Restructure and Reform: Post-BP Deepwater Horizon Proposals to Improve Oversight of Offshore Oil and Gas Activities

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RESTRUCTURE AND REFORM:
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LEILA MONROE*

I. INTRODUCTION

The explosion of the BP Deepwater Horizon on April 20, 2010, and the resulting catastrophic oil spill was not the first indication that federal oversight of offshore oil and gas activities was not adequate. With eleven people killed1 and over 62,000 barrels of oil spilled per day,2 this horrific event captured the attention of the public and decisionmakers and demanded immediate action to address the causes of the catastrophe. As those causes were examined, however, it became clear that the deficiencies in management, oversight, and response capabilities had

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been known, to some extent, for years. Prior to the accident on the BP Deepwater Horizon offshore drilling rig, Congress, federal oversight bodies, media, and other observers had documented the failures of the U.S. Department of the Interior (DOI or “Department”), and its delegate, the Minerals Management Service (MMS), to effectively regulate and oversee lucrative Outer Continental Shelf (OCS) oil and gas activities. Even before the well was capped on July 15, 2010\(^3\) – and the nearly three months of hydrocarbons gushing into the deep sea brought to an end – the Obama Administration and DOI Secretary Salazar ordered a number of investigations and reports to determine the causes of the accident and produce recommendations to remedy significant oversight flaws.

This Article chronicles the multiple reviews that were conducted, in an attempt to understand the flaws in government management and oversight that allowed this disaster to occur. It endeavors to distill the key recommendations produced by numerous reviewers related to improving DOI’s management and oversight of offshore oil and gas exploration and development activities. Although they are also critically important topics, each with identified opportunities for improvement, it is not within the scope of this Article to provide an in-depth discussion of industry culture and practice, technological failures, oil spill response, or spill restoration.

Part II of this Article discusses the troubled history of the Minerals Management Service under the DOI. Part III reviews the chronology of the BP Deepwater Horizon oversight structure reforms. Part IV examines necessary changes to address past failures in government regulation and oversight that contributed to the BP Deepwater Horizon disaster. With regard to reforming government management and oversight, four areas of change were identified by the multiple reports, investigations, and recommendations produced by an array of government agencies, task forces, panels, and experts examining the complex problems and necessary reform with DOI, MMS, and the regulations they administer. These multiple reviewers identified cross-cutting opportunities for deep, lasting improvements to U.S. oversight of offshore oil and gas activities.

First, restructuring of DOI’s oversight agencies must create institutional structures that provide a solid firewall against the inherent conflict of interest between the Department’s revenue collection and resource management – including environmental protection – duties. Second, sufficient funding, staff, and technology must be available for regulators to keep pace with one of the most high-tech, risky, and

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Lucrative industries in the world. Third, DOI must work much more closely with the federal natural resources and maritime safety agencies to improve tough oversight, availability of science, efficiency and sharing of resources. Fourth, the U.S. regulatory approach must be significantly improved to better manage risk and keep pace with rapid industry advances.

This Article also examines actions that have been taken, as of the time of its writing (January 2011), by the Obama Administration and Congress to implement recommendations to improve government oversight of offshore oil and gas exploration and production. Some changes to the federal oversight structure were made by the Administration in the immediate wake of the spill, and other changes were implemented after the completion of reviews and issuance of recommendations. However, by the time the most comprehensive review was released, the Final Report of the presidentially authorized National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling4 (“National Commission”), Congress had yet to pass any form of oil spill response bill, administrative will to take bold and aggressive steps was flagging, and industry was voraciously attacking the validity of these well-supported recommendations for change.5 Industry opponents of change may succeed, as they have in the past, at halting any reforms that would slow the pace or increase the costs of offshore oil and gas exploration and production.6

II. TROUBLED HISTORY OF U.S. DEPARTMENT OF THE INTERIOR’S MINERALS MANAGEMENT SERVICE

The U.S. Department of the Interior and its delegate agency, the Minerals Management Service,7 had jurisdiction over 1.76 billion acres

4 See REPORT OF NAT’L COMM’N, supra note 1.
5 See Press Release, Bureau of Ocean Energy Mgmt., Regulation and Enforcement, Director Bromwich Discusses Strengthened Oversight of Offshore Oil and Gas Drilling and Development at Gulf Oil Spill Series (Jan. 13, 2011), available at www.boemre.gov/ooc/press/2011/press0113.htm (claiming that the major challenge facing the United States and the industry is how to dramatically improve the safety of drilling, especially deepwater drilling, without negatively affecting the level of operations or the number of people working).
6 See REPORT OF NAT’L COMM’N, supra note 1, at 71.
of the OCS and primary oversight for offshore oil and gas development constituting “approximately thirty percent of domestically produced oil and eleven percent of the domestic natural gas supply.”

Long before the explosion of the BP Deepwater Horizon on April 20, the Obama Administration, Secretary Salazar, and their predecessors were well aware of major problems in government management and oversight of offshore oil and gas activities. MMS was established administratively by Secretary of the Interior James Watt in 1982, and nearly from its inception, it was impacted by industry influence and conflicts of interest. Examples of past problems included pressure from MMS management to quickly process permit approvals and environmental reviews; failures to enforce safety and environmental requirements in spite of substantial violations; allowing industry self-regulation and monitoring (such as incorporation of American Petroleum Institute-written standards into offshore operating regulations); flawed royalty contracts that cost the government an estimated $6.4 and $9.8 billion in the MMS’s duties and assigning them to two new bureaus and an office); see also U.S. DEP’T OF THE INTERIOR, SECRETARIAL ORDER No. 3302, CHANGE OF THE NAME OF THE MINERALS MANAGEMENT SERVICE TO THE BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION AND ENFORCEMENT (June 18, 2010), available at www.doioig.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=35872 (renaming the MMS as the Bureau of Ocean Energy Management, Regulation and Enforcement). This transitional structure has led to some confusion; throughout this Article, each of the entities is referenced depending on the time of the relevant action and which agency had authority at that time.

8 U.S. DEP’T OF THE INTERIOR, OFFICE OF THE INSPECTOR GEN., REPORT NO. X-SP-MOI-0008-2010, INSPECTOR GENERAL’S STATEMENT SUMMARIZING THE MAJOR MANAGEMENT AND PERFORMANCE CHALLENGES FACING THE DEPARTMENT OF THE INTERIOR 1 (Oct. 2010), available at www.doioig.gov/images/stories/reports/pdf/X-SP-MOI-0008-2010%20Performance%20Challenges.pdf. This report identified the “significant impediments to the Department’s efforts to promote economy, efficiency, and effectiveness in its bureaus’ management and operations.” Id. OCS energy oversight is only one among eight categories of performance challenges identified, which also include financial management, information technology security, resource protection and restoration, and revenue collection. Id.


13 See REPORT OF NAT’L COMM’N, supra note 1, at 225.
forgone revenues; serious flaws in auditing of production reports and royalty payments; graft, malfeasance, and widespread corruption among MMS personnel; and a “revolving door” where employees move between positions with industry and MMS.

After taking office, Secretary Salazar announced a program to address the problems raised by the Government Accountability Office and DOI Inspector General, addressing ethics standards, royalty policies and program oversight issues raised to ensure a fair return to taxpayers, and balancing the agency’s mission to include an aggressive offshore renewable energy component. Efforts to reform the agency between 2009 and the BP Deepwater Horizon accident included issuance of new ethics guidelines and a new ethics code and program, elimination of the Royalty-in-Kind program and disciplinary actions against employees implicated in Inspector General investigations of that program, and proposal of certain new rules on safety systems and audit requirements.

A number of the investigations, especially by the National Commission, examined the iterative development of regulation. This history reveals striking patterns: periods of cozy industry-government collaboration and rapid development have been interrupted by disasters, which have led to a re-evaluation and adoption of stricter rules and

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20 See REPORT OF NAT’L COMM’N, supra note 1 at 68-76.
III. CHRONOLOGY OF BP DEEPWATER HORIZON REVIEWS AND OVERSIGHT STRUCTURE REFORMS

This Part reviews the government-initiated actions intended to identify the root causes of the BP Deepwater Horizon accident. This review focuses primarily on failures of government oversight and recommendations for improving federal agency structure and oversight.\footnote{For example, on May 14, 2010, the Council on Environmental Quality and the DOI announced a review of the former MMS’s application of NEPA. CEQ, REPORT REGARDING THE MINERALS MANAGEMENT SERVICE’S NATIONAL ENVIRONMENTAL POLICY ACT POLICIES, PRACTICES, AND PROCEDURES AS THEY RELATE TO OUTER CONTINENTAL SHELF OIL AND GAS EXPLORATION AND DEVELOPMENT (Aug. 16, 2010), available at www.whitehouse.gov/sites/default/files/microsites/ceq/20100816-ceq-mms-ocs-nepa.pdf. The National Academy of Engineering and National Research Council also conducted a review of the blowout and ways to prevent such events. NATIONAL ACADEMY OF ENGINEERING/NATIONAL RESEARCH COUNCIL (NAE/NRC) COMMITTEE, ANALYSIS OF CAUSES OF THE DEEPWATER HORIZON EXPLOSION, FIRE, AND OIL SPILL TO IDENTIFY MEASURES TO PREVENT SIMILAR ACCIDENTS IN THE FUTURE, INTERIM REPORT (Nov. 16, 2010), www8.nationalacademies.org/cp/projectview.aspx?key=49246. The topics of those reviews are beyond the scope of this Article.}

Ten days after the explosion of the BP Deepwater Horizon, on April 30, 2010, Secretary Salazar issued Order No. 3298 to establish the Outer Continental Shelf Safety Oversight Board, with the purpose to “ensure a timely, high-level review and implementation, as appropriate, of recommendations to address the Department’s current and future responsibility for management and administration of the OCS program.”\footnote{U.S. DEP’T OF THE INTERIOR, SECRETARIAL ORDER NO. 3298, ESTABLISHMENT OF THE OUTER CONTINENTAL SHELF SAFETY OVERSIGHT BOARD (Apr. 30, 2010), available at www.doi.gov/news/doinews/upload/Order-3298.pdf.} The OCS Safety Oversight Board – composed of the Assistant Secretaries for Policy, Management Budget and Land Minerals Management and the Inspector General – was charged with providing oversight, support, resources and recommendations to MMS regarding the “Joint Investigation into the marine casualty, explosion, fire, pollution, and sinking of mobile offshore drilling unit BP Deepwater Horizon, with loss of life in the Gulf of Mexico, 21-22 April, 2010.”\footnote{DEP’T OF THE INTERIOR & DEP’T OF HOMELAND SEC., JOINT DEPARTMENT OF THE INTERIOR AND DEPARTMENT OF HOMELAND SECURITY, STATEMENT OF PRINCIPLES AND CONVENING ORDER REGARDING INVESTIGATION INTO THE MARINE CASUALTY, EXPLOSION, FIRE, POLLUTION, AND SINKING OF MOBILE OFFSHORE DRILLING UNIT DEEPWATER HORIZON, WITH LOSS
The Joint Investigation was conducted according to principles and a convening order between DOI and the Department of Homeland Security. The investigation was performed under the authority of the Outer Continental Shelf Lands Act (OCSLA)\(^{26}\), and in accordance with a Memorandum of Agreement for conducting investigations.\(^{27}\) Multiple extensions were granted to the Joint Investigation Team; the report is expected to be completed July 27, 2011.\(^{28}\) The Joint Investigation is focusing on operations, manning, maintenance and preparedness causes and the responsibility for each held by the Operator (BP), drilling contractor (Transocean), Flag State (RMI), and Coastal State (MMS/USCG).\(^{29}\)

On April 30, 2010, the President also directed Secretary Salazar to conduct a thorough review of this event and to report, within thirty days, on what, if any, additional precautions and technologies should be required to improve the safety of oil and gas exploration and production operations on the OCS.\(^{30}\) The report responding to that order was produced on May 27, 2010.\(^{31}\)

On May 12, 2010, the Obama Administration submitted oil spill response legislation to Congress “proposing to change the thirty-day congressionally-mandated deadline to a 90-day timeline that can be further extended to complete additional environmental and safety reviews, as needed.”\(^{32}\) This legislative proposal was designed to respond

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\(^{28}\) See Press Release, U.S. Dep’t of the Interior & U.S. Coast Guard, Deepwater Horizon Joint Investigation Team Announces Extended Deadline for Final Report (Oct. 22, 2010), available at www.deepwaterinvestigation.com (extension was requested to allow time for forensic testing and public hearing based on that forensic evidence).


\(^{31}\) Id.

\(^{32}\) Press Release, Dep’t of the Interior, Interior Issues Directive to Guide Safe, Six-Month
to MMS’s need for more time to review exploration plans.33

The Administration acted very quickly in announcing the intent to reform the agency with the primary responsibility for oversight of offshore oil and gas, in response to the BP Deepwater Horizon catastrophe. On May 19, 2010, Secretary Salazar issued Secretarial Order 3299 separating and reassigning the responsibilities previously performed by MMS into two new bureaus and one new office, in an effort to separate their potentially conflicting duties.34 These offices are the Bureau of Ocean Energy Management (BOEM), responsible for resource evaluation, planning, and other activities related to leasing; the Bureau of Safety and Environmental Enforcement (BSEE), responsible for creation of standards, inspections, and enforcement of safety and environmental protection regulations; and the Office of Natural Resources and Revenue (ONRR), responsible for the collection, distribution, and management of revenue. The structure and responsibilities of each of these entities was fleshed out over the course of the following year, with ONRR receiving its direction and responsibilities on October 1, 2010, BOEM and BSEE receiving more detail on their mandates on January 19, 2011, and the details of the new structure to be worked out through 2011.35

President Obama announced on May 22, 2010, the creation of the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (National Commission), “an independent, nonpartisan entity, directed to provide a thorough analysis and impartial judgment. The President charged the Commission to determine the causes of the disaster, and to improve the country’s ability to respond to spills, and to recommend reforms to make offshore energy production safer.”36

The National Commission released its comprehensive report eight months later, on January 12, 2011, and that report is discussed in detail in Part IV below.

A few days after the creation of the National Commission, on May 27, 2010, Secretary Salazar submitted to the President a report responding to the Executive request for identification of immediate,

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33 Id.
34 See U.S. DEP’T OF THE INTERIOR, SECRETARIAL ORDER NO. 3299, supra note 7.
36 REPORT OF NAT’L COMM’N, supra note 1, at vi.
short-and long-term measures that DOI should take to improve safety of energy development on the OCS. The report recommended a number of specific safety measures for blowout preventers and well control, improvements that could be made to the culture of safety through operational and personnel management, and “prescriptive near-term requirements, longer-term performance-based safety measures, and one or more Department-led working groups to evaluate longer-term safety issues.” Based on this report, Secretary Salazar determined that safety required that deepwater drilling activities on new wells cease while additional reviews were being conducted. Thus, on May 28 he issued a memorandum ordering suspension of OCS drilling on new deepwater wells, and two days later he released a Moratorium Notice to Lessees and Operators (“Moratorium NTL”) directing oil and gas lessees and operators to cease drilling new deepwater wells, including wellbore sidetrack and bypass activities; prohibiting the spudding of any new deepwater wells; and putting oil and gas lessees and operators on notice that, with certain exceptions, MMS will not consider for six months drilling permits for deepwater wells and for related activities. For the purposes of the Moratorium NTL, “deepwater” means depths greater than 500 feet.

On June 18, 2010, Secretary Salazar issued Secretarial Order 3302 formally eliminating the former MMS and creating the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE or “Bureau”). On June 23, 2010, DOI announced the creation of the Investigations and Review Unit (IRU), which according to BOEMRE Director Bromwich, “will provide us the capacity to investigate allegations of misconduct, to provide unified and coordinated monitoring of compliance with laws and regulations, and to respond swiftly to

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emerging and urgent issues on a Bureau-wide level and in the
industry." The IRU is intended to respond to possible misconduct and
unethical behavior by Bureau employees; pursue alleged misconduct by
oil and gas companies involved in offshore energy projects; quickly
respond to emerging issues and crises, including significant incidents
such as spills and accidents; and share information about misconduct or
crises with the DOI’s Office of Inspector General, then jointly determine
which office will conduct any investigation.

On July 14, 2010, DOI released an implementation report to
describe the status of the reorganization of the Minerals Management
Service. This report provided some detail about the intended purpose of
each of the three departments that succeeded MMS. The report states that
the plan for implementation balances “the need for an expedited
transition with the extensive analysis and planning required to
successfully implement an organizational change of this scope and
complexity.”

On September 1, 2010, the OCS Safety Oversight Board produced a
report for Secretary Salazar, “providing recommendations to improve
and strengthen the Department’s overall management, regulation, and
oversight of OCS operations, including undertaking further audits or
reviews, and reviewing existing authorities and procedures.” The
Oversight Board was an internal DOI review mechanism; it consisted of
the Assistant Secretary for Land and Minerals Management, the Interior
Department Inspector General, and the Assistant Secretary for Policy

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43 U.S. DEP’T OF THE INTERIOR, IMPLEMENTATION REPORT OF REORGANIZATION OF THE MINERALS MANAGEMENT SERVICE (July 14, 2010), available at www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=38543%20 [hereinafter REORGANIZATION IMPLEMENTATION REPORT]. In some DOI materials, this report is referred to as the Implementation Plan, although this is distinct from the SAFETY OVERSIGHT REPORT IMPLEMENTATION PLAN cited infra at note 47.

44 Id. at 6.

Management and Budget.\textsuperscript{46}

On September 4, 2010, Director Bromwich submitted to Secretary Salazar the Implementation Plan of Bureau of Ocean Energy Management, Regulation and Enforcement in response to the Report of the OCS Safety Oversight Board. Director Bromwich explained to Secretary Salazar that the Implementation Plan contains information about how most of the recommendations in the OCS Safety Oversight Board Report were already being addressed by the reorganization of the agencies.\textsuperscript{47} Given that a number of in-depth investigations were still months away from releasing their recommendations, this stated approach calls into question the extent to which BOEMRE was really willing to go to eradicate the deepest flaws in government oversight.

In a move to separate revenue collection activities from the mineral leasing and regulatory functions on October 1, 2010, the Office of Natural Resources Revenue (ONRR) authority over revenue collection functions was officially transferred from BOEMRE to the Assistant Secretary for Policy Management and Budget.\textsuperscript{48} ONRR was given duties for management of:

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\text{[R]evenues from Federal and Indian onshore and offshore mineral and energy resource leases, and other mineral and energy resource development arrangements and activities not subject to the mining laws, to assure full and timely collection, distribution, and disbursement of bonuses, rentals, royalties, and other revenues and coordination of related Departmental policy.}\textsuperscript{49}
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The Bureau of Ocean Energy Management, Regulation and Enforcement created eleven Implementation Teams to direct the process of reforming the agencies.\textsuperscript{50} According to Director Bromwich, the teams

\textsuperscript{46} Id.
\textsuperscript{49} See id.
\textsuperscript{50} See Bureau of Ocean Energy Management Plans for Regulating Oil Drilling: Hearing Before the National Comm. on the BP Deepwater Horizon Oil Spill, 111th Cong. (2010) (statement
considered the recommendations for improvement received from sources including the report and conversations with the National Oil Spill Commission, the report of the National Academy of Engineering, and the report of the Safety Oversight Board commissioned by Secretary Salazar.51

Throughout the fall and winter of 2010, the staff of the National Commission released a number of reports, and the National Commission released its final report on January 11, 2011. The report included many recommended changes to Federal laws, regulations, and oversight structure discussed in more detail below. The National Commission also made recommendations to address industry practices and other aspects of oil spill response not explored in this Article.

IV. NECESSARY CHANGES TO ADDRESS FAILURES IN GOVERNMENT REGULATION AND OVERSIGHT CONTRIBUTING TO THE BP DEEPWATER HORIZON DISASTER

The blowout was not the product of a series of aberrational decisions made by rogue industry or government officials that could not have been anticipated or expected to occur again. Rather, the root causes are systemic and, absent significant reform in both industry practices and government policies, might well recur. The missteps were rooted in systemic failures by industry management (extending beyond BP to contractors that serve many in the industry), and also by failures of government to provide effective regulatory oversight of offshore drilling.52

This Part reviews those failures of government oversight identified by the multiple bodies and experts that investigated the causes of the BP Deepwater Horizon tragedy. Some other problems underlying that catastrophe, such as industry culture and practice or flaws in oil spill response preparedness and technology, are beyond the scope of this Article.

Various reviews of the BP Deepwater Horizon disaster produced dozens of specific recommendations for improving management and


52 REPORT OF NAT’L COMM’N, supra note 1, at 122.
oversight of U.S. offshore oil and gas exploration and production. This Article discusses four general recommendations that are cross-cutting and identified by multiple reviewers as being necessary for deep, lasting improvements to U.S. oversight of offshore oil and gas activities: (1) restructuring of DOI’s oversight agencies must eliminate the inherent conflict of interest between revenue collection and oversight activities; (2) sufficient funding, staff, and technology must be available for regulators to keep pace with industry; (3) agencies must work together to improve tough oversight, availability of science, efficiency and sharing of resources; and (4) the U.S. regulatory approach must be improved to better manage risk and keep pace with rapid industry advances.

These are not the only recommendations identified by the various commissions, reviews, and experts consulted, and this analysis does not provide significant detail about the reforms proposed. This Article attempts to synthesize those recommendations that appeared most frequently and appear to be the greatest priority with regard to improving government oversight of offshore oil and gas activities.

A. CONFLICTING AGENCY MANDATES NECESSITATE SIGNIFICANT RESTRUCTURING, TOUGH FIREWALLS, AND EXTERNAL REVIEW

The 1978 Outer Continental Shelf Lands Act Amendments (OCSLA) gave DOI and its delegate, the Minerals Management Service, four distinct – and often conflicting – responsibilities: to manage offshore leasing, to collect revenue and conduct auditing, to ensure appropriate permitting and operational safety, and to protect the natural resources on the OCS. Each of these responsibilities requires different skill sets and cultures, and since its creation, MMS has been torn in two conflicting directions by these competing mandates.

The revenue generated from energy activities on the OCS is tremendously important to the federal government, so it is easy to understand how the pressure to issue leases quickly and in large numbers would outweigh careful environmental review and strict oversight of
agency activities:

Since 1953, the Federal Government has received approximately $200 billion in lease bonuses, fees, and royalty payments from OCS oil and gas operators. Last year, the Federal OCS leasing revenue was $6 billion. The OCS oil and gas industry provides relatively high-paying jobs in drilling and production activities, as well as employment in supporting industries. Offshore operations provide direct employment estimated at 150,000 jobs.55

Close ties between MMS and industry resulted in many instances of the oversight agency giving the industry significant discounts, or shortchanging taxpayers, for the extraction of public resources.56 This pervasive problem is identified by the National Commission as occurring from the very first years of the MMS leasing program.57 MMS’s practice of opening large areas of the OCS to be leased had the effect of reducing rents received for leases: “Secretary Watt’s plans for accelerated leasing would cost the U.S. Treasury $77 billion over the five-year period.”58

The conflicting mandates require fundamental reforms “in both the structure of those in charge of regulatory oversight and their internal decision-making process to ensure their political autonomy, technical expertise, and their full consideration of environmental protection concerns.”59 A number of recommendations emerged to address this tension within the Minerals Management Service, and its successor agencies, BOEM, BSEE, and ONRR.

In the wake of the BP Deepwater Horizon explosion, the Administration acknowledged that MMS suffered from conflicts between its resource management, safety and environmental oversight and enforcement, and revenue collection mandates.60 Thus, the Department moved quickly to reassign these responsibilities into three new entities within DOI. While this reorganization was a step in the right direction, reviewers expressed concern that it “does not adequately address the

57 REPORT OF NAT’L COMM’N, supra note 1, at 65 (quoting the Sierra Club’s estimates in Interior Denies Oil Leasing Plan Will Cost $77 Billion, ASSOCIATED PRESS, Sep. 28, 1982).
58 Id.
59 Id. at vii.
60 See REORGANIZATION IMPLEMENTATION REPORT, supra note 43, at 2.
deeper problem of fully insulating the Department’s safety and environmental protection functions from the pressures to increase production and maximize lease revenues.”61 Although the restructuring included the creation of a Chief Environmental Officer position, the new structure maintains within the Bureau of Ocean Energy Management (BOEM) both the authority to issue leases and to perform environmental review and planning decisions.62

B. REMEDY MMS LACK OF SUFFICIENT FUNDING, STAFF, AND TECHNICAL RESOURCES

A cross-cutting theme identified in various reviews was that the lack of sufficient funding or staff with the right training, education, management commitment, motivation and technical resources (laptops) significantly undermined the ability of DOI to provide effective management and oversight. Lack of funding and sufficient resources was identified by multiple reviewers as the cause of numerous problems, including inability to recruit and retain the best staff, vulnerability of staff to industry capture, and inability of staff to keep up with the workload. Reviews conducted by both the OCS Safety Oversight Board and the National Commission identified the dramatic increase in workload without a commensurate increase in MMS resources as a significant problem.63

The OCS Safety Oversight Board identified lack of sufficient funding and staffing, and the need for more personnel and training, education, and professional growth and development opportunities for them as significant problems undermining federal oversight of OCS energy extraction activities.64 The National Commission called the situation “safety regulation on a starvation diet”65 and noted that MMS would “increasingly struggle to keep up with the pace of industry expansion, while juggling four distinct responsibilities – offshore leasing, revenue collection and auditing, permitting and operational safety, and environmental protection – requiring different skill sets and cultures.”66

61 REPORT OF NAT’L COMM’N, supra note 1, at 255.
62 See Dep’t of the Interior, supra note 28.
63 See OCS SAFETY OVERSIGHT REPORT, supra note 45, at 6; see also REPORT OF NAT’L COMM’N, supra note 1, at 72, 256-57.
64 See OCS SAFETY OVERSIGHT REPORT, supra note 45, at 4-5.
65 REPORT OF NAT’L COMM’N, supra note 1, at 72.
66 Id. at 67 (“The root problem has instead been that political leaders within both the Executive Branch and Congress have failed to ensure that agency regulators have had the resources necessary to exercise that authority, including personnel and technical expertise, and, no less
Without sufficient funding, the regulators were not able to keep pace with technological and industry advancements. In one of his multiple testimonies to the National Commission, Director Bromwich explained the work the agency was doing to achieve reform:

We are also taking steps to secure additional funding and resources for BOEMRE and its successor agencies. . . . Central to this effort is encouraging congressional approval of additional funding and resources for BOEMRE and its successor agencies as we implement the reorganization. The Administration recently submitted a FY 2011 Budget Amendment requesting a $100 million increase for BOEMRE operations funding to facilitate reorganization and reform of the agency.67

Implementation of many of the identified recommendations and pledged reform is primarily dependent on the availability of additional resources, specifically funding and personnel.68

Despite the importance of securing sustained and sufficient funding for federal oversight activities, there has been fierce political opposition to attempts to increase agency funding. A proposal, consistent with the recommendations of the National Commission,69 to raise fees on oil and gas operators to better cover the costs of hiring new rig inspectors, conducting scientific research, and finalizing the reform of the oversight agency was criticized strongly by Republican lawmakers and the industry. These critiques claimed the fees would drive offshore oil and gas operations overseas.70
C. IMPROVE CONTENT AND UNIFORM APPLICATION OF REGULATIONS AND ENFORCEMENT

The development of offshore oil and gas management and oversight structures has been iterative; major accidents have resulted in staged reforms and improvement of regulations and oversight. Industry and government have a long history of working very closely together to advance drilling: reforms proposed in the wake of a disaster were frequently not fully realized. Government incentives have enabled the expansion of development deeper and deeper, and the industry has continued to expand and grow.71

Just over a month after the BP Deepwater Horizon disaster, Secretary Salazar fulfilled President Obama’s April 30, 2010, request for a thirty-day review of additional precautions and technologies that could improve the safety of OCS oil and gas exploration and production. Even while the well was still gushing, and the causes of disaster were still being investigated, DOI identified numerous necessary improvements to enhance enforcement of current regulations; improve safety management systems, procedures, and operations; and institute new rules requiring a comprehensive, systems-based approach to safety and environmental management.72 The extent of the problems identified and changes needed were so significant that Secretary Salazar called for a six-month moratorium on new permits and drilling activities in the OCS.73

i. U.S. Regulations Need Significant and Ongoing Improvement

As more information was gathered and additional reviews conducted, the extent to which regulations have not kept pace with technological advances was brought into sharp relief. J. Robinson West, former Assistant Secretary of the Interior and current industry consultant, stated in testimony to the National Commission, “[T]he fundamental challenge all regulators face is the potential mismatch between very dynamic business processes and static regulatory systems.”74

Analysis of the flaws with the U.S. system led to consideration of offshore oil and gas in regulation and reforms in other nations around the

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71 See REPORT OF NAT’L COMM’N, supra note 1, at 68-72.
73 Id.
Numerous post-BP Deepwater Horizon reviewers discussed the differences between the U.S. regulatory system and the approaches applied in the United Kingdom and Norway, which have moved away from a prescriptive regulatory approach to a performance-based approach. Regulatory systems are typically categorized as falling into one of three groups: (1) prescriptive, applied in the United States and focusing on detailed regulations and requirements; (2) self-regulation, in nations, such as Angola, that lack capacity or will to substantially oversee industry; and (3) performance-based or “safety case” approaches that focus on a flexible, yet arguably more effective, risk management structure, such as those in the United Kingdom, Norway, Australia and Canada.

Secretary Salazar acknowledged the need to adopt a safety case approach, based on the guidelines applied by the International Association of Drilling Contractors, that would “establish risk assessment and mitigation processes to manage a drilling contractor’s controls related to the health, safety, and environmental aspects of their operations,” and to finalize a Safety and Environmental Management System for offshore drilling operations. At first glance, this was a demonstration of meaningful commitment to reforms, but the Report of the National Commission reveals that the Norwegian, British and Canadian governments adopted such an approach in the early 1990s, and MMS had been instructed by the Marine Board of the National Research Council of the need to conduct such a regulatory overhaul. “At the time of the Macondo blowout—almost 20 years after its original proposal—MMS had still not published a rule mandating that all operators have plans to manage safety and environmental risks.”

The Bureau of Ocean Energy Management, Regulation and Enforcement has demonstrated resolve to implement a number of safety and environmental measures. These include the Drilling Safety Rule,

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75 See REPORT OF NAT’L COMM’N, supra note 1, at 69-71.
77 Statement of J. Robinson West, supra note 74. Comparisons of regulatory approaches in Norway, United Kingdom, Australia, and Canada are also available in U.S. DEP’T OF THE INTERIOR, supra note 37, at 15-16, and REPORT OF NAT’L COMM’N, supra note 1, at 68-72.
79 See REPORT OF NAT’L COMM’N, supra note 1, at 69-71.
80 Id. at 71.
containing new standards for well design; casing and cementing and requiring operators to obtain independent third-party inspection and certification of each stage of the proposed drilling process; and the Workplace Safety Rule, which requires operators to develop a comprehensive safety and environmental management program that identifies the potential hazards and risk-reduction strategies for all phases of activity, from well design and construction, to operation and maintenance, and finally to the decommissioning of platforms.82

BOEMRE also issued new Notices to Lessees (NTL): NTL-06, which requires that operators’ oil spill response plans include a well-specific blowout and worst-case discharge scenario and that operators also provide the assumptions and calculations behind these scenarios;83 and NTL-10, which establishes informational requirements, including a corporate statement from the operator that it will conduct the applied-for drilling operation in compliance with all applicable agency regulations, including the new Drilling Safety Rule.84

Although these are improvements over the pre-BP Deepwater Horizon requirements, the new regulations and rules are still based on American Petroleum Institute (API) practice. For example, according to the National Commission, the Workplace Safety Rule—based on the Safety and Environmental Management Program Recommended Practice 75 developed in 1993 by the API and incorporated by reference into the rule—needs updating immediately to be sufficient.85

Even these modest measures have faced fierce industry opposition. For example, media reported that offshore oil and gas industry groups have expressed strong opposition to the changes, bombarding DOI and the Administration with critiques.86 In two weeks in January 2011, industry representatives met with Director Bromwich and his staff in Washington, D.C., to strongly express their concern about delays to new

83 See BUREAU OF OCEAN ENERGY MGMT., REGULATION AND ENFORCEMENT, NTL NO. 2010-N06, INFORMATION REQUIREMENTS FOR EXPLORATION PLANS, DEVELOPMENT AND PRODUCTION PLANS, AND DEVELOPMENT OPERATIONS COORDINATION DOCUMENTS ON THE OCS (June 18, 2010), available at gomr.boemre.gov/homepg/regulate/regs/ntls/2010NTLs/10-n06.pdf.
85 See REPORT OF NAT’L COMM’N, supra note 1, at 242.
permitting that might be caused by the new rules.\textsuperscript{87}

\textit{ii. New Rules Must Also Be Meaningfully Enforced}

New rules and regulations will not have their intended effect without tough, persistent and uniform enforcement. The review conducted by the OCS Safety and Oversight Board found numerous problems that have undermined the effectiveness of enforcement. In particular, civil penalties, capped at $35,000 per violation,\textsuperscript{88} are far lower than necessary to serve as an effective deterrent for an industry that pays between $500,000 and $1 million per day to run a facility.\textsuperscript{89} Furthermore, the vast majority of “Incidents of Noncompliance” (INC) that are issued do not result in civil penalties or meaningful follow-up. Of the 2,298 INCs issued in 2009, only eighty-seven were referred to the civil penalty process, a total of $919,000 in civil penalties were collected, and only fifty follow-up inspections were conducted.\textsuperscript{90} Finally, lack of whistleblower protections has been a significant problem.\textsuperscript{91}

The OCS Safety and Oversight Board identified numerous disparities between oversight offices and regions. Differences include different protocols, program structures, and capacity between the Pacific Region, Gulf of Mexico Region and Alaska Region.\textsuperscript{92} Disparities also exist between the district offices within a single region, with the result that operators “shop around” for approval.\textsuperscript{93} MMS’s past malfeasance often occurred at the field office level. All reforms must be designed to affect all levels of the restructured agency.

Additionally, it is important to improve coordination between Washington and field offices and to ensure that reforms permeate vertically through the new regulatory structure. One step to achieve this would be to issue a binding directive similar to the Bureau of Land Management’s (BLM) recently instituted policy that requires the field offices to form Interdisciplinary Consistency Review Teams for lands in their jurisdictions and to report to the Washington office to ensure leasing decisions appropriately consider environmental factors and

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\textsuperscript{87} Id.
\textsuperscript{88} See 43 U.S.C.A. § 1350(b) (Westlaw 2011); see also 30 C.F.R §§ 250.200–206 (Westlaw 2011).
\textsuperscript{89} OCS SAFETY OVERSIGHT REPORT, supra note 45, at 18.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id. at 8-9.
\textsuperscript{93} Id. at 6.
In August 2010, BOEMRE took a step in the right direction to improve the explicit code of conduct for all employees, by issuing new guidance to strengthen recusal for conflict of interest, reduce cronyism, and improve reporting industry attempts to influence or coerce agency action.

D. INCREASE PARTICIPATION AND OVERSIGHT FROM EXTERNAL AGENCIES

Although DOI interacts with multiple federal agencies in overseeing offshore energy activities, interagency consultation requirements are weak or very narrow. There is limited onus on BOEMRE to accept the input or expertise of natural resource agencies in planning, leasing and permitting under OCSLA. The National Commission identified the “need for greater interagency consultation” as a key recommendation to better safeguard the environment. The need for this change was also expressed by multiple experts who testified or provided written comment to the Commission. Improving substantive, and in some instances binding, interagency consultation is likely to have positive effects on the offshore oil and gas oversight regime, including improving the identification of the areas where oil and gas operations are acceptable and those “that should be excluded from lease sales because of their high ecological importance or sensitivity,” ensuring external review of

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96 This Article does not focus on numerous other opportunities to improve OCSLA, for example, by requiring more comprehensive and effective environmental review of planning and leasing decisions. Existing Regulatory Structure & Consulting Agency Roles: Statutory Framework and Interagency Consultation & Planning: Hearing Before the National Comm. on the B.P. Deepwater Horizon Oil Spill and Offshore Drilling, 111th Cong. (2010) (statement of Margaret R. Caldwell), available at www.oilspillcommission.gov/sites/default/files/documents/MargaretCaldwellWrittenStatement.pdf; see also Memorandum from Jody Freeman, Harvard Law School, to Nat’l Comm’n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Structural Options for Improving MMS/BOEM Decision Making on Offshore Drilling (Oct. 13, 2010), available at www.scribd.com/doc/40642315/Jody-Freeman-Presentation-on-Structural-Options-for-MMS-BOEM.
97 See REPORT OF NAT’L COMM’N, supra note 1, at 262-63.
98 Id.
99 Id.
agency decisions, which will help balance consideration of DOI’s multiple mandates (i.e., environmental protection versus revenue maximization); improving resource sharing; enhancing exchange of scientific information; and saving money or increasing efficiency through cost and staff sharing.\footnote{100}

There are consultation requirements throughout the multi-staged OCSLA leasing program. The Secretary of the Interior “shall invite and consider suggestions for such program from any interested Federal agency, including the Attorney General, in consultation with the Federal Trade Commission, and from the Governor of any State which may become an affected State under such proposed program.”\footnote{101} Although the Secretary must reply to the state’s requests “in writing, granting or denying such request in whole or in part,” and must similarly respond to the Attorney General on comments regarding anti-trust matters, there is no obligation for other agencies to comment or for DOI to respond or incorporate comments received.\footnote{102}

Consultation requirements of other environmental statutes (including the Clean Air Act and the Endangered Species Act) also require BOEMRE to confer with federal agencies charged with marine resource protection: the National Oceanic and Atmospheric Administration (NOAA), the National Marine Fisheries Service (NMFS), U.S. Fish and Wildlife Service (USFWS), and U.S. Environmental Protection Agency (EPA), all of which possess significant scientific data and expertise on ecosystems and wildlife in the OCS.\footnote{103}

The OCS Safety Oversight Panel identified the need for better resource sharing between BOEMRE and the other agencies: “In addition to its own legal mandates, BOEMRE conducts inspections for the EPA on air quality and point-source discharges, for the USCG on safety, and for the Department of Transportation on pipelines – all without reimbursement.”\footnote{104} BOEMRE also shares responsibility for oversight of offshore oil and gas activities with the U.S. Coast Guard (USCG), which has oversight responsibility for the safety of systems at the platform level of mobile offshore drilling unit (MODU), while BOEMRE oversees sub-platform drilling systems.\footnote{105} Despite a 2004 Memorandum of

\footnote{100} Statement of Margaret R. Caldwell, supra note 96; see also Memorandum from Jody Freeman, supra note 96.

\footnote{101} 43 U.S.C.A. § 1344(c)(1) (Westlaw 2011).


\footnote{103} See Memorandum from Jody Freeman, supra note 96.

\footnote{104} OCS SAFETY OVERSIGHT REPORT, supra note 45, at 13.

\footnote{105} See 43 U.S.C.A. § 1337(p) (Westlaw 2011); see also HAGERTY & RAMSEUR, supra note 10, at 13.
Understanding between MMS and the USCG “to promote interagency consistency in the regulation of OCS activities and facilities under the jurisdiction” of both agencies, better coordination is also necessary in order to facilitate unannounced inspections.

To achieve improved interagency coordination, the National Commission and other experts recommended the OCSLA be amended to designate NOAA, which has science and marine resource expertise and responsibilities, as a cooperating agency for the purposes of National Environmental Policy Act (NEPA) compliance under OCSLA. Improvements could also be made by clarifying and strengthening interagency consultation with NOAA, EPA, NMFS, and USFWS, requiring that BOEMRE consult with these agencies and respond to input in writing.

An augmented role for other natural resources agencies and independent science entities will help ensure development of regulations and enable their implementation and enforcement to be robust and free from industry influence. In particular, NOAA, as the lead federal agency with knowledge and jurisdiction over coastal and marine ecosystems, should be given a much stronger role in preparation of Environmental Impact Statement and related NEPA documents, even beyond the status of a co-operating agency. Congress could also consider amending the OCSLA to accord NOAA further deference, particularly at the planning and leasing stages of OCS review.

To improve external oversight of all aspects of offshore oil and gas oversight, periodic reviews should also conducted by external entities, such as the National Academies of Sciences and Engineering. Additional oversight by agencies outside of DOI might also be pursued for the development of certain standards and regulations. For example,


107 OCS SAFETY OVERSIGHT REPORT, supra note 45, at 9 (conducting a survey of 400 BOEMRE employees, finding that 90% of inspectors responding to the survey identified a critical need for more unannounced inspections, which were rarely performed because of the requirements of the Coast Guard to satisfy its Maritime Security Plan).

108 See REPORT OF NAT’L COMM’N, supra note 1, at 264.

109 See Statement of Margaret R. Caldwell, supra note 96.

110 See REPORT OF NAT’L COMM’N, supra note 1, at 264.

111 Id.
the development of new safety standards and regulations could be advised or reviewed by the National Academy of Engineering, which the President has tasked with conducting an independent, technical investigation to determine the root mechanical and technical causes of the BP Deepwater Horizon disaster.\(^\text{112}\)

V. CONCLUSION

In the wake of the BP Deepwater Horizon catastrophe, tremendous effort has been dedicated by external and government experts to determining the failings in management and oversight that allowed the accident to occur. Various reviews made clear that deep and systemic problems with the federal oversight structure were contributing causes and that there are clear opportunities to make permanent, lasting improvements to address these problems. Identification of necessary reforms is only the first step to reforming management and oversight of U.S. offshore oil and gas exploration and production. Now, sustained commitment is needed from both the Administration and Congress to ensure that these reforms are meaningfully implemented. There is indication that industry and political forces are endeavoring to undermine such implementation.

The Obama Administration has taken significant steps to address problems with government oversight, but this action must be sustained and supported by funding and legislative action from Congress. In August 2010, the U.S. House of Representatives passed H.R. 3534, the CLEAR Act, which sought to implement many of the reforms that were identified by the National Commission and many expert reviewers that have been analyzed in this Article.\(^\text{113}\) Those included codification of MMS restructuring, with the creation of an independent science office to conduct NEPA reviews; amendments to OCSLA that would have required enhanced consultation with NOAA; establishment of stronger safety standards; and numerous other provisions that would have addressed oil spill liability and funding for restoration and numerous other deficiencies not covered by this Article. There was insufficient Senate support to pass the bill out of Congress. Since release of the Final Report in January 2011, members of the National Commission have

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testified before Congress to explicitly request legislative action to implement recommendations of the report, but a highly contentious political climate will make passage of such legislation very challenging.\textsuperscript{114}