10

Organizational Responses of Transnational Private Regulators after Major Accidents

The Case of the American Petroleum Institute and the Deepwater Horizon Oil Spill

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10.1 INTRODUCTION

Since 1924, the American Petroleum Institute (API) has developed nearly 700 safety standards and recommended practices covering all segments of the oil and gas industry. Many of API's standards and recommended practices are incorporated into public regulations, to the point that they are considered the most used standards by national regulators in the oil and gas industry.

This chapter analyzes the organizational changes of the API as a response to pressures and demands from public authorities and investigations in the aftermath of the Deepwater Horizon (DWH) oil spill, the major environmental accident in the oil and gas industry in the United States. The DWH oil spill created new incentives and rationales for API to internalize the need for change.

This exogenous event, and the reaction of the API, will contribute to shine light on the mechanics and dynamics of resilience of transnational private regulators and on the relation between public and private authority – in particular on the capacity (or lack thereof) of the former to effectively enroll, steer, and influence the latter. The organizational response of the API to the regulatory crisis created by the DWH accident support the findings of other chapters in this book that argue that that private bodies grow stronger out of episodes and shocks.[1]

Besides API, this chapter focuses on the Bureau for Safety and Environmental Enforcement (BSEE), the federal regulator for offshore oil and gas exploration and production in the United States, in order to investigate how public authorities react to changes undertaken by private regulators in times of crisis. Qualitative research methods such as case studies and the analysis of regulations and investigation reports are used to explain the reorganization of private and public regulators after major accidents in the offshore oil and gas sector.

[1] See P. Delimatsis, "The Resilience of Private Authority in Times of Crisis," Chapter 1.

https://doi.org/10.1017/9781009329408.015 Published online by Cambridge University Press

Section 10.2 explains the emergence of the API as a transnational private regulator and its dynamics such as the resistance to federal safety regulations. Section 10.3 analyzes how the DWH oil spill and the introduction of safety regulations by BSEE became drivers for API's change. Section 10.4 examines the organizational responses introduced by the API in order to adapt itself to the new demands from the public regulator. Section 10.5 discusses the co-regulatory scheme adopted by BSEE legitimizing the response of API. Taking into account the transnational nature of the API and its organizational changes, Section 10.6 identifies the lessons that regulators beyond the United States may learn in order to promote safety in the offshore oil and gas industry, and monitor compliance with safety standards. Section 10.7 provides conclusions.

10.2 THE API'S STRENGTH AND RELATIVE INFLUENCE AS A TRANSNATIONAL PRIVATE REGULATOR

10.2.1 *The Origins of API and Its Growth in Significance*

Transnational private regulators have emerged and multiplied in the oil and gas industry[2] in areas such as safety regulation that are considered as the preserve of public authority. The most ancient and influential transnational private regulator in this sector is the API, whose standards are the most used by national regulators worldwide.[3] In 1919, API was founded in the United States as a nonprofit national trade association to promote the interests of the petroleum industry in all its branches.[4] Soon after its foundation, it was clear that in order to be more effective, API had to develop its own standards for the oil and gas industry.[5] In 1923, API created its Standards Department, and one year after, the API published its first standard on drill pipe threads.[6] Since then, the API has developed nearly 700 standards and recommended practices covering all segments of the oil and gas industry.[7]

[2] See A. Wawryk, Adoption of International Environmental Standards by Transnational Oil Companies: Reducing the Impact of Oil Operations in Emerging Economies (2002) 20:4 *Journal of Energy & Natural Resources Law* 406; S. Trevisanunt, Is There Something Wrong with the Increasing Role of Private Actors? The Case of the Offshore Energy Sector, in *What's Wrong with International Law?* (C. Ryngaert, E. Molenaar, and S. Nouwen eds., 2015), at 69.

[3] See: API, API Standards: International Usage and Deployment (2020); The International Association of Oil and Gas Producers (OGP), Regulator's Use of Standards. Report No. 426 (OGP, 2010), at 54. In this report, the OGP analyzed fourteen national regulators' use of standards in their regulatory documents and evidenced that API standards were the most used with 225 references.

[4] API, Origins, www.api.org/about#tab-origins. In late 1969, API made the decision to move its offices to Washington, DC, where it remains today.

[5] API, Timeline, www.api.org/about#tab-timeline.

[6] Ibid.

[7] API, Overview and Mission, www.api.org/about#tab-overview-and-mission.

Many of those standards and recommended practices are incorporated into public regulations.

The wide use of the API's standards by national regulators beyond the United States consolidates the influence of the API as a transnational private regulator. This transnational role is reflected by the API's twofold mission of not only influencing public policy in support of a strong, viable US oil and natural gas industry but also promoting safety across the oil and gas industry globally.[8] In order to strengthen its global presence, between 2007 and 2010, the API opened three international offices in Beijing, Dubai, and Singapore.[9] The API has around 600 members from international major oil companies to small independent firms in all sectors of the industry, including exploration and production, pipeline operators, marine transportation, refining, marketing, and service and supply firms.[10]

10.2.2 *The API's Influence and Resistance to Governmental Safety Regulations*

The API has sought to expand its influence by promoting the uptake of its standards for the offshore oil and gas industry by BSEE. Historically, the BSEE has formally adopted the standards developed by the API, incorporating them into its own regulations.[11] In parallel, the API has also opposed government initiatives to adopt safety regulations. An example of this opposition is the case of the Safety and Environmental Management Systems (SEMS). From 1991 to 2009, the federal offshore safety regulator unsuccessfully tried to introduce SEMS to manage the risks of offshore oil and gas operations. However, its Minerals Management Service (MMS), the predecessor of BSEE, found strong opposition from the API.

The first attempt was in 1991, when, in response to several investigations, MMS initiated a rule-making procedure to require operators to implement a safety and environmental management program (SEMP).[12] The API was averse to this initiative and asked MMS to postpone the rule-making procedure in order to allow the API itself to elaborate an offshore safety standard. MMS acceded to this proposal and participated in the API's standard-setting process, which was concluded in 1993 when the API published its "Recommended Practice 75" (API RP-75) as a guidance document.[13]

[8] Ibid.

[9] R. Goodman, API Standards and the Standards Development Process, www.bsee.gov/sites/bsee.gov/files/research-guidance-manuals-or-best-practices/structures/6-api-standards-r-goodman-bsee-workshop1.pdf.

[10] API, *supra* note 3.

[11] National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Deep Water, Report to the President (2011), at 225.

[12] Ibid., at 71.

[13] Ibid.

https://doi.org/10.1017/9781009329408.015 Published online by Cambridge University Press

The second rule-making attempt to introduce SEMS was in 2006 and 2009, when, after a period of advocating for voluntary implementation of the API RP-75, the MMS proposed a rule that required operators to implement SEMS. Once more, the API opposed this regulation, arguing that the implementation of SEMS should remain voluntary. The API presented several arguments for this request: (a) the offshore industry had an admirable safety record, (b) voluntary programs that have enough flexibility to suit the culture of each company are the best way to promote safety in the industry, and (c) having a detailed plan on paper will not ensure an improvement in performance.[14] In the middle of this rule-making procedure, the DWH accident occurred, and the federal government adopted SEMS regulations, taking the API RP-75 as its backbone.

The API's consistent opposition to safety regulations by the federal government has been explained as a reaction to the potential high costs that such regulations could imply for oil and gas operations.[15] Therefore, the API favors regulatory initiatives that foster industry autonomy from government oversight.[16] Such was the API's influence, that only two decades after its first rule-making attempt and a major event such as the DWH accident, the federal government found the momentum to make the SEMS programs mandatory by regulations. The Section 10.3 describes this exogenous event and the criticisms to the role of the API as standard-setter.

10.3 THE DWH ACCIDENT

10.3.1 *The DWH Accident, Criticisms to the Regulatory Regime, and the Adoption of SEMS Regulations*

On April 20, 2010, a sudden explosion and fire occurred on the Deepwater Horizon oil rig in what later became one of the largest marine oil spills in history. The rig was located approximately fifty miles southeast of Louisiana in the Gulf of Mexico and had a 126-member crew onboard. The accident resulted in the deaths of eleven workers and seventeen others were seriously injured. For eighty-six days, oil flowed into the Gulf of Mexico reaching an expanse of shoreline. In total, more than 4.9 million barrels of oil were spilled causing serious environmental damage into the Gulf of Mexico.[17]

[14] API and Offshore Operators Committee (OOC), written comments on the subject proposed rule to add a new Subpart S-Safety and Environmental Management Systems (SEMS) (September 15, 2009), www.bsee.gov/sites/bsee.gov/files/safety-alerts/regulations-and-guidance/oocapicommentletter9-15-09.pdf.

[15] National Commission, *supra* note 10, at 225.

[16] Ibid.

[17] United States Coast Guard, BP Deepwater Horizon Oil Spill Incident Specific Preparedness Review, Final Report (2011), at 109.

The DWH accident originated a regulatory crisis in the United States. We define regulatory crisis as periods of instability or disorder caused by unexpected internal or external events that threaten or affect the normal functioning of an organization or system and bring into question the building blocks of the regulatory framework that govern them. The term "crisis" has been deployed by several scholars to describe "an unexpected event that creates uncertainty and poses a direct or perceived threat to the goals and norms of an organization or society";[18] "a phase of disorder in the seemingly normal development of a system . . . crises are transitional phases, during which the normal ways of operating no longer work,"[19] and "periods of disorder . . . along with widespread questioning or discrediting of established policies, practices and institutions."[20] These definitions have features of the three components that according to Boin et al. a crisis possess: a threat, uncertainty, and urgency.[21] In this sense, our definition of "regulatory crisis" as a specific type of crisis contributes to expand the definition of the term "crisis: provided by the aforementioned scholars as well as in other chapters of this book such as the one by Partiti ("Human Rights Due Diligence and Evolution of Voluntary Sustainability Standards," Chapter 7), in which he analyzes human rights due diligence and evolution of voluntary sustainability standards.

The DWH accident was an external and unexpected event that brought into question the regulatory regime to prevent accidents and marine pollution from offshore oil and gas operations in the United States. After the accident, both public and private regulators in the offshore oil and gas industry introduced reforms that aimed at changing building blocks of the regulatory regime, such as the regulators, the rules to promote safety in the industry, and monitoring mechanisms.

Regarding rule-making and monitoring mechanisms, one of the major findings of the investigations conducted after the DWH accident was the high reliance of the regulatory framework on prescriptive rules and checklist inspections to manage the risks of offshore oil and gas operations in the United States.[22] In order to overcome such weakness, several investigations advised the federal government to complement prescriptive regulations with a risk-based performance approach. This was precisely one of the first measures that BSEE implemented in reaction to the accident. In October 2010, the BSEE issued its Workplace Safety Rule, also known as the SEMS regulation, requiring all oil and gas operators in the US Outer Continental Shelf

[18] C. Coyne, Constitutions and Crisis (2011) 80:2 *Journal of Economic Behavior & Organization* 351.

[19] A. Boin, et al., *The Politics of Crisis Management: Public Leadership under Pressure* (2005).

[20] D. Nohrstedt and C. Weible, The Logic of Policy Change after Crisis: Proximity and Subsystem Interaction (2010) *Journal of Risk, Hazards, & Crisis in Public Policy* 1.

[21] Boin, et al., *supra* note 18.

[22] National Commission, *supra* note 10, at 68.

(OCS) to develop, implement, and audit a SEMS program. The SEMS regulation was amended in 2013 (SEMS regulation II). The SEMS regulation is considered the first environmental and safety performance–based rules adopted by the offshore oil and gas federal regulator in the United States.[23]

The SEMS program is a comprehensive system to reduce human error and organizational failure. It is defined by the SEMS regulation as a program where the operator identifies, addresses, and manages safety, environmental hazards, and impacts throughout the life of their offshore operations, comprising the design, construction, start-up, operation (including, but not limited to, drilling and decommissioning), inspection, and maintenance of all new and existing facilities, including mobile offshore drilling units (MODUs) when attached to the seabed. The SEMS program must address the elements described by BSEE's regulations and meet or exceed the standards of safety and environmental protection of the API RP 75 in its third edition, 2004.[24]

BSEE does not supervise the SEMS program directly. Instead, it has created a third-party audit scheme to conduct such task. The reasons for this approach are not explicated in the background of SEMS regulations. However, there are at least two hypotheses on the motives for this approach. The first is that BSEE lacked personnel, budget, and expertise to audit the SEMS programs.[25] The second is that BSEE did not want the industry to rely on the government to manage the SEMS program.[26] Indeed, in 2006, when the federal government presented an advance notice of proposed rule-making to seek comments on the introduction of SEMS, it asked the industry whether the MMS or an independent third party should verify the SEMS plan. Most commenters were not in favor of the MMS approving the SEMS plans. Instead, they suggested that such review should be conducted by a third party because the MMS might not have the resources and expertise to approve a minimum of one plan for each operator.[27]

Under the third-party audit scheme, operators must maintain and keep up to date with the SEMS program by means of periodic audits.[28] Initially, SEMS regulations

[23] J. Weaver, Managing Offshore Safety in the United States after the Macondo Disaster, in *Managing the Risk of Offshore Oil and Gas Accidents: The International Legal Dimension* (G. Handl and K. Svendsen eds., 2019), at 55.

[24] Office of the Federal Register of the United States, Code of Federal Regulations (CFR) §250.1900, §250.1902.

[25] Weaver, *supra* note 22, at 69.

[26] US Chemical Safety and Hazard Investigation Board, Drilling Rig Explosion and Fire at the Macondo Well Investigation Report, Volume 4 (April 20, 2016), at 77.

[27] Federal Register of the United States, 74 Fed. Reg. 28639, A Proposed Rule by the Minerals Management Service on 06/17/2009, Safety and Environmental Management Systems for Outer Continental Shelf Oil and Gas Operations, www.federalregister.gov/documents/2009/06/17/E9-14211/safety-and-environmental-management-systems-for-outer-continental-shelf-oil-and-gas-operations.

[28] Office of the Federal Register of the United States, *supra* note 23, CFR §250.1909

established that the audits might be conducted either by the operator's personnel or by independent third parties.[29] However, in 2013, a reform to the regulations required operators to audit the SEMS program only by an independent third party. One of the aims of this change was to improve the quality of audits based on the experience of the first cycle of audits.[30] Indeed, after the first audits, BSEE found several flaws in the audit processes including the use of diverse audit methodologies, reporting formats, and scope of activities. Due to these shortcomings, BSEE could not assess the status of implementation and effectiveness of many SEMS in the first cycle of audits.

10.3.2 *Criticisms of the Role of the API as Standard-Setter*

The investigations after the DWH accident not only revealed the shortcomings of the federal government's regulatory approach to managing the risks of offshore oil and gas operations but also raised concerns about the influence of the API as a standard-setting organization. The National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (hereinafter the National Commission) indicated that the API's role as a standard-setter for drilling safety was undermined by its role as the industry's main lobbyist.[31] Furthermore, industry officials asserted that the API's safety standards had failed to reflect "best industry practices" and that the reliance of the MMS on those standards had affected the entire federal regulatory system for offshore oil and gas safety.[32]

As regards the oil and gas industry, the National Commission's final report primarily advised to create a safety self-regulator, similar to the one established in the nuclear sector in the United States.[33] The commission warned that since the API was culturally ill-suited to drive a safety revolution in the industry, it was essential that the new safety regulator operate apart from the API.[34] The report highlighted that the new industry's safety regulator should prompt continuous improvement in standards and practices by incorporating the highest safety standards achieved globally, including but not exclusively those adopted by the API.[35]

In the aftermath of the accident, the API reacted to these new demands with an organizational change: the creation of the Center for Offshore Safety (COS).

[29] Ibid., CFR § 250.1920 (a).
[30] BSEE, SEMS Program Summary – First Audit Cycle (July 23, 2014), www.bsee.gov/sites/bsee.gov/files/memos/safety/sems-program-summary-8132014.pdf.
[31] National Commission, *supra* note 10, at 225.
[32] Ibid.
[33] Ibid., at 241.
[34] Ibid.
[35] Ibid., at 242.

https://doi.org/10.1017/9781009329408.015 Published online by Cambridge University Press

10.4 THE API'S ORGANIZATIONAL RESPONSE TO THE DWH ACCIDENT

10.4.1 *Creation of the Center for Offshore Safety (COS)*

In March 2011, the API created the Center for Offshore Safety (hereinafter COS or the Center) in response to both the Commission's recommendation to the industry of establishing a new safety self-regulator for oil and gas operations and the adoption of the SEMS regulations. The COS is an industry-sponsored group focused on safety of offshore oil and gas operations on the US Outer Continental Shelf (OCS). The mission of the Center is "to promote the highest level of safety for the U.S. offshore oil and natural gas industry through effective leadership, communication, teamwork, utilization of disciplined management systems and independent third-party auditing and certification."[36]

COS works as a unit of the API's Global Industry Services division that is responsible for standards development, certification, training, publications, and safety programs for onshore, offshore, and refinery operations.[37]

Initially, COS membership was limited to deep-water operators, contractors, and service companies. In 2015, COS allowed membership to all companies operating on the US Outer Continental Shelf.[38] Since then, membership for COS is mandatory for the API members who operate offshore but voluntary for non-API members.[39] From the around sixty operators and seventeen drilling contractors that work on the US Outer Continental Shelf, as of March 2021, COS had eighteen members. From these members, eleven are operators, three are rig contractors, and four are service companies.[40] Section 10.4.2 examines the key role of the API and the members of COS in the governance of the Center.

10.4.2 *The Governance of COS*

COS is governed by a charter, governing procedures, and the governing board. The charter establishes COS' objectives, guiding principles, responsibilities, and API oversight and interfacing. In turn, the governing procedures provide information on the policies and procedures for COS' governing board, its activities, and guidelines for its conduct. The Center's governing board consists of a maximum of twenty-four

[36] The Center for Offshore Safety, Charter, at 1, https://centerforoffshoresafety.org/~/media/COS/Membership/2018-112_COS_Charter_062518.pdf.

[37] Ibid.

[38] National Academies of Sciences, Engineering, and Medicine, *Beyond Compliance: Strengthening the Safety Culture of the Offshore Oil and Gas Industry* (2016), at 15.

[39] The Center for Offshore Safety, *supra* note 35.

[40] The Center for Offshore Safety, Member Organizations, www.centerforoffshoresafety.org/Membership/Member-Organizations.

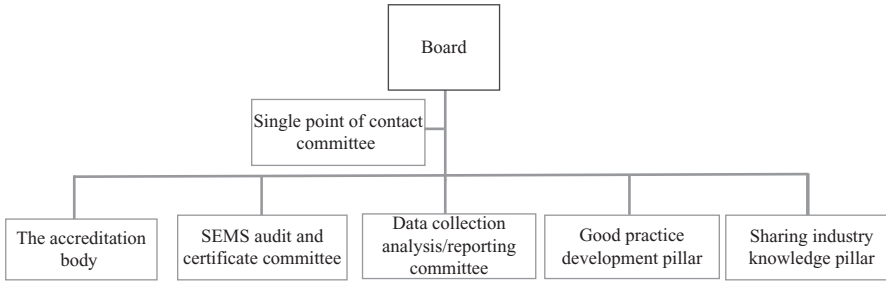

FIGURE 10.1. The structure of COS
Source: The author, adapted from COS, 2020

members that represent oil and gas producers, drilling contractors, service companies, and industry associations. As stated in COS' charter and governing procedures, the API has several mechanisms to control the Center. These mechanisms comprise the approval of COS' board members, charter, and annual plans, reporting obligations, and the revision of all work products developed by COS intended to inform member companies, industry, and the public.[41] The Center is accountable to, and must interact with, several API committees and follow the API's internal policies and procedures.[42] Regarding its structure, COS works through subordinate groups approved by the board, which are designated as committee, subcommittee, or work group.[43] Figure 10.1 presents an overview of the COS's structure.

Besides the governing board, COS has six groups. The first group is a single point of contact committee to manage communication between COS and member companies. The five remaining groups are the accreditation body, the SEMS audit and certificate committee, the data collection analysis/reporting committee, the good practice development pillar, and the sharing industry knowledge pillar. From all the activities developed by the Center, the groups in charge of the accreditation body and the SEMS audit and certificate committee perform functions directly related to the monitoring of the SEMS program.

10.5 CHANGES TO SEMS REGULATIONS: INTRODUCING A CO-REGULATORY SCHEME

10.5.1 *The Role of COS for the Implementation of SEMS Regulations*

The role of COS in the implementation of SEMS regulations has increased over time. Just a few years after its creation, BSEE embraced the Center and provided it

[41] The Center for Offshore Safety, Governance Procedures COS-100-01 (August 2016); The Center for Offshore Safety, *supra* note 35.
[42] The Center for Offshore Safety, *supra* note 35
[43] Ibid.

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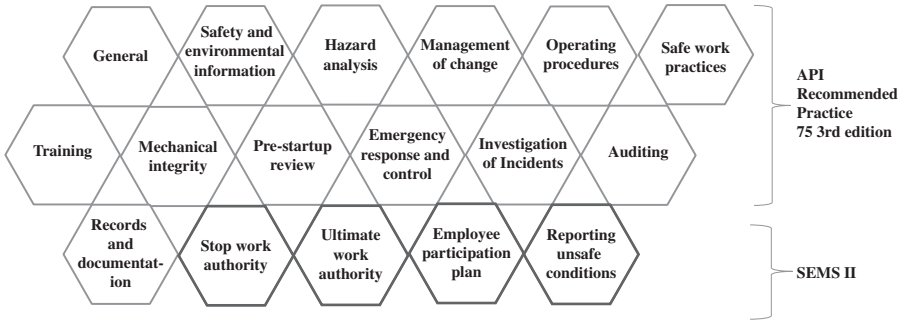

FIGURE 10.2. The seventeen elements of the SEMS program.
Source: The author, based on SEMS II

with a formal role in the implementation of SEMS programs. Such a formal role was the result of acknowledging the leadership that COS displayed to guide operators in their audits. In order to assume leadership in the audits processes, in 2012, COS started an audit service provider (ASP) accreditation program.[44] The goal of the program was to improve the audits through a consistent and unified set of requirements for ASP and their auditors.[45] For this purpose, in 2012, COS adopted a series of standards to guide operators on how to conduct audits (SEMS toolkit) and the competences that ASP's and auditors should fulfill (ASP – accreditation program). The proactive role of COS was acknowledged by BSEE in 2013 when it adopted SEMS regulations II (SEMS II).

SEMS II modified several aspects of the SEMS program both in its content and the auditing process. With respect to the content of the SEMS program, SEMS II included best practices that were not covered by the API RP-75 regarding the involvement of the workforce in the SEMS program. Therefore, besides the thirteen elements established by the API RP 75 third edition, operators must include four new elements in their SEMS program: stop work authority, ultimate work authority, employee participation plan, and reporting unsafe working conditions.[46] Figure 10.2 presents a diagram with the seventeen elements of the SEMS program, highlighting in blue those established by the API RP-75 and in yellow those incorporated by SEMS II.

Regarding the audit process, SEMS regulations II indicate that audits should only be conducted by independent third parties, which were called audit service providers (ASPs). In turn, the ASPs must be accredited by an accreditation body (AB) approved by BSEE as an independent third-party organization that assesses and

[44] The Center for Offshore Safety, 2019 Annual Performance Report (2020), at 42.
[45] Ibid.
[46] Office of the Federal Register of the United States, *supra* note 23, CFR §250.1902 (b); §250.1903 b; §250.1911; §250.1921; §250.1931; §250.1932; §250.1933.

https://doi.org/10.1017/9781009329408.015 Published online by Cambridge University Press

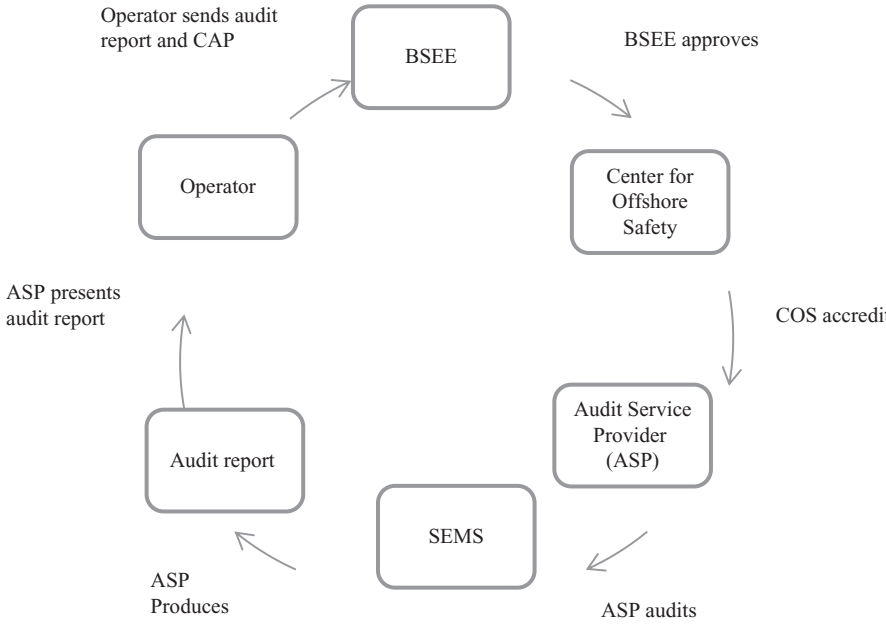

FIGURE 10.3. SEMS II third-party audit scheme.
Source: The author, based on SEMS II

accredits ASPs.[47] In 2015, BSEE approved COS as the first and, so far, only AB to accredit ASPs.[48] Since June 2015, all SEMS programs must be audited by a COS-accredited ASP. As of March 2021, COS had accredited five ASPs.[49] Figure 10.3 illustrates the roles of BSEE, COS, and ASPs in the audit scheme.

Besides these changes, SEMS II required operators to comply with three COS standards related to the third-party audits. With SEMS II, BSEE introduced a model of co-regulation to monitor the implementation of the SEMS program elements of which are analyzed in Section 10.5.2.

10.5.2 *SEMS Regulations through the Lens of Co-regulation*

Co-regulation is a form of regulation that combines elements of private self-regulation and state or public regulation.[50] Under this approach, a government

[47] Ibid., CFR §250.1903 a, b; §250.1922 a.
[48] Ibid., CFR §250.1903 (a).
[49] The Center for Offshore Safety, SEMS Audit Providers, https://centerforoffshoresafety.org/sems-audit-providers/find%20a%20cos%20accredited%20asp.
[50] R. Baldwin, M. Cave, and Martin Lodge (eds.), *Understanding Regulation* (2nd ed., 2011), at 147; N. Gunningham and J. Rees, Industry Self-regulation: An Institutional Pespective (1997) 19:4 *Journal of Law & Policy* 366; C. Coglianese and E. Mendelson, Meta-regulation and Self-regulation, in *The Oxford Handbook on Regulation* (M. Cave, R. Baldwin, M. Lodge, eds., 2010), at 24.

https://doi.org/10.1017/9781009329408.015 Published online by Cambridge University Press

regulator identifies a problem and commands the industry to develop plans aimed at solving it.[51] In response, the industry, as a self-regulator, develops its own internal regulations.[52] By implementing a scheme of co-regulation, the government transfers part of its regulatory tasks – either rule-making, monitoring, or enforcement – to the regulated industry.

In the case of the SEMS regulations, BSEE transferred part of its rule-making and monitoring powers to the oil and gas industry. An example of the delegation of rule-making responsibilities is the adoption of the API RP-75 as the backbone of the SEMS program. By requiring operators to implement a SEMS program on the basis of a standard developed by the API, BSEE yielded part of its rule-making tasks to the industry self-regulator.

The SEMS program gives the opportunity to oil and gas operators of developing risk management systems identifying the mechanisms to address their safety and environmental risks. For example, operators can devise their instruments for risk analysis, monitoring, maintenance, and procedures for managing change.[53] Thus, these mechanisms become the rules that operators must comply with.

However, management systems do not operate alone.[54] Their effectiveness depends not only on the capacity of regulatees to comply with their obligations but on the regulator's capacity to monitor and enforce the management system.[55] Precisely, this is another co-regulatory element in SEMS regulations: the delegation of the government's monitoring task to the oil and gas industry through different mechanisms. The two main mechanisms that BSEE chose to monitor the implementation of SEMS regulations are a form of meta-regulation that involves the offshore oil and gas industry and third-party audits. Meta-regulation is described as the activity of "regulating the regulators, whether they be public agencies, private corporate self-regulators or third party gatekeepers."[56]

Through meta-regulation, a regulator oversees another and sets standards for its activities.[57] Meta-regulation may involve the delegation of regulatory activities by a public authority to private actors aiming at improving voluntary compliance with regulations, reinforcing the ownership of responsibilities among the regulates, and decreasing public enforcement costs.[58]

In the case of the SEMS regulations, BSEE (meta-regulator) approved the COS (industry self-regulator), which, in turn, accredits the third parties that audit SEMS programs. The involvement of the COS is not limited to accrediting the auditors.

[51] Coglianese and Mendelson, *supra* note 49, at 7.
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] C. Parker, *The Open Corporation: Effective Self-regulation and Democracy* (2002), at 15.
[57] P. Verbruggen and T. Havinga, The Rise of Transnational Private Meta-regulators (2016) 21 *Tilburg Law Review* 116, at 119–122.
[58] Ibid.

The BSEE has also adopted several of COS standards, therefore, influencing the rule-making tasks of the meta-regulator.

Taking into account the role of the API and COS in both the rule-making and monitoring aspects of the co-regulatory scheme introduced by SEMS regulations, one of the main concerns is the role of BSEE as meta-regulator. This concern was highlighted by the US Chemical Safety and Hazard Investigation Board in its last report on the DWH accident, indicating that if BSEE does not independently assess the quality and effectiveness of the third-party audits, the scheme could "devolve into ineffective industry self-regulation."[59]

Taking into account that, by design, the role of BSEE as meta-regulator is to oversee the third-party audit scheme, Section 10.5.3 will describe the tools that BSEE has to perform such functions and its relations with COS.

10.5.3 *The Role of BSEE as Meta-regulator and Its Interactions with the COS*

The interactions between the BSEE and COS as public and private authority are shaped by several mechanisms developed by both authorities in their respective domains. In the case of BSEE, there are at least seven of those mechanisms in SEMS regulations. The first three mechanisms are in relation to COS and the remaining four mechanisms are in relation to the audit scheme. In relation to COS, the first mechanism is the approval of BSEE to COS as the AB.[60] SEMS regulations establish the requirements that COS had to fulfill in order to obtain such approval, as it did in 2015. Those requirements include standards from the International Organization for Standardization[61] and from COS itself.[62] The relation between the BSEE and COS is governed through a memorandum of understanding that authorizes the Center to review auditors and accredit those qualified to conduct the SEMS audits.[63] The second and third mechanisms that BSEE has to steer the work of COS and monitor its performance are the establishment of new regulatory requirements for the AB and audits.[64] The objective of such audits is to verify the compliance of COS with the accreditation requirements. Beyond these

[59] US Chemical Safety and Hazard Investigation Board, *supra* note 25, at 79.

[60] Office of the Federal Register of the United States, *supra* note 23, 30 CFR § 250.1922.

[61] The ISO standard required by SEMS II is ISO/IEC 17011, Conformity Assessment – General Requirements for Accreditation Bodies Accrediting Conformity Assessment Bodies, 1st ed., September 1, 2004; corrected version, February 15, 2005.

[62] Office of the Federal Register of the United States, *supra* note 23, 30 CFR § 250.1922. The AB must have an accreditation process that meets or exceeds the requirements contained in Section 6 of Requirements for Accreditation of Audit Service Providers Performing SEMS Audits and Certification of Deepwater Operations, COS-2-04.

[63] The Center for Offshore Safety, Continual Improvement of SEMS Audits (April 20, 2020), at 6, www.centerforoffshoresafety.org/-/media/COS/COSReboot/2020SEMSAuditingWebinarSlides.pdf?la=en&hash=B928B14370F9B5797D69085503B5ACBFBB2C13D9.

[64] Office of the Federal Register of the United States, *supra* note 23, 30 CFR § 250.1922 (a) (2).

mechanisms, it is important to notice that SEMS regulations do not establish enforcement tools against the AB.

In relation to the audit scheme, the fourth instrument of BSEE to oversee it are all the instances where BSEE receives information from the audits, including the audit plan, the audit report, and the CAP.[65] In the case of the audit plan, operators must send it to BSEE before the audit, and BSEE reserves the right to modify the list of facilities proposed to audit. Regarding the CAP, the BSEE may notify the operator if the proposed schedule to correct the deficiencies identified in the audit is not acceptable or if the CAP does not effectively address the audit findings.[66]

The fifth monitoring tool of BSEE over the co-regulatory scheme is direct evaluations of the SEMS. BSEE retains power to evaluate or visit facilities directly or through its authorized representative.[67] These evaluations or visits may be random and may be based upon the operator's performance or that of its contractors.[68]

The sixth monitoring mechanism of BSEE is directed SEMS audits. If based on the results of BSEE's inspections and evaluations, or as a result of an event, BSEE identifies safety or noncompliance concerns, BSEE may direct the operator to have an ASP audit of his SEMS program.[69] BSEE-directed audit is an additional requirement to the regular audit required by SEMS II. BSEE can also opt for conducting the SEMS audit directly.[70]

Finally, if BSEE considers that the operator is not in compliance with SEMS regulations, it can issue a notice of noncompliance (NNC). By NNCs, BSEE informs the operator in the case of an event of noncompliance and the actions needed to correct it in order to avoid the use of enforcement tools against the operator.[71] According to the severity of the violation, BSEE can use several enforcement tools, including a warning, shut-in, civil penalty, performance improvement plan, referral for criminal penalties, and a disqualification referral.

In turn, COS has developed its own mechanisms to interact with the BSEE and, eventually, influence its behavior. The main mechanism is the issuance of guideline documents or standards on the third-party audits. COS has been successful in developing several documents that BSEE has incorporated by reference in SEMS regulations. The second mechanism is an External Stakeholder Group where BSEE and other governmental organizations celebrate regular meetings with COS to review the progress of the Center.[72]

[65] Ibid., 30 CFR § 250.1920.
[66] Ibid., 30 CFR § 250.1920 (d) (4).
[67] Ibid., 30 CFR §250.1924 (a).
[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] Ibid., 30 CFR §250.1451 a, §250.1927 (a).
[72] The Center for Offshore Safety, *supra* notes 35 and 40; Weaver, *supra* note 22, at 70–71.

After the introduction of this co-regulatory scheme, the question whether the BSEE provides effective oversight of the operator's implementation of SEMS.[73] This question brings also concerns upon the transparency of the system and how BSEE has used the tools at its disposal to oversee the co-regulatory scheme.

10.5.3.1 The Oversight of BSEE to the Third-Party Audit Scheme

Under the BSEE-COS co-regulatory scheme, BSEE became to a large extent a receiver of information from the operator, mainly the audit plan, the audit report, and the CAP. With those documents, BSEE can assess the implementation of the SEMS programs at both the industry and operator's level, and even more importantly, it can assess the improvement of safety in the industry. Therefore, the role of BSEE assessing the information delivered by the operator and making decisions on the basis of such information is paramount for the success of the co-regulatory scheme. This section analyzes, first, how BSEE has assessed such information and, second, whether it has used its enforcement tools to ensure compliance with SEMS regulations.

The third-party audit scheme introduced in 2015 applied to the second and third cycle of SEMS audits completed by early 2017 and 2019, respectively. However, from 2015 to 2019, BSEE published limited information on the implementation of SEMS programs and the audit results. In addition, since 2017, BSEE has not published annual reports informing the public on the results of its regulatory functions. Only in 2020, BSEE published two documents on the results of the second and third SEMS audits on its website.

The first document is a safety alert issued by BSEE in May 2020 with the analysis of SEMS audits from forty-one operators in the Gulf of Mexico. The safety alert identified several common deficiencies for each SEMS assessed. However, it was not a complete report on the results of SEMS audits but an alert to operators.

The second document is an analysis of the results of the third SEMS audits published on BSEE's website in October 2020. This document does not indicate its author nor date. The fact that it is not signed by BSEE's officials, does not have the logo of BSEE, and based on the wording that it uses, it may be inferred that the document was prepared by a firm hired by BSEE.[74] The document includes as an appendix a memorandum issued by BSEE in October 2017 with a review of the second cycle of SEMS audit reports. This "anonymous" document and its appendix are the main information published on the BSEE's website on the results of the second and third cycle of SEMS audits.

[73] J. Weaver, *supra* note 22, at 76.

[74] SEMS Successes, Challenges and Recommendations Based on Analysis of 3rd Round SEMS Audit Results and SEMS Corrective Actions, www.bsee.gov/sites/bsee.gov/files/analysis-of-sems-audit-reports-october-20-2020.pdf.

In its memorandum issued in October 2017, BSEE presented the results of sixty SEMS audits conducted in the second cycle. BSEE highlighted the success of COS accreditation program in several aspects. COS held the third-party auditors to account for their adherence to quality auditing standards and to standardize reporting formats, which was reflected in more consistent audits. This improvement allowed BSEE to review the audit findings more in depth, as well as the status of implementation of SEMS. In this way, the work of the Center supported BSEE to address the auditing and reporting challenges found during the first audit cycle.[75]

BSEE also found opportunities for improvement in the auditing process. The main concern was that the assessment of the SEMS was general and not centered on the operations conducted by operators such as exploration, drilling, construction, production, well maintenance, and decommissioning. Therefore, BSEE considered to implement a more risk-based approach in future audits, focused on the riskiest operations, with high volume of accidents or with more concerns on the effectiveness of SEMS. In this way, future audits could evidence where SEMS work and not.[76]

Regarding the result of the second cycle of SEMS audits, 47 percent of the findings were considered as deficiencies, 28 percent opportunities for improvement, and 25 percent good practices. Six SEMS elements accounted for the most deficiencies (60 percent): safe work practices, hazards analysis, mechanical integrity, general (policy and leadership), operating procedures, and management of change.[77] Beyond this analysis, the report did not refer to the results of implementing the CAP after the audits.

In turn, the document published on BSEE's website in October 2020 analyzed the audit reports of the third cycle where fifty-two SEMS were evaluated.[78] Though the report did not refer to whether the third cycle of audits addressed the recommendations of the second cycle of focusing the audits on the riskiest operations, the report presented conclusions regarding the adoption of SEMS, the audit process, and the corrective action plan. With respect to the adoption of SEMS, the main findings were that all the operators included in the report had developed their SEMS program, however the main challenge was to implement it. More than 60 percent of the deficiencies were related to the same five SEMS elements found in the second cycle of audits: safe work practices, mechanical integrity, hazard analysis, operating procedures, and management of change. Half of all deficiencies were regarding the implementation of the SEMS policies and procedures.[79]

[75] BSEE, Summary – Learnings from Second SEMS Audit Cycle (October 2, 2017), www.bsee.gov/sites/bsee.gov/files/analysis-of-sems-audit-reports-october-20-2020.pdf.
[76] Ibid.
[77] Ibid.
[78] *Supra* note 73.
[79] Ibid.

Despite these findings, the report found that SEMS were moving toward a level of maturity in comparison to the results of the first and second audits.

With regard to the audit process, the report concluded that the quality of the SEMS audit reports increased significantly compared to the first and second cycles. However, it found opportunities of improvement in the audit process. The report indicates that the approach of the audits was to review the seventeen elements of the SEMS program through a checklist included as a reference by SEMS regulations. In this regard, the report recommended to adopt performance-based audit practices, instead of the checklist approach, and to inform the audit plans with performance indicators based on incident history, leading and lagging indicators, and the a risk-based sampling of operations by the auditors.[80] The latter recommendation, replicated to some extent BSEE's conclusion after the second cycle of SEMS audits.

With respect to the CAP, the report recommended two measures: (a) to adopt COS standards and (b) to implement surveillance audits as part of the corrective plan close out process, in order to verify that the deficiencies found in the auditing process were addressed.

From the two documents published by BSEE on the implementation of the co-regulatory scheme, this chapter draws several conclusions regarding both the audit process and the implementation of SEMS by operators. The first one is that BSEE is satisfied with the role of COS. The Center has supported BSEE to improve the third-party audits, accrediting the auditors and making audits more standardized. However, the audit process needs to move from checklist audits to risk-based audits focused on the riskiest operations in order to assess how effective SEMS programs are in improving safety in the real world and beyond the information documented on paper.

The second conclusion regards the adoption of SEMS. The message from the analysis of SEMS audits is that the implementation of SEMS programs is moving toward a level of maturity. Nevertheless, multiple deficiencies persist and most of them are constantly found in the same core SEMS elements: safe work practices, mechanical integrity, hazard analysis, operating procedures, and management of change.

Other conclusions relate to the oversight of BSEE to the third-party audit scheme. In first instance, the role of BSEE needs to be more transparent. Such transparency is insufficient due to the fact that BSEE has not published annual reports since 2017 and the only two documents related to the analysis of SEMS audits by third-parties were published five years after the implementation of the scheme. A second challenge of the BSEE is related to how it analyzes the information provided by the operators and how implementing SEMS has impacted the levels of safety and environmental protection in offshore oil and gas operations.

[80] Ibid.

Since offshore safety depends on identifying relevant indicators, and making them matter,[81] it is important to correlate the findings of SEMS audits with leading and lagging indicators. Some indicators include numbers of loss of containment events, gas releases and fires, explosions, loss of well control, injuries, blowouts, speed or response to well kicks, numbers of cementing failures, numbers of times gas alarms are triggered,[82] and incident investigations.[83]

In the analysis of the second SEMS audit cycle, BSEE already mentioned the importance of performance metrics, indicating that it would track metrics, particularly number and gravity of incidents, and examine if SEMS deficiencies and corrective actions were leading operators to improve their underlying systems.[84] Yet this analysis continues as a pending task for BSEE.

At this point, the question remains regarding what the enforcement approach of the BSEE toward the co-regulatory scheme is. Though there is not complete information on how BSEE has used its enforcement tools and directed audits to enforce SEMS regulations, a few documents published by BSEE evidence that the regulator mainly uses its enforcement tools when operators do not comply with deadlines to submit, for instance, their audit report or CAP. For example, in November 2013, BSEE posted on its website that it had issued INCs against twelve operators for their failure to comply with SEMS regulations. BSEE ordered five operators to halt operations because they did not submit their audit plans and SEMS audits. The remaining seven companies failed to complete the audits before the deadline and were directed to provide BSEE with a copy of their SEMS programs and complete the audits.[85]

Furthermore, in 2019, BSEE published its SEMS Oversight and Enforcement Program (OEP) where it establishes a policy to standardize its approach to the oversight and enforcement of compliance by operators.[86] The main approach is the limited use of INCs. The policy indicates in which specific cases BSEE specialists can issue enforcement tools in the case of violations of SEMS regulations. Most of the cases listed in the policy are related to failures to submit the audit plan, audit report, the CAP, and other documents required by SEMS regulations.

[81] A. Hopkins, *Disastrous Decisions: The Human and Organisational Causes of the Gulf of Mexico Blowout* (2012), at 150.

[82] Ibid.

[83] Text taken from M. Nieves-Zárate, Ten Years After the Deepwater Horizon Accident: Regulatory Reforms and the Implementation of Safety and Environmental Management Systems in the United States (SPE/IADC, 2021), at 10.

[84] BSEE, *supra* note 74. On the importance of performance indicators, see also, *supra* note 25.

[85] See BSEE, BSEE Cites Offshore Operators for Failure to Complete Safety and Environmental Management System Audits (2013), www.bsee.gov/site-page/bsee-cites-offshore-operators-for-failure-to-complete-safety-and-environmental-management.

[86] BSEE, BSEE Safety and Environmental Management Systems (SEMS) Oversight and Enforcement Program (OEP) (2019).

Besides the information on the initial INCs and the OEP, there is not concrete information on how BSEE has used its enforcement tools and directed audits to enforce SEMS regulations. In the analysis of the second SEMS audit cycle, BSEE mentioned that on the basis of performance metrics, it will consider using its "directed audit" to explore unidentified deficiencies that may be contributing to incidents and noncompliance events.[87]

Though BSEE publishes a list of all incidents of noncompliance issued to offshore operators on its website, the list does not indicate the motive of noncompliance. This missing information and the lack of BSEE's annual reports from the years 2017 to 2019 hamper the analysis on how often BSEE has used its enforcement tools due to noncompliance with SEMS regulations, and how SEMS directed audits have been used as an enforcement tool.[88]

In addition to the self-assessment of the BSEE, external organizations to the co-regulatory audit scheme have also examined the implementation of the scheme and highlighted its strengths and weaknesses. Section 10.5.3.2 presents some of the assessments from the US Chemical Safety and Hazard Investigation Board, the National Academies of Sciences, Engineering, and Medicine (NAS), as well as the analysis of the author of this chapter.

10.5.3.2 The Strengths and Weaknesses of the BSEE-COS Co-regulatory Scheme

In its last report, the NAS admitted that COS is making important contributions to offshore safety.[89] The Center plays an important role not only in its capacity as AB but also sharing safety information from its members on a regular basis. Indeed, since its creation, COS has published six annual performance reports from 2014 to 2019. In its annual performance reports, COS presents safety performance indicators and data from the learning from incidents and events shared voluntarily by its members under confidentiality agreements.

Though the information published by COS is limited to the information provided by its members, in the annual report from 2019, it included an analysis of forty-seven SEMS audits submitted between 2017–2019 to BSEE by COS members and non-members.[90] The data was supplied to COS by BSEE, excluding identifying information of operators in order to ensure confidentiality and reduce any bias.[91] Taking into account that BSEE had not published information on the results of the third cycle of SEMS audits, the COS report contributed providing transparency to the co-regulatory scheme regarding the partial results of the third audits.

[87] BSEE, *supra* note 74.
[88] Text taken from Nieves-Zárate, *supra* note 82, at 11.
[89] National Academies of Sciences, Engineering, and Medicine, *supra* note 37, at 16.
[90] The Center for Offshore Safety, *supra* note 39.
[91] Ibid.

https://doi.org/10.1017/9781009329408.015 Published online by Cambridge University Press

Regarding the weaknesses of the co-regulatory scheme, one of the major points of concern is that BSEE misses the opportunity of developing its own expertise in a scheme where it does not audit SEMS programs directly.[92]

The second major point of concern is related to the independence of the co-regulatory scheme. The independence of this scheme has been criticized from at least two angles: independence of COS from the API and independence of the third-party auditors from the operators. As it was discussed in Section 10.2, the National Commission provided a warning regarding the need for creating an industry safety self-regulator separated from the API. However, as it was described in the section on the governance of COS, the Center is not only part of the API, but the latter has many mechanisms to control COS's work. The criticisms on such dependence have persisted in several investigation reports, bringing into question the Center's credibility and objectivity.[93]

The other concern on the independence of the scheme is grounded on the fact that SEMS regulations do not establish any requirement regarding the independence of the ASP from the operators.[94] In the case of the AB, the regulations require that it must establish measures to avoid conflict of interests with the ASPs, however, there are not similar requirements regarding the independence of ASPs and operators.[95]

Another weakness is the low number of COS members. Indeed, the number of COS members has decreased from twenty members in 2016 to eighteen members in 2021. The NAS considers that all companies conducting offshore oil and gas operations should participate in the safety institute advised after the DWH accident. However, several barriers may prevent them to join COS, including the annual cost of membership or the requirement to provide to the Center the resulting data of audits.[96]

Besides these concerns, several aspects of the governance of COS could improve in order to represent different interests of the oil and gas industry beyond oil and gas producers, drilling contractors, service companies, and industry associations. For instance, COS could allow the workforce to have representatives in its governing board. This may be an aspect to improve, considering the key role of workers to advance safety in the offshore oil and gas industry.

So far, this chapter has explained the organizational changes undertaken by the API after the DWH accident in the United States. To conclude this research, this chapter will explore the transnational dimension of the API's organizational changes

[92] US Chemical Safety and Hazard Investigation Board, *supra* note 25, at 80.

[93] US Chemical Safety and Hazard Investigation Board, *supra* note 25, at 79; other investigations highlighting this point were undertaken by National Academies of Sciences, Engineering, and Medicine, *supra* note 37, at 7–8, 17, 104.

[94] US Chemical Safety and Hazard Investigation Board, *supra* note 25, at 80.

[95] Office of the Federal Register of the United States, *supra* note 23, CFR § 250.1922 (b).

[96] National Academies of Sciences, Engineering, and Medicine, *supra* note 37, at 17.

and what lessons regulators outside the United States that rely on the API RP-75 standard can learn.

10.6 THE TRANSNATIONAL DIMENSION OF THE API'S ORGANIZATIONAL CHANGES AND LESSONS FOR REGULATORS BEYOND THE UNITED STATES

The API has taken several steps to strengthen the transnational dimension of its organizational changes both around COS and the API RP-75. Since 2012, COS has developed a SEMS certificates program to demonstrate that an organization has completed a SEMS audit by an accredited ASP and satisfies the requirements of the API RP 75.[97] Though initially the certificate was only allowed for COS members, in 2020, COS allowed non-COS member companies and operations outside the United States to obtain the SEMS certificate.[98] The certification program is open not only to operators but also to drilling contractors and other offshore service providers. Furthermore, in 2019, the API published a new edition of its RP-75 in order to strengthen its global relevance.

Even before these changes, other regulators around the world had adopted the API RP-75 in their regulations.[99] Safety regulators beyond the United States that endorse the API RP-75 for offshore oil and gas operations may have several lessons to learn from the experience in the United States. One of the lessons is that the sole adoption of the API RP-75 does not guarantee that oil and gas companies are implementing best safety practices in their operations.

Indeed, SEMS regulations II by BSEE and several investigation reports evidenced that API RP-75 does not reflect several good practices in the offshore oil and gas industry, such as the involvement of the workforce in the management system and current process safety principles, including a risk reduction goal, a focus on major hazards, measurements, and metrics.[100] The first deficiency was addressed by SEMS II, however, the other issues were not tackled by the regulation nor by the new version of the API RP-75. Therefore, regulators should consider to complement the API RP-75 with their own regulations in order to incorporate good practices missing in this standard.

Another lesson is on the implementation of the API RP-75. The BSEE has developed a whole third-party scheme to audit the SEMS programs. Other regulators should be aware that it is not sufficient just to adopt the API standards in their

[97] Center for Offshore Safety, *supra* note 43, at 9.

[98] Ibid.

[99] Some examples of countries whose regulators have adopted API RP-75 are India, Nigeria, and Colombia. For India, see OGP, *supra* note 2; for Nigeria, see API, *supra* note 2; for Colombia, see Ministry of Mines and Energy, Resolutions 40687 of 2017 and 40295 of 2020.

[100] For a complete analysis on process safety principles and the defficiencies in API RP-75, see US Chemical Safety and Hazard Investigation Board, *supra* note 25.

regulations, it is important to follow up with mechanisms to ensure that oil and gas companies are actually complying with such standards. Regulators can verify the compliance with standards directly or use third parties. When developing third-party audit schemes, a good practice is to put in place mechanisms to ensure their independence from the regulated industry.

10.7 CONCLUSION

After the major accident in the history of the oil and gas industry in the United States and the criticisms that emerged against the API as private standard-setter, it would have been expected that the regulatory reforms adopted after the accident reduced the reliance of the federal regulatory framework on the API. Looking back, during the decade after the accident, BSEE not only neglected the recommendation of reducing its dependence on the API but increased it in more dimensions than the regimen that preceded the oil spill. Despite the criticisms, the API adapted to the post DWH–era, strengthening the influence of its safety standards in the federal regulatory framework and through organizational responses that allowed it to fill some of the gaps identified by investigation reports. The resilience of the API in the wake of the DWH disaster is the result of its decades of expertise, resources, and leadership in the offshore oil and gas industry that contrast with a public regulator in need of those resources. Over time, BSEE has been receptive to the solutions provided by the API and endorsed them with the introduction of a co-regulatory regime for the implementation of SEMS regulations.

Though this new co-regulatory regime still has to stand the test of time, there are already concerns on its effectiveness. The most significant concern is that the goal of BSEE endorsing the API RP-75 was to implement a performance-based rule to manage the risks of offshore oil and gas operations. Yet the formulation of the API RP-75, its implementation, and the audits are far from a performance-based approach. The model remains prescriptive with the risk of reducing the SEMS program to paperwork disconnected from operations in the real world and far from achieving its goal of improving the safety and environmental performance of oil and gas companies. Precisely, the disconnection between the implementation of SEMS, its effectiveness, and the lack of indicators that show how the environmental and safety performance of operators has evolved since the implementation of SEMS is one of the aspects that undermine the co-regulatory scheme. The scheme could benefit from more transparency by the BSEE as a meta-regulator, analyzing those indicators on an annual basis and evidencing how it has used its oversight powers to ensure compliance with the scheme or introduce the changes needed to make it effective.

Given the transnational nature of the API, its response to the DWH accident has also implications for regulators outside the United States, who have several lessons to

learn regarding the strengths and weaknesses of the API RP-75 and the challenges to implement it.

In this way, the analysis on the resilience of the API in times of crisis and the increase of the interdependence between public and private authorities contributes to the empirical evidence on proactive free-riding discussed in this book, particularly in the chapter on the resilience of private authority in times of crisis. The reorganization of the API after the DWH accident provides an example of the perpetuation of private regulatory power not only regarding rule-making but also monitoring the implementation of standards.