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Bridging Documents: Current Legal Issues & Risk Mitigation

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Bridging Documents: Increased Complexity, Increased Responsibility

- Address an expanding spectrum of activities
 - Typically HSE
 - Now SEMS, WCID, and process safety
- Present legal risks
 - Contract
 - Heightened standard of care
 - Expanded liability
- Benefit from an integrated approach that involves HSE, operations, and legal in negotiating

EVOLUTION

What Is a Bridging Document?

“Document that aligns and co-ordinates the requirements and responses of various parties in relation to a specific aspect of a project. Commonly used to align and co-ordinate the emergency response procedures for owner and contractors.”

-- IADC Lexicon / API RP 2MOP (2010)

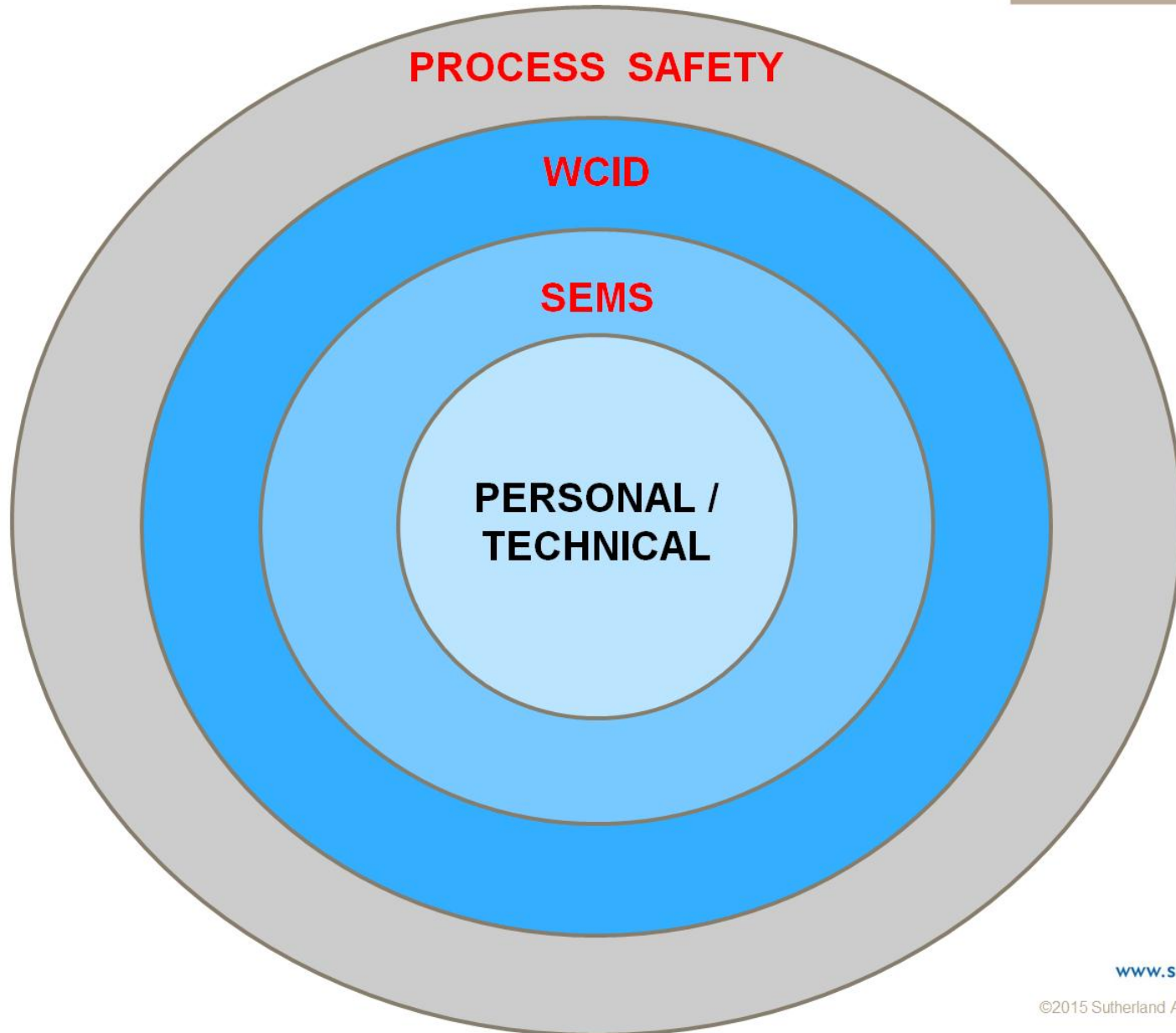
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More Requirements, More Complexity

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Safety and Environmental Management System (SEMS)

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“[A] SEMS program is intended to focus attention on the role of human error and poor organization in accidents, drive continuous improvement in the offshore industry’s safety and environmental records, encourage the use of performance-based operating practices, and encourage collaboration between industry to promote the interests of offshore worker safety and environmental protection.”

BSEE Final SEMS Rule, April 2013

A Brief History of SEMS

- Recommended practice: API RP 75 3d Edition (2004)
- Regulation for operators: SEMS I (2010) & SEMS II (2013)
- Regulation for drilling contractors? “BSEE is evaluating the possibility **of requiring contractors to have a SEMS program** while performing operations in the OCS.” – James Watson, August 2013
- Ongoing BSEE focus: “[W]e place great emphasis on the establishment of a safety culture throughout industry, the cornerstone of this effort being the Safety and Environmental Management System, or SEMS.” – Brian Salerno, May 2015

Well Construction Interface Document (WCID)

- Facilitates exchange of information between operator and drilling contractor
- Aligns operator and contractor practices
 - WCID-SEMS
 - SCID-Well Plan
- Defines roles and responsibilities
- Documents participation
- API RP 97 – November 2013
 - 30 CFR 250.1914 – requires bridging documents
 - BSEE participating in development of API RP 97

CSB Drive for Safety Case

- SEMS inadequate
 - Lagging vs. leading, or predictive, indicators
- Reasons for Safety Case
 - Requires the operator and contractor to be more proactive in thinking of safety
- “Industry management, the regulator and the workforce must work together to develop more effective process safety and indicators programs for offshore energy operations”
--CSB, July 2012



Process Versus Personal Safety

- “Personal or Occupational safety hazards give rise to incidents – such as slips, falls, and vehicle accidents – that primarily affect one individual worker for each occurrence. Process safety hazards give rise to major accidents involving the release of potentially dangerous materials, the release of energy (such as fires and explosions), or both.”
- “Process safety incidents can have catastrophic effects and can result in multiple injuries and fatalities, as well as substantial economic, property, and environmental damage. Process safety... involves the prevention of leaks, spills, equipment malfunctions, overpressures, excessive temperatures, corrosion, metal fatigue, and other similar conditions.”

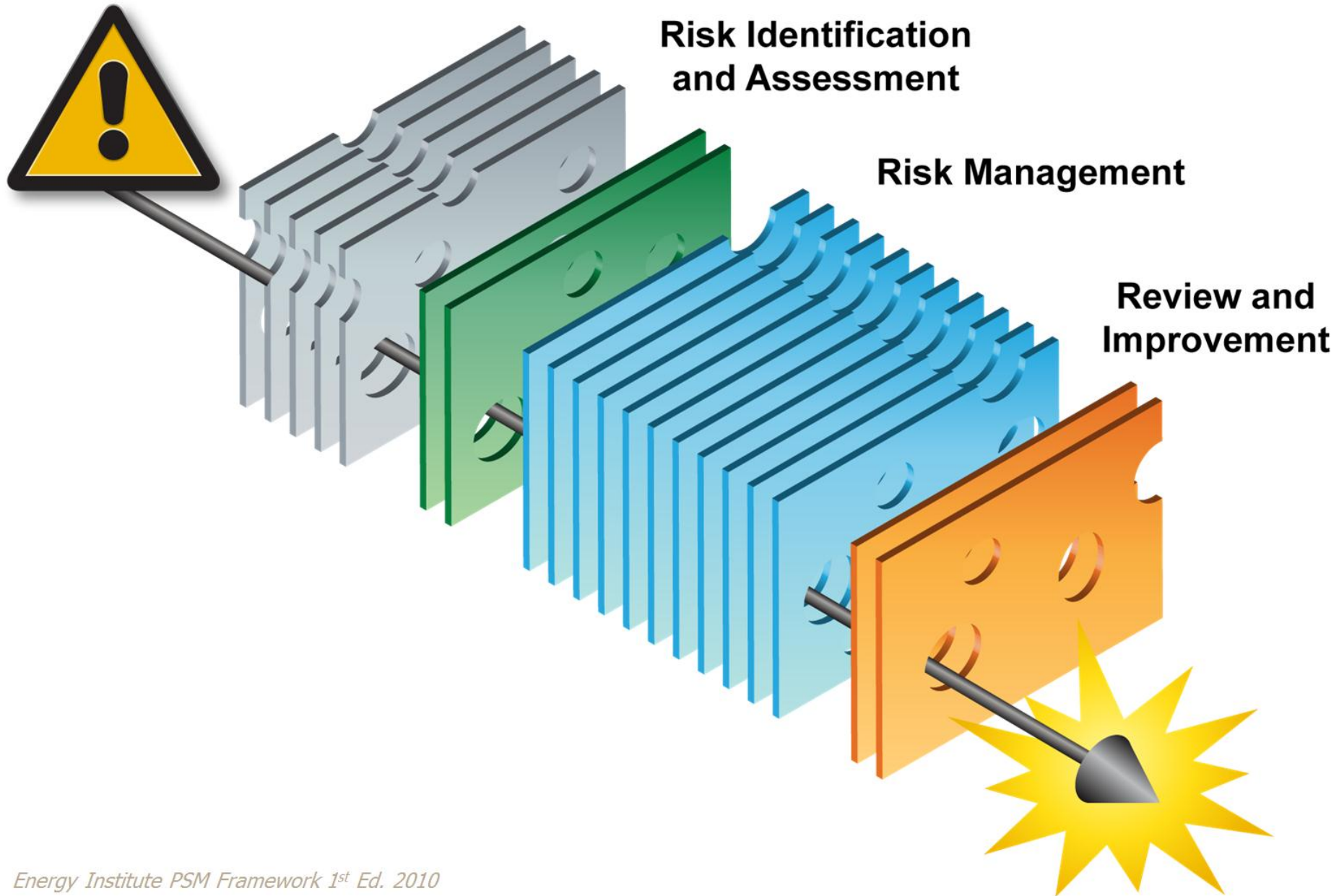
Organisational Causes of the Gulf of Mexico Blowout, CCH Australia Limited, , Sydney 2012 at 73 (citing Baker, J, et al, The report of the BP US refineries independent safety review panel, BP, London 2007).

**Process Safety
Leadership**

**Risk Identification
and Assessment**

Risk Management

**Review and
Improvement**



EXPANDING LEGAL RISK



Types of Legal Risk

- Contractual
- Heightened standard of care
- Expanded and multiplied liability

ADDITIONAL CONTRACT RISK

Increased Contractual Risk – How It Happens

- Bridging document allocates operational risk to drilling contractor explicitly
 - WCID
- Bridging document includes provisions that modify, expand, or enhance the requirements of the drilling contract
- Bridging document creates conflicts or ambiguities with other contract documents

Example: Expanded Requirement

- **Drilling Contract**: “Contractor shall perform the Services without undue delay and shall comply with the terms of this Contract and Good Oil and Gas Field Practices.”

-Versus-

- **HSE Bridging Document**: “Contractor shall ensure that the proposed operations are carried out in accordance with all applicable local government regulations, operator and contractor standards, industry standards worldwide, standards referred to or incorporated in the contract, best practices, and all other relevant standards.”

Increased Contractual Risk – Consequences

- Higher standard of performance & lower threshold for termination
- Commercial and operational disadvantage
- Risk of pretextual termination
- Increased exposure in litigation

EXPANDED STANDARD OF CARE

“[R]easonable caution as a prudent man would have exercised under such circumstances.”

Safety and environmental information

Hazard analysis

Management of change

Operating procedures

Safe work practices

Training

Mechanical integrity

Pre-startup review

Emergency response and control

Investigation of incidents

Audits

Records of compliance

An Expanded Standard of Care

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Records of compliance

Policies

Industry standards

Contract language

Bridging document language

Contractual Undertakings Affect the Standard of Care

- Courts and regulators look to industry practices to determine what is reasonable conduct
- The policies and processes invoked in a bridging agreement are a stick against which “reasonable” behavior is measured
- If parties to a contract agree to perform in certain ways, their failure to perform in those ways supports the claim that they have behaved negligently
- Third parties and regulators adverse to operators and drilling contractors rely extensively on such claims

PROCESS SAFETY RISKS

- Process safety focuses on the performance of an organization as a whole in identifying and mitigating risk
- Legal adversaries use it to justify looking beyond any single incident to the system of conduct that led up to the incident
- This approach holds companies to a higher standard of performance, exposes them to broader scrutiny, penalizes aspirational policy-making, and simplifies claims of intentional wrong-doing
- Intentional or grossly negligent conduct comes with significantly increased liability

Process Failures = Gross Negligence

- “Negligence that is especially bad.”
- “Willful misconduct . . . [based on] an accumulation of acts, a chain of circumstances . . .”
- “A conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party.”
- “Gross negligence is distinguished from ordinary negligence by the mental attitude of the defendant, not by the nature of the negligent act.”

Example: Macondo Process Safety Arguments

- Prior Events
 - BP 2005 Texas City Explosion
 - Transocean Well Control Events
- Rig Maintenance
 - BOP
 - Generally
- Safety Culture

EXAMPLES

Principles of Drafting Bridging Agreements

- Adopt uniform standards of performance
- Avoid overbroad, vague, and superlative requirements
- Establish a clear hierarchy of contractual provisions
- Be explicit and definite in designating which company's system governs a given process
- Simplify, clarify, and use defined terms
- Limit incorporating extra-contractual standards, practices, and procedures
- Maintain agency and control
- Do not undertake responsibilities that are unlikely to be carried out in practice

Example: Standards of Performance

- Use identical standards in drilling contract and bridging document
 - Watch out for counter-parties setting different or higher standards for certain activities in a traditional bridging document or WCID
- Avoid language that can be read as setting a performance standard for a specific task
 - Specific language may trump general language
 - “Contractor will provide a competent crew” is trumped by “[t]he certification program is intended to guarantee that all contractor employees are experienced and capable of doing their jobs at the highest level of competence and ability.”
- Prefer the reasonable to the superlative
 - Good: “Contractor will perform to generally accepted oilfield practices and maintain the drilling equipment in good working condition according to reasonable industry standards.”
 - Bad: “Contractor will perform with the due skill and care of an expert drilling contractor, maintain the drilling unit in first class condition, and operate at the highest standard of safety at all times.”

Example: Clear Hierarchy & Designations of Responsibility

- **GOOD**: “In the event of a conflict between this Bridging Agreement and the Contract, the terms of the Contract shall prevail. The safety management system of the Contractor shall govern all operational performance under this Contract and Bridging Agreement unless the safety management system of the Operator is specified herein to govern performance of a particular task.”
- **AMBIGUOUS**: “This Bridging Agreement shall be considered a supplementing amendment to the Contract and, for the avoidance of doubt, shall constitute part of the Contract for purposes of any assignment or novation of the Contract.”
- **BAD**: “The Parties agree at all times to follow the policies and procedures in the safety management systems of [Operator A] and [Drilling Contractor B], and to adhere to the requirements set forth in the Agreement for Drilling Services, the Bridging Agreement, and the Annexes.”

Example: Simplify, Focus & Define

- Define terms and acronyms
- Use simple and plain language wherever possible
- Consider how definitions interact with other provisions
- More is often less
 - “Incident means an undesired event or near miss arising in relation to performance of the Work at or in proximity to the Location or worksite which resulted or may have resulted in harm to a person, damage to or loss of property, damage to the environment, or process loss, including but not limited to a fire, explosion, loss of revenue, equipment, vehicles, productivity, or hydrocarbons, and any release of any kind into the environment . . . The Parties agree to perform a joint investigation and prepare a written report regarding any Incident as required by Article 10 – Investigation and Reporting.”

Example: Avoid Incorporation

- The goal is to set clear standards and responsibilities within the contract and bridging agreement
- Incorporating extra-contractual documents is problematic for several reasons
 - Increased complexity – will anyone know how all the documents relate? Will anyone in operations?
 - Conflict between explicit contractual requirements and incorporated requirements, as well as conflict between various incorporated requirements
 - Importation of additional (and sometimes surprising) standards
 - Added momentum to heightened standard of care arguments
- Example: GOM Bridging Agreement 2013 incorporated or referenced 24 operator standards; 15 drilling contractor standards; 19 government or third party documents (CFR; API; IADC; IATA; ISPS; MARPOL; etc.).

Example: Maintain Agency & Control

- Investigations – balanced obligations
 - “Each party shall produce to the other any documents generated in the Investigation.”
 - “Contractor shall provide the results of its investigation to Operator.”
- Audits – limited scope, set timing
 - “Operator has the right to audit the performance of Contractor by making a written request to Contractor. The audit will be performed within one month and is limited to material reasonably related to the performance of Contractor.”
 - “Operator has the right to audit the Contractor at any time on any matter related to this Contract or the Work, and the audit shall occur within 7 days.”

BEST PRACTICES

Managing Risk in Bridging Agreements

- Include the legal team in assessing bridging agreements
- Focus on creating cohesive deals in which the contract and bridging agreements are aligned
- Limit the terms of the deal to what is in the contract documents wherever possible
- Identify and assess all kinds of risks – HSE, operational, and legal – while negotiating and drafting
- Remember that a policy has to be workable to be good