilitate any trend analysis, all monetary thresholds for notification and reporting should be indexed for inflation. Both agencies have processes in place for indexing civil penalties for inflation. A similar process should be applied to reporting thresholds.

We would also align ourselves with the detailed comments provided by the Offshore Operators Committee.

Our response to the "Request for Comments on Issues Related to the Proposed Rule" is provided as enclosure (4).

If you have any questions regarding these recommendations or comments, please contact me by phone at: (713) 292-1945, ext. 207.

Sincerely,

Alan Spackman
Director, Offshore Technical
and Regulatory Affairs

Enclosures:

(1) Review of U.S. Coast Guard and U.S. Minerals Management Service Activities regarding Reporting and Investigation of Incidents and Injuries on the Outer Continental Shelf
(2) Decisions relating to United States Coast Guard and Occupational Safety and Health Administration Jurisdiction over Mobile Offshore Drilling Units
(3) Concerns regarding Medical Privacy Issues
(4) IADC Response to Request for Comments on Issues Related to the Proposed Rule

Copy to: (via e-mail)

Office of Information and Regulatory Affairs
Office of Management and Budget
Attn: Desk Officer, Department of Interior

Commandant (G-MOS)
U.S. Coast Guard

Review of U.S. Coast Guard and U.S. Minerals Management Service Activities regarding Reporting and Investigation of Incidents and Injuries on the Outer Continental Shelf

The Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA), which were signed into law on 18 September 1978, established a national policy for the conduct of oil and gas operations on the Outer Continental Shelf (OCS) and mandated specific actions with regard to the safety of OCS operations. Among other things, the amendments called for a comprehensive assessment of the capability to ensure safety of oil and gas development on the OCS. Section 21(a) of OCSLAA states:

> "Safety regulations - (A) Upon the date of the enactment of this section, the Secretary and the Secretary of the Department in which the Coast Guard is operating shall, in consultation with each other and, as appropriate, with the heads of the Federal departments and agencies, promptly commence a joint study of the adequacy of existing safety and health regulations and of the technology, equipment, and techniques available for the exploration, development and production of the Outer Continental Shelf."

On 4 December 1978 (43 FR 56799), the United States Coast Guard (USCG) issued a final rule promulgating new requirements for virtually all U.S.-flag Mobile Offshore Drilling Units (MODUs). These regulations contained provisions (46 CFR 109.411) addressing the reporting of certain casualties and incidents involving these vessels, irrespective of their location (in State waters, on the OCS, or overseas).

In June of 1979, the U.S. Geological Survey (USGS) requested that the National Research Council (NRC) undertake an assessment of the sufficiency of OCS regulations and technologies as a major portion of the technical base and analysis for the Congressionally mandated study. In June 1981, the NRC completed its assessment and published the findings and recommendations in a report entitled "Safety and Offshore Oil." One of the recommendations of this report stated:

> "The Department of the Interior, the Coast Guard, and the Environmental Protection Agency should take steps to strengthen the safety information elements of the government's OCS regulatory program. They should:
>
> - Review and revise existing reporting requirements (e.g., those covering accidental discharges, workplace accidents, and fires and explosions) to ensure that the information gathered for safety purposes is limited to hat is really necessary for the regulation of safety and is useful in monitoring and analyzing the safety of OCS activities. The information should include causal factors in reporting of accidental spills. All this is necessary in implementing FIRS.
> - Conduct more comprehensive and frequent investigations of OCS accidents (and near misses) in order to develop information relative to the causes and consequences of accidents.
> - Make use of the safety information that is gathered in the identification, analysis, and resolution of safety problems, in the continuing evaluation of the adequacy of technologies in the application of BAST and in evaluating the efficiency of the regulatory process.
>
> * * * *"

It is noteworthy that the NRC report did not implicate the Occupational Safety and Health Administration (OSHA) in its discussion or recommendations regarding actions to strengthen the safety information elements of the OCS regulatory program.

On 20 September 1979 (44 FR 54499), the USCG issued an Advance Notice of Proposed Rulemaking (ANPRM) inviting public participation in the development of regulations for unregulated hazardous working conditions related to OCS activities. The ANPRM specifically notes that section 21(c) of the OCSLAA direct the Secretary of the Department in which the Coast Guard is operating to:

"promulgate regulations or standards applying to unregulated hazardous working conditions related to activities on the Outer Continental Shelf when he determines such regulations or standards are necessary."

On 19 December 1979, the USCG and OSHA agreed to a "Memorandum of Understanding Concerning Occupational Safety and Health on Artificial Islands, Installations, and Other Devices on the Outer Continental Shelf of the United States." This MOU was published in the Federal Register on 21 February 1980 (45 FR 9142). The USGS was not a party to this MOU. The MOU provides:

"I. PURPOSE

The purpose of this Memorandum of Understanding is to establish procedures to increase consultation and coordination between the United States Coast Guard (USCG) and Occupational Safety and Health Administration (OSHA) with respect to matters affecting the occupational safety and health personnel working on the Outer Continental Shelf of the United States.

II. DEFINITION

For purposes of the Memorandum, the following definition applies:

Working Conditions on the Outer Continental Shelf of the United States

Working Conditions related to activities, including diving, taking place on or from, on the waters adjacent to, or otherwise associated with artificial islands, installations, or other devices permanently or temporarily attached to the seabed and exploring for, developing or producing resources from the Outer Continental Shelf of the United States, or any device (other than ship or vessel) used for the purpose of transporting such resources (43 U.S.C. 1333(a)(1)).

III. AGENCY RESPONSIBILITIES

A. United States Coast Guard

The USCG has authority to promulgate and enforce Safety and Health Relations working on the OCS of the United States. In carrying out this responsibility on the OCS the Coast Guard will cooperate with the Occupational Safety and Health Administration to maximize the safety and health protection of employees, avoid duplication of effort, and avoid undue burdens on the maritime industry. The USCG, consistent with its statutory authority:

1. Promulgates regulations and may modify any regulation, interim or final, applying to hazardous working conditions related to activities on the Outer Continental Shelf, and promulgates such other regulations as may be necessary to promote the safety of life and property on the OCS;

2. Promulgates regulations to provide for scheduled onsite inspection, at least once a year, of each facility on the Outer Continental Shelf which is subject to any environmental, safety or health regulation promulgated by the Coast Guard pursuant to the OCS Act[1], and also provides for periodic onsite inspection without advance notice to the operator of such facility to assure compliance with such environmental, health or safety regulations;

3. Reviews any allegation from any person of the existence of a violation of a safety or health regulation or other unsafe working conditions.

4. Investigates and makes a public report on any death or serious injury occurring as a result of operations conducted pursuant to the OCS Act, and may investigate and report on other injuries, casualties or accidents.

5. Initiates appropriate civil and criminal procedures and other actions to enforce any provision of the OCS Act or any regulation issued under the Act.

B. Occupational Safety and Health Administration

The Occupational Safety and Health Act (OSH Act)[2] applies with respect to working conditions on Outer Continental Shelf Lands (29 USC 653(a)), but does not apply to working conditions with respect to which the Coast Guard or other Federal agencies exercise statutory authority to prescribe or enforce standards affecting occupational safety and health (29 USC 653(b)(1), Sec. 21(d) of the OCS Act). The Occupational Safety and Health Administration will cooperate with the Coast Guard to maximize the safety and health protection of employees, avoid duplication of effort, and avoid undue burdens on the maritime Industry.

Consistent with its statutory authority under the Occupational Safety and Health Act, OSHA:

1. Prescribes occupational safety and health rules and regulations as necessary to carry out its responsibility under the OSHA Act;

2. Inspects and investigates places of employment to insure compliance with any applicable OSHA requirements; OSHA Instruction CPL 2.46 January 20, 1982 Office of Compliance Programming 3. Responds to allegations of violations of applicable OSHA requirements and makes investigations where there are reasonable grounds to believe that a violation exists. 4. Issues citations and initiates appropriate civil and criminal procedures against employers for violations of applicable OSHA requirements;

IV. PROCEDURES

The two agencies agree, consistent with their statutory obligations, to observe the following procedures in carrying out their responsibilities to promote safe working conditions on the OCS:

A. Development and promulgation of standards

The Coast Guard will develop and promulgate necessary regulations to assure safe and healthful working conditions on the OCS. OSHA will continue to promulgate general standards, which may apply to working conditions on the OCS not being regulated by the Coast Guard. In developing regulations and standards, the two agencies will cooperate to the maximum extent possible. Such cooperation will include, but will not be limited to the following:

1. Information and data availability. For the purposes of identifying work hazards, determining accident or illness causes, developing corrective measures, and assessing the impacts of new or revised regulations or standards, the two agencies will exchange data and study results to the extent permitted by law.

2. Standards research and development projects. The two agencies will jointly participate in standards research and development projects of mutual interest and benefit.

3. Review of existing regulations and standards. The two agencies will jointly review existing USCG and OSHA regulations and standards to help identify hazards that require priority attention in Coast Guard regulations development projects;

4. Exchange of technical expertise. Each agency will provide the other with technical support, where feasible, to assist in the review of particular hazards or the development of regulations.

5. Early notice of rulemaking activities. The Coast Guard will provide for OSHA's review and consultation copies of drafts of advance notices, which relate to working conditions on the OCS. Likewise, OSHA will provide for the Coast Guard's review and consultation copies of drafts of advance notices of proposed rulemaking, notices of proposed rulemaking, and final rules, which have application to any working condition on the OCS. Publication of any rule, however, is not contingent upon receipt of comments.

B. Enforcement of regulations and standards

While OSHA has statutory responsibilities with respect to workplaces on the OCS, the following provisions have been drafted to emphasize the Coast Guard's increasing role for safety and health on the OCS, as provided under the OCS Lands Act Amendments of 1978 (Pub. L 95-372). Through this Act, Congress expressed the expectation that the Coast Guard would be the principal Federal agency in matters of occupational safety and health on the OCS.

1. *Routine enforcement activities:*

a. The Coast Guard will continue to enforce existing regulations issued under its authority, which affect working conditions on the OCS.

b. The Coast Guard will also enforce any new occupational safety and health regulations promulgated under its authority affecting working conditions on the OCS.

c. OSHA remains responsible for enforcing requirements adopted under the OSH Act, which apply to working conditions on the OCS for which the Coast Guard or other Federal agencies have not exercised their statutory authority to prescribe or enforce standards affecting occupational safety and health. To minimize any duplication, which may result from exercising this responsibility, OSHA will consult with the Coast Guard and seek to minimize the need for OSHA's routine inspection activity.

2. *Investigation of accidents:*

In accordance with regulations issued under its authority, the Coast Guard will investigate deaths, injuries and other casualties to the OCS Act. In the course of all such investigations, formal and informal, the Coast Guard will cooperate with OSHA regulations related to the casualty or accident. Such cooperation will include: promptly making investigation information available to OSHA; inviting OSHA attendance at Coast Guard formal hearings; and developing lines of inquiry suggested by OSHA. Where a Coast Guard investigation identifies an apparent violation of an applicable OSHA regulation the Coast Guard will promptly notify OSHA and subsequently will cooperate with OSHA with respect to any enforcement action OSHA may undertake. This cooperation may include, but is not limited to, providing transportation, as

available; provided, however, OSHA remains responsible for obtaining its own legal right of access to any facility.

3. *Investigation of allegations:*

The Coast Guard will review any allegation from any person of the existence of a violation of an occupational safety or health regulation or other unsafe working condition on the OCS and take appropriate action under the circumstances. Copies of complaints of occupational safety or health violations on the OCS received by OSHA will be referred to the appropriate Coast Guard district commander for action. The Coast Guard will notify OSHA as promptly as possible of the disposition of allegations forwarded by OSHA.

* * * * *

VIII.SAVINGS PROVISION

Nothing in this Memorandum shall be deemed to alter, amend, or affect in any way the statutory authority of the Coast Guard or OSHA. "

1"OCS Act refers to the Outer Continental Shelf Lands Act, as Amended (43 USC 1331 et. seq.).

2"OSH Act" refers to Public Law 91-596, the Occupational Safety and Health Act of 1970.

The MOU remains in effect, and unmodified.

On 1 May 1980 (45 FR 29072), the USCG issued a Notice of Proposed Rulemaking (NPRM) proposing comprehensive amendments to the regulations governing OCS activities. This rulemaking was specifically noted as separate from the ANPRM of 20 September 1979. The NPRM included the following:

- Provisions concerning investigations to be conducted by the Coast Guard, including a list of the types of incidents which might be investigated by the Coast Guard. (The proposed rules acknowledged that the USGS shares responsibility for investigations with the Coast Guard and sought to minimize the burdens that might accrue from separate and possibly duplicate investigations.)
- Provisions which would apply the requirements established in 46 CFR Subchapter I-A to foreign-flag MODUs operating on the OCS, including the provisions in part 109 regarding casualty reporting.
- Revised and expanded requirements requiring reporting of certain specified casualties and incidents. (Reporting of damage to facilities was limited to floating facilities.)
- Acknowledging that certain vessels engaged in OCS activities were not required to report deaths or injuries to the USCG, provisions extending the death and injury reporting requirements to all vessels engaged in OCS activities.

On 4 March 1982 (47 FR 9383), the USCG issued final rules governing Outer Continental Shelf Activities. Included in these rules were provisions, substantially unchanged from the May 1980 NPRM, governing investigations (33 CFR 140, subpart C) and the reporting of casualties and incidents associated with:

- OCS facilities (33 CFR §§146.30, 146.35, 146.40 and 146.45);
- Mobile offshore drilling units (33 CFR 146.203, by referral to 46 CFR part 109 (46 CFR 109.411 requires reporting of casualties); and
- Vessels (33 CFR 146.301)

On 8 January 1984 (49 FR 1085) the USCG issued a NPRM proposing additional workplace safety and health standards, mainly associated with personal protective equipment, but including provisions regarding the reporting of unsafe working conditions.

Having received the NRC's report, the Minerals Management Service (MMS, formerly USGS) formed a task force to review the report and prepare the Congressionally mandated report. The "Joint Report by Minerals Management Service and U.S. Coast Guard on Offshore Safety and Health

Regulations and Technology" was forwarded to the Congress by the President in May 1984. In response to the NRC's recommendation, the report states:

> "The MMS and Coast Guard agree that safety information elements of the OCS regulatory program need to be strengthened. Both agencies are re-evaluating the information that is collected and the use that is made of it.
>
> Prior to the Committee's assessment, the Coast Guard began to evaluate its existing safety information and analysis systems and to identify how state-of-the-art computer technology should be used. This activity is continuing with the evaluation and improvement of a casualty information system, to make it more responsive to causal analysis of recurring incidents. In fiscal year 1983, the Coast Guard revised its accident reporting form to provide the input data necessary to most effectively use this casualty information and analysis system. The Coast Guard will use this system to monitor and analyze casualty data continuously to evaluate the safety of offshore operations and the efficiency of current regulations.
>
> The MMS is evaluating its failure and accident information collection and analysis system to better identify and analyze causal information about OCS oil and gas exploration and development-related incidents. The EVENRS File, begun by the Geological Survey in 1971, was the first attempt to collate and utilize such a database. It remains the most complete, publicly available database (sic).
>
> As a result of the recommendations and findings contained in the Committee's assessment, the MMS has requested the Marine Board of the NRC for assistance in developing an OCS Safety Information System. A Marine Board Committee on OCS Safety Information and Analysis was formed in September 1982 to study the matter and develop recommendations. A final report is expected in fiscal year 1984.
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> In July of 1980, the Coast Guard initiated a study of maritime health problems. Entitled "A Crew Exposure Study," the project will characterize the hazards for offshore workers and tanker crewmen exposed to hydrocarbons and chemicals. When completed in 1984, it will be the most comprehensive study of maritime health problems ever undertaken.
>
> Both agencies agree that more comprehensive investigations are needed; however, they do not agree with the Committee's recommendation regarding near misses. The Coat Guard and the MMS have defined reportable accidents by establishing minimum levels of resultant monetary damage and lost-time injury. Each reportable accident is investigated by the appropriate agency. Both the Coast Guard and the MMS are working to improve the quality of these investigations as related to identifying primary and secondary causes. In order to investigate all "near misses," the agencies would have to require that all accidents and "near misses" be reported. This would clearly strain agency resources and reduce the comprehensiveness of serious accident investigations. However, if an investigation reveals information about recent related "near misses," this information is considered in the course of the investigation.
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> A Memorandum of Understanding (MOU), signed on December 18, 1980, between the Geological Survey and the Coast Guard addresses the coordination of accident investigations. This MOU defines the relationship between the MMS and the Coast Guard. The types of incidents addressed involve collisions, fires and explosions, deaths and injuries, pollution, facilities, material, and equipment.
>
> Further, the MMS and the Coast Guard are currently discussing procedures that will allow the MMS to accept reports of accident investigations from the Coast Guard of workplace safety incidents in lieu of participating in these investigations. If successful, this arrangement would reduce or entirely eliminate the expenditure of MMS resources to conduct or participate in investigations of accidents involving only workplace safety. Therefore, more resources could be committed to improving the comprehensiveness of the investigation of operational accidents."

On 10 July 1986 (51 FR 25054) the Coast Guard finalized the regulations proposed in its January 1984 NPRM. The adopted rules are substantially similar to those of the NPRM. **The preamble to the rule articulates the Coast Guard's determination that MODUs idle in a lease OCS area are not subject to regulations issued under the authority of the OCS Lands Act.** (This determination appears to be questioned by the MMS's 8 July 2003 NPR.)

On 29 August 1989, the MMS and USCG agreed to a "Memorandum of Understanding Concerning Regulation of Activities and Facilities on the Outer Continental Shelf of the United States." This MOU was published in the Federal Register on 28 September 1989 (54 FR 39820). The MOU acknowledged

that each agency had statutory responsibility for "Reviewing alleged or observed violations of safety regulations issued under the Act" and that the agencies had "similar" statutory authority for "Investigating and making public reports on deaths, serious injuries, fires, and oil spillage occurring as a result of OCS operations." In outlining the responsibilities of the agencies with respect to investigations, the MOU stated:

VI: Investigations:

A. Responsibilities

Investigation and public report by the MMS or the USCG are required for fires, oil pollution, deaths, and injuries associated with OCS activities. In addition, the Agencies investigate certain incidents relating to other regulatory responsibilities, e.g. loss of well control, sinking, capsizing, or major damage to a vessel or facility. To avoid duplication of effort and to simplify administration, the primary Agency regulating a particular facility, system or operation will be responsible for leading the investigation and reporting on incidents involving that facility, system or operation.

Where only one Agency has an investigative interest in an incident, that Agency will investigate and report. Where both agencies have investigative interest in an incident, one Agency will assume lead responsibility with supporting participation by the other Agency. Where investigations involve both Agencies, assumption of lead Agency responsibility will be determined by the circumstances of the particular incident, using the following ranking order for types of incidents:

1. *Collisions.* The USCG will normally be the lead Agency.

2. *Blow Outs, Fires and Explosions.* The MMS will normally be the lead Agency for incidents of fires or explosion involving drilling or production operations. The USCG participation will be requested in all investigations of fires or explosions that involve death or injuries or that occur on OCS drilling facilities, vessels, equipment, or operations for which the USCG is responsible under paragraphs IV.B.2 or C.2. of this MOU.

3. *Deaths and Injuries.* The USCG will normally be the lead agency for all incidents involving death or injuries. The MMS participation will be requested in investigations of all deaths and injuries associated with oil or gas drilling or production operations or equipment, including hydrogen sulfide exposure.

4. *Pollution.* The MMS will normally be the lead Agency for incidents involving pollution from all OCS facilities. The USCG participation will be requested in all investigations of pollution.

5. *Facilities, Material, and Equipment.*

a. The USCG will normally be the lead Agency for incidents involving damage to OCS drilling facilities and vessels engaged in OCS activities, or damage to propulsion, auxiliary, or emergency systems and equipment covered under IV.B.2. of the I MOU.

b. The MMS will normally be the lead Agency for incidents involving damage to OCS production facilities. The USCG participation will be requested in incidents involving those OCS production facilities, which require a USCG COI or LOC.

B. Conduct of Investigations:

1. Where the lead Agency identified by the ranking order in VI.A.1. through 5 determines not to investigate, that Agency shall notify the other agency of its intent.

2. In all cases, the lead Agency or the Agency conducting an investigation is responsible for preparing, reviewing, approving, and releasing the investigation report in accordance with the normal procedures of that Agency.

3. The specific procedures for participation in a joint Agency investigation shall be determined on a case-by-case basis by mutual agreement, with designation of the lead Agency determined using the procedures identified in paragraphs VI.A.1. through 5. Prior to public release of a joint Agency report of investigation, the lead Agency will forward a copy of the report to the supporting Agency for comment. The lead Agency will file any supporting Agency comments with the final report. When the supporting Agency's conclusions and recommendations differ from those of the lead Agency, each Agency's conclusions or recommendations will be included with the report in a mutually acceptable manner determined on a case-by-case basis.

4. Following completion of an Agency's investigation, the final report will be forwarded to the other Agency upon specific request, but need not be routinely forwarded.

On 16 December 1998, the MMS and the USCG agreed to a MOU replacing the 1989 MOU. This MOU was published in the Federal Register on 15 January 1999 (64 FR 2660). Regarding investigations, the MOU provided the following guidance:

VIII. Accident Investigations

The MMS or the USCG is responsible for conducting investigations and preparing a public report for each major fire, oil spillage, serious injury, and fatality associated with OCS activities. To avoid duplication of effort and to simplify administration, the responsibility for investigating and preparing a public report for these incidents rests with the agency that is listed in Section III as being responsible for the system associated with the incident. In addition, the MMS investigates blowouts and the USCG investigates collisions.

For those incidents for which both agencies have an investigative interest in the system associated with the incident, one agency will assume lead investigative responsibility with supporting participation by the other agency. The lead agency in a joint investigative effort shall investigate and prepare, approve, and release the report in accordance with the normal procedures of that agency, subject to the following terms and conditions:

1. The lead agency shall be determined through mutual agreement. If mutual agreement is not reached, each agency may decide to conduct its own investigation.

2. The specific details of a supporting agency's participation in a joint investigation shall be determined on a case-by-case basis through mutual agreement.

3. Prior to the public release of a joint agency report, the supporting agency will be afforded an opportunity to comment on the report. If the supporting agency's conclusions and/or recommendations differ with those of the lead agency, either both conclusions and/or recommendations will be included in the lead agency's report in a mutually acceptable manner, or a joint report will not be issued, and each agency may issue separate reports.

On 7 December 1999 (64 FR 68416), the USCG issued a notice of proposed rulemaking (NPRM) proposing a major revision of its Outer Continental Shelf Activities regulations. Among other things, the NPRM specifically indicated that was proposing a consolidated form that could be used to satisfy the casualty reporting requirements of the USCG, MMS and OSHA. Similar to the structure of the existing regulations, the proposed regulations would establish casualty-reporting requirements for:

- Fixed facilities (proposed 33 CFR §§143.110, 143.115, and 143.120);
- Mobile offshore drilling units (proposed 33 CFR §§145.105, 145.106, and 145.107); and
- An expanded population of vessels (proposed 33 CFR §§146.110, 146.115, and 146.120)

The regulated public responded with numerous comments on the proposed rules, including comments regarding the proposed casualty investigation and reporting requirements. As the USCG has not completed the rulemaking, the disposition of the public comments and the final form of the reporting requirements is unknown. If the MMS provided comments, they were not made part of the public docket.

The remainder of the chronology of activities is presented in the preamble to the MMS's 8 July 2003 NPR.

Decisions relating to United States Coast Guard
and
Occupational Safety and Health Administration Jurisdiction
over
Mobile Offshore Drilling Units

The situation on Mobile Offshore Drilling Units (MODUs) or other "vessels" differs fundamentally from that on fixed platforms due to the exercise of jurisdiction by another agency, *i.e.*, the United States Coast Guard (USCG), over working conditions and occupational safety on board vessels. The authority of the USCG to regulate working conditions and occupational safety on inspected vessels, such as MODUs, is well settled as evidenced by the Supreme Court of the United States in Chao v. Mallard Bay Drilling, Inc. (534 U.S. 235 (2002)). The decision of the Court reads, in part:

> "The OSH Act imposes on covered employers a duty to provide working conditions that "are free from recognized hazards that are causing or are likely to cause death or serious bodily harm" to their employees, as well as an obligation to comply with safety standards promulgated by the Secretary of Labor. 29 U. S. C. §§654(a)(1), (2).[6] The coverage of the Act does not, however, extend to working conditions that are regulated by other federal agencies. To avoid overlapping regulation, §4(b)(1) of the Act, as codified in 29 U. S. C. §653(b)(1), provides:
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> > "Nothing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies . . . *exercise* statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health." (Emphasis added).
>
> Congress' use of the word "exercise" makes clear that, contrary to respondent's position, see, e.g., Tr. of Oral Arg. 39, mere possession by another federal agency of unexercised authority to regulate certain working conditions is insufficient to displace OSHA's jurisdiction. Furthermore, another federal agency's minimal exercise of some authority over certain conditions on vessels such as Rig 52 does not result in complete pre-emption of OSHA jurisdiction, because the statute also makes clear that OSHA is only pre-empted if the working conditions at issue are the particular ones "with respect to which" another federal agency has regulated, and if such regulations "affec[t] occupational safety or health." §653(b)(1).7 To determine whether Coast Guard regulations have pre-empted OSHA's jurisdiction over the working conditions on Rig 52, it is thus necessary to examine the contours of the Guard's exercise of its statutory authority, not merely the existence of such authority.
>
> Congress has assigned a broad and important mission to the Coast Guard. Its governing statute provides, in part:
>
> > "The Coast Guard . . . shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department. ..." 14 U. S.C. §2 (2000 ed.).
>
> Under this provision, the Guard possesses authority to promulgate and enforce regulations promoting the safety of vessels anchored in state navigable waters, such as Rig 52. As mentioned above, however, in defining the Coast Guard's regulatory authority, Congress has divided the universe of vessels into two broad classes: "inspected vessels" and "uninspected vessels." In 46 U. S. C. §3301 (1994 ed. and Supp. V), Congress has listed 14 types of vessels that are "subject to inspection" by the Guard pursuant to a substantial body of rules mandated by Con-gress.8 In contrast, 46 U. S. C. §2101(43) defines an "un-inspected vessel" as "a vessel not subject to inspection under section 3301 . . . that is not a recreational vessel." The parties do not dispute that OSHA's regulations have been pre-empted with respect to inspected vessels, because the Coast Guard has broad statutory authority to regulate the occupational health and safety of workers aboard inspected vessels, 46 U. S. C. §3306 (1994 ed. and Supp. V), and it has exercised that authority. Indeed, the Coast Guard and OSHA signed a "Memorandum of Under-standing" (MOU) on March 17, 1983, evidencing their agreement that, as a result of the Guard's exercise of comprehensive authority over inspected vessels, OSHA "may not enforce the OSH Act with respect to the working conditions of seamen aboard inspected vessels." 48 Fed. Reg. 11365. The MOU recognizes that the exercise of the Coast Guard's authority—and hence the displacement of OSHA jurisdiction—extends not

only to those working conditions on inspected vessels specifically discussed by Guard regulations, but to all working conditions on inspected vessels, including those "not addressed by the specific regulations." Ibid. Thus, as OSHA recognized in the MOU, another agency may "exercise" its authority within the meaning of §4(b)(1) of the OSH Act either by promulgating specific regulations or by asserting comprehensive regulatory authority over a certain category of vessels.

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6 The Secretary of Labor has delegated her authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. See 65 Fed. Reg. 50017 (2000).

7 The Circuits have recognized at least two approaches for defining "working conditions" under §4(b)(1). A "hazard-based" approach, which the Secretary of Labor endorses, focuses on "the particular physical and environmental hazards encountered by an employee" on the job. Brief for Petitioner 24; see, e.g., Donovan v. Red Star Marine Services, Inc., 739 F. 2d 774, 779–780 (CA2 1984). In contrast, an "area-based" approach defines "working conditions" as the "area in which an employee customarily goes about his daily tasks." Southern R. Co. v. Occupational Safety and Health Review Comm'n, 539 F. 2d 335, 339 (CA4 1976). We need not choose between these interpretations, however, because the Coast Guard did not regulate the "working conditions" at issue in this case under either definition of the term.

8 "The following categories of vessels are subject to inspection under this part: (1) freight vessels. (2) nautical school vessels. (3) offshore supply vessels. (4) passenger vessels. (5) sailing school vessels. (6) seagoing barges. (7) seagoing motor vessels. (8) small passenger vessels. (9) steam vessels. (10) tank vessels. (11) fish processing vessels. (12) fish tender vessels. (13) Great Lakes barges. (14) oil spill response vessels.""

U.S. flag MODUs are "inspected vessels" as either "seagoing barges" or "seagoing motor vessels." As regards foreign-flag MODUs working on the Outer Continental Shelf (OCS), the USCG's ***exercise*** of its authority over these vessels vis-à-vis the Occupational Safety and Health Administration (OSHA) is spelled out in Volume II, Section B, Chapter 8 of the Marine Safety Manual (Commandant Instruction M16000) which states:

> "In 1979, the Coast Guard and OSHA signed an MOU which gave the agencies joint responsibility for the occupational safety and health of personnel on OCS facilities. In 1983, the two agencies entered into a second MOU, which further defined the responsibilities of each agency with respect to Coast Guard certificated vessels. The 1983 MOU designated the Coast Guard as the dominant federal agency second MOU which further defined the responsibilities of statutory authority to prescribe and enforce standards or regulations affecting the occupational safety and health of seamen aboard vessels, including MODUs that are inspected and certificated by the Coast Guard. The MOU further states that OSHA has concluded that it may not enforce the Occupational Safety and Health Act with respect to the working conditions of seamen aboard inspected vessels. OSHA retained, however, the authority over discrimination cases on inspected vessels. ***"A foreign MODU operating under the authority of an LOC issued by the Coast Guard is considered "an inspected and certificated vessel" for the purposes of the 1983 MOU with OSHA."*** (Emphasis added).

The decision in Chao v. Mallard Bay Drilling, Inc. also specifically addresses the situation of certain uninspected drilling vessels that may (albeit rarely) operate on the OCS:

> "In addition to issuing these general marine safety regulations, the Guard has exercised its statutory authority to regulate a number of specific working conditions on certain types of uninspected vessels. For example, the Guard regulates drilling operations that take place on the outer continental shelf. See 43 U. S. C. §1333(a)(1); 33 CFR pt. 142 (2000). And it is true that some of these more specific regulations would, pursuant to §4(b)(1), pre-empt OSHA regulations covering those particular working conditions and vessels."

One may question whether the industrial workers on a MODU are "seamen" for the purposes of regulation of working conditions, etc.; however, this issue too is settled. In CPL2-1.20 OSHA states that:

> "A seaman is an employee who:
>
> a. Is engaged or employed in any capacity on board a vessel and has a more or less permanent connection with the vessel, and
> b. Contributes to the function of the vessel or the accomplishment of its mission. To be a seaman one need not aid in navigation or contribute to the transportation of the vessel, but one must do ship's work. Land based maritime workers are not seamen (e.g., shipyard employees, longshoremen)."

We believe that there can be no question that the drilling crew, who are employed by the owner of the vessel to undertake the mission (i.e., perform contract drilling services) of the vessel are "seamen" for the purposes of the pre-emption of OSHA jurisdiction.

Concerns regarding Medical Privacy Issues

IADC is concerned as to the implications of both the current and the 8 July 2003, proposed rule with respect to Federal and State medical right-to-privacy requirements. Specifically, IADC questions whether it is legally permissible and proper to require contractors, sub-contractors and third parties to submit such data to a Lessee or designated Operator. Penalties for improper disclosure of such information range from relatively minor civil penalties escalating to criminal and civil penalties of up to $250,000.00.

We have researched several such privacy requirements and have consulted with outside counsel. In order to keep our comments succinct, we will only concentrate on three (3) such mandates, the Health Insurance Portability and Accountability Act of 1996 (P.L. 104-91, HIPAA), Texas Health and Safety Code, Chapter 773 and Louisiana Revised Statute 23:1127. There are numerous other privacy statutes and requirements, which may negatively impact the ability of an employer to provide Individually Identifiable Health Information (IIHI) to the Lessee (Operator).

The HIPAA addresses several broad health issues, including privacy requirements that protect medical records and other health information. The U.S. Department of Health and Human Services (HHS) issued implementing regulations, 45 CFR Parts 160-164, with various compliance deadlines, including, with certain limited exceptions, 14 April 2003, as regards the Privacy Rule. HHS's Office of Civil Rights (OCR) administers the privacy considerations. The rule is very confusing as to who is in fact regulated (Covered Entity) and how broad the exceptions are to the disclosure prohibitions. Compounding industry's and government's inability to fully comprehend the import of these regulations is the fact there is a dearth of case law upon which to rely. Violation of the Privacy Rule may subject a company or individual to civil and/or criminal penalties. The civil penalties for privacy standards violations range from $100 to $250,000 depending on the nature and intent of the violation.

Individually Identifiable Health Information (IIHI) is defined as: (1) information that includes demographic information that is a subset of health information; (2) relates to the past, present or future physical or mental health or condition of an individual; and (3) that identifies the individual; or (4) there is a reasonable basis to believe the information can be used to identify the individual (45 CFR 160.103). Generally, this definition includes but is not limited to the name of the person, the social security number, address or other identifying information. Protected Health Information (PHI) is in effect the same as IIHI. It is defined at 164.501 as individually identifiable health information.

As to the scope of the privacy requirements, as we understand it, Lessees and their contractors, subcontractors and third parties are not considered Covered Entities. However, medics aboard the rig or platform, shore-side physicians and other recognized healthcare providers are Covered Entities. Accordingly, information received from a rig medic, physician or other healthcare provider as regards the medical condition of an individual, in all probability, is protected by the HIPAA Privacy Rule.

HIPAA's enabling rulemaking does contain a number of exceptions relative to disclosing protected health information, the majority of which is found in 164.512 of the Privacy Rule. An example is an injured or ill person may voluntarily sign a valid Release/Disclosure (release) document to allow for such disclosure. On the surface, this appears to be a relatively simple exercise-it is not. The person must ***voluntarily*** sign the release form. With very limited exceptions, medical treatment or payment for healthcare may not be conditioned on the individual providing an executed form. If the injured or ill person is incapable of signing such a release, a prudent healthcare provider or employer cannot be expected to release any protected information.

Generally, HIPAA's Privacy Rule does not apply to Workers' Compensation claims. However, this appears to somewhat in dispute, since the rule, at 164.512(l) uses qualifying language ". . .that provide benefits for work-related injury or illness without regard to fault." Individuals employed aboard Mobile Offshore Drilling Units (MODUs) and Offshore Supply Vessels (OSVs) are generally considered Seamen. A Seaman's recovery for work-related injury or illness **is** in fact reduced for their share of fault, under the doctrine of comparative negligence. At this time, we frankly do not know if this language prohibits disclosure of a seaman's IIHI without a voluntary release being properly executed. Additionally, we understand the workers' compensation disclosure exception only extends to the employer of the injured or ill individual. In other words, if a Roustabout working for XYZ Drilling Company is injured while his rig is contracted to ABC Oil and Gas Company, we have been advised the protection afforded by the workers' compensation exception only extends to XYZ Drilling Company, not to its client.

An additional issue that must be addressed is the unfortunate fact certain incidents that initially are claimed as job-related, upon investigation turn out to be injuries that have occurred away from the worksite. Such investigations take time, generally beyond the reporting periods specified in the proposed rule.

Another exception that is pertinent is found in 164.512(a), which allows for disclosure of IIHI to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. We are of the opinion this exception will allow a Lessee to disclose IIHI to MMS as required by a final rule relative to **their** employees, due to the direct regulatory relationship between MMS and the Lessee. Conversely, we are of the view contractors, subcontractors and third parties are not afforded protection under this exception since MMS has repeatedly indicated that it does not have a direct regulatory relationship with these entities.

When disclosures are required under other federal law, IIHI may be disclosed as required by other law. If a disclosure is not required but only **permitted** under other law, an entity must determine whether the disclosure is permissible under HIPAA and then follow HIPAA requirements for making such a disclosure. If another federal law prohibits disclosure that is permitted but not required under HIPAA, entities must comply with the other federal law.

As regards State Laws, the issue of Federal preemption is rather muddied. We understand HIPAA does not preempt state laws when a provision of state law is more stringent than the requirements of the federal Privacy Rule.

Chapter 773 of the Texas Health and Safety Code prohibits disclosure of the identity, evaluation or treatment of a patient. The exceptions codified in Section 773.092 provide that otherwise confidential information may be disclosed under certain circumstances, including to governmental agencies if the disclosure is required or authorized by law. We reiterate our comment as to MMS's only regulatory relationship being over that of the Lessee. Additionally, if a valid release is executed by the treated individual, disclosure may be made provided the release specifies: (1) the information or records to be covered by the release; (2) the reason(s) or purpose(s) for the release; and (3) the person to whom the information is to be released. Again, we know of no legal basis upon which to condition treatment or payment of medical care on the execution of a release. A person aggrieved by an unauthorized disclosure of confidential information may bring an action for damages against those responsible in addition to obtaining appropriate injunctive relief. The Texas Code would potentially be relevant if treatment was rendered in the State of Texas or where Texas courts have jurisdiction.

Louisiana Revised Statute (La.R.S.) 23:1127 states that any medical records or information furnished to an employer shall be held confidential and the employer or any party shall be liable to the employee for

actual damages sustained by him as a result of the breach of this confidence up to a maximum of $1,000 plus all reasonable attorney's fees necessary to recover such damages. As expected, there are exceptions similar to what is detailed above relative to the State of Texas.

In view of the above, it is clear a non-Lessee face a daunting, if not an impossible, task complying with the current and proposed incident reporting rules. Granted, it appears all that is necessary is the execution of valid Release/Disclosure form to allow relevant health information to be forwarded to the Lessee, who in turn will use that information to advise the MMS; however, that is too simplistic of a perspective. Many individuals are cognizant of their right to medical privacy. Many IADC member companies have experienced difficulty in securing more benign medical release form executions, the majority of which must be effectuated in order to process a workers' compensation or a Seaman's claim. It is quite probable injured or ill individuals employed by the Lessee's contractors, subcontractors, or a third party will refuse to sign the Release/Disclosure form.

We believe that MMS, in consultation with DHS and the USCG, must make specific adjustments to the reporting rules to deal with this eventuality.

IADC Response
to
Request for Comments on Issues Related to the Proposed Rule

Question 1. *Should MMS require operators to submit information on the total number of hours worked by their employees and contractors offshore? If so, what recommendations do you have for MMS collecting the data, and how can we minimize the collection burden?*

The Bureau of Labor Statistics uses a formula based on the total number of hours worked to normalize injury/illness data and calculate incident rates. MMS currently does not require ``collection of hours worked'' information for offshore workers and, therefore, cannot normalize the raw injury data we receive to produce comparable rates for the OCS. Through the voluntary joint Government/industry OCS Performance Measures Program, MMS does receive total hours worked for company employees and contractors (about 2/3 of all OCS operators participated in 1998). From this data, we are able to calculate rates for the data submitted. Receiving information on hours worked from all OCS operators would allow MMS to produce normalized injury/illness analyses and trend data for all injury incidents reported to MMS.

IADC Response:

In concept, collecting and reporting such data would seem beneficial. At the highest level, having such data would allow this industry sector to be compared directly to other sectors for which OSHA and BLS report data. However, other than for the comparison, what use would the information be? MMS certainly would not suggest diversion of its resources to the regulators of other industry sectors where performance lagged.

Such information would permit MMS to make comparisons of performance between lessees, permit holders, or operators; however, equitable comparisons would still be difficult because of the inherent difficulties associated with categorizing the data according to those functional activities where there are substantially differing levels of exposure to occupational injury or illness (*e.g.*, construction vs. production).

Question 2. *What kind of information should MMS collect about contractor performance on the OCS?*

According to 1998 OCS Performance Measures data, contractors represented about 80 percent of the total hours worked on the OCS and were involved in over 80 percent of the recordable and lost workday injury and illness cases. Gathering and analyzing data specific to contractors and contract operations might provide insight to operators, contractors, and MMS about ways to decrease injuries to contractors and enhance the safety of contract operations.

IADC Response:

MMS has made it abundantly clear that it interprets its authority as placing the burden for safe and environmentally sound operations on the Lessee or its designated. Unless and until MMS determines that a differing approach is permissible and appropriate, it is at this level that MMS should focus.

In order to collect information "about contractor performance" it would be necessary for MMS to develop and maintain a system for assigning identification numbers to each contractor with employees working on the OCS or to utilize another system that uniquely identifies employers. We suspect that there are thousands of such contractors. As MMS already has difficulty uniquely identifying "operators," we would question its ability to undertake this added function without a concomitant requirement for such contractors to register. MMS would need to obtain new, reassign existing personnel, in order to administer such a program.

We would also voice concern that mandating that contractors report hours worked by their employees to the "operator," as would be required by MMS's current interpretation of its rules, would require contractors to provide proprietary information to their clients – this would be especially problematic in the case where the contract was for performance of a service or task, rather than on a cost-plus basis.

Under both the current and proposed regulations, the lessee (not the employer) is responsible for reporting incidents. Most "incidents" are not truly investigated by MMS or the USCG, but simply checked for completeness and entered into the agencies' respective databases. Under this system, there would seem to be an incentive for an "operator" to assign responsibility for the events leading to the incident to its contractors. Such contractors are without an administrative means of rebutting the alleged responsibility in either the MMS or USCG reporting systems.

Question 3. *What specific incident data analyses could MMS publish to help lessees/operators enhance the safety of their operations?*

MMS intends to provide OCS lessees, operators, and others with the most useful incident data analyses possible. Are there specific analyses that would be particularly helpful to the industry or other regulators in preventing incidents and promoting safety?

IADC Response:

As MMS is aware, IADC has a well-established process for the timely collection and dissemination of "Safety Alerts"; however, one of the shortcomings of the IADC program is its ability to disseminate information on incidents that are being litigated, are likely to be litigated, or for which dissemination of information is embargoed by the terms of a settlement. MMS and the Coast Guard are not so constrained; however, neither agency is particularly timely in publishing the findings of its respective investigations. Placing additional emphasis on timely publication of findings of fact in incident investigations and Safety Alerts, as appropriate, would be helpful.

Question 4. *What kind of electronic reporting methods are most accessible to you as an OCS lessee/operator? What recommendations do you have for developing an electronic system?*

IADC Response:

IADC does not represent lessees/operators. Unless MMS extends its reporting requirements to contractors, our members would not be directly affected. Most of our members have the capacity to use Internet-based systems; however, such systems should not be the solely acceptable means of making "immediate" notifications or reports. Except where "immediate" reporting is required, most companies will probably subject any reports to an internal review prior to submission to the MMS or the Coast Guard, making access to the Internet for submission of such reports a virtual certainty.