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Blowout: Legal Legacy of the Deepwater Horizon Catastrophe:Troubled Waters: Federal Oversight of Offshore Oil Drilling

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Troubled Waters:

Federal Oversight of Offshore Oil Drilling

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The oil seeping into the Gulf of Mexico in the aftermath of the 2010 Deepwater Horizon explosion was just the visible manifestation of an uncomfortable fact: the United States lacks a national energy policy. As a result, some of the most critical energy decisions policymakers have undertaken in recent years have been driven by a myriad of factors, ranging from short-term political calculations to well-orchestrated lobbying campaigns. And while the Obama administration is working to overhaul the regulatory system that has governed offshore oil and gas drilling for decades, it remains unclear how it will fulfill the competing missions that have guided the program since its inception.

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The Minerals Management Service (MMS) emerged out of a drive for regulatory reform. Before it existed, the U.S. Geological Survey (USGS) oversaw the collection of royalties from oil and gas companies, based on how much they took from federal land and offshore reserves.[1] But the program became mired in allegations of fraud, and a panel appointed to investigate the problems recommended that a new agency take over those duties as its main mission.

James G. Watt, Ronald Reagan's first Interior Secretary, created an agency in 1982 that went further than USGS's mandate. It would not only lease tracts for exploration and collect the government's share of oil and gas revenue, but would regulate the industry as well. The agency was charged under law to "meet the nation's energy needs," a mandate which established an inherit conflict with competing goals such as safeguarding the nation's coasts.

Even after its establishment of MMS, Watt moved to expand the new agency's powers. William D. Bettenberg, one of the agency's early directors, left his office in Reston one Friday afternoon and returned Monday to learn that Watt was giving MMS oversight of drilling operations in the Outer Continental Shelf, a responsibility that had rested within another Interior Department division, the Bureau of Land Management.

As he set up the agency, Bettenberg turned to the oil and gas industry for guidance. "Sometimes we applied industry standards," he says. "Many of the standards are good." Bettenberg, who retired in 2005 after working for more than four decades in Interior, wonders whether the agency could have done more to regulate deep-sea drilling. "This recent spill has prompted me to conclude I didn't ask enough questions," he says. "I suspect people didn't keep up with technology."

One of the reasons technology became more complicated over time is that—without making a conscious decision about it—elected officials concentrated drilling in the gulf. The trend began in 1981 when Watt proposed opening up the Pacific Outer

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1. Juliet Eilperin & Scott Higham, *Seeking Answers in MMS's Flawed Culture,* WASH. POST, Aug. 25, 2010, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/08/24/AR201008 2406771.html. Except as otherwise noted, this is the original source for all quotes, statistics, and factual statements contained in this essay.

Continental Shelf and Georges Bank off Massachusetts to drilling. The House Appropriations Committee members whose districts would be directly affected by the plan—Representatives Les AuCoin (D-Ore.) and Silvio O. Conte (R-Mass.)—blocked him. They inserted a provision in a spending bill mandating that no money could be used to lease exploratory tracts in central and Northern California waters or the Georges Bank. Watt had no choice but to back down.

Lawmakers continued to expand the moratorium, even after Watt stepped down from his post. From 1982 to 1992, the territory declared off-limits grew from 700,000 acres off the California coast to more than 266 million acres off the Pacific and Atlantic coasts, Alaska's Bering Sea and the eastern Gulf of Mexico.

George H.W. Bush went even further, saying during his 1988 presidential bid that offshore areas needed protection "until technology moves forward." In his first year as president, he canceled a slew of lease sales by executive order and established a marine sanctuary in California's Monterey Bay. The government also bought back leases for tracts off South Florida. The result: more offshore auctions were canceled than held between 1987 and 1992.

The gulf remained the primary place for deepwater ventures. At this point, it is home to ninety-nine percent of the nation's offshore oil production.

Under the Clinton administration, regulators only grew closer to the oil and gas drillers they oversaw. Bill Clinton appointed Vice President Al Gore to oversee a "reinventing government" initiative, which sought to cut the federal workforce, reduce regulation and form "partnerships" between Washington and industry. Profound changes would take place at MMS: It was ordered to do a better job of collecting royalties, while losing nearly ten percent of its staff during the next five years.

Reinvention also became the agency's mantra. In October 1993, an Interior panel issued findings aimed at future drilling policies. Titled "Moving Beyond Conflict to Consensus," it represented a paradigm shift. Chaired by an oil drilling company executive, the panel urged a reversal of restrictions championed during the previous decade by George H.W. Bush and many members of Congress. It recommended that Interior lift the moratoriums, share revenue with states whose water would be opened up for leasing, and create incentives to spur exploration, such as royalty relief for industry. The panel called large spills in the gulf "improbable," citing relatively low reservoir pressure that required companies to retrieve the oil and gas through "artificial lifting" in ninety percent of the wells.

With hindsight, Clinton's Interior Secretary Bruce Babbitt says he sees how policymakers came to focus more on revenue than on risks. "This kind of partnership stuff, in a way, is an inevitable part of a system in which you are producing the second-largest amount of revenue for the U.S. government," he says. "It was not a good decision. My belief, with considerable hindsight, is there is no place for performance-based regulation because of the high risk."

At the end of the Clinton administration, MMS itself issued a warning. In a budget document, the agency reported in 2000 that the burgeoning number of deepwater wells had made overseeing operations in the gulf more complex. The number of companies working there had grown by thirty percent and many employees were new. MMS cautioned: "The offshore industry significantly downsized in the 1980s. . . . The presence of workers without offshore experience is placing an added burden on the inspection and compliance program." The document attracted little notice.

Under George W. Bush's administration, the drive for energy exploration intensified. Nine days after taking office Bush signed an executive order creating the National Energy Policy Development Group. As the task force's chair, Vice President Richard B. Cheney held closed-door meetings with executives from BP, Exxon-Mobil, Conoco, Shell and other firms. Jim Ford, then director of federal relations for the American Petroleum Institute, sent the panel an e-mail on March 20, 2001 outlining the industry's legislative and policy wishes. He called for limiting regulations, reducing the backlog of drilling permits, and making it easier for energy companies to access oil and gas leases.

In its report on May 16, the task force said that drilling in the Outer Continental Shelf had an "impressive environmental record" and that state and federal regulations were interfering with exploration and production. The panel urged Bush to direct Interior Secretary Gale A. Norton to "consider economic incentives" for oil and gas firms and reduce the amount of royalties they had to pay.

Soon after, Bush signed two executive orders that tracked many points in Ford's e-mail and adopted many of the Cheney panel's recommendations. MMS routinely exempted drilling operations from detailed environmental reviews, and pressed ahead with exploration activities.

Bush's Interior Secretary Gale Norton, and her deputy, J. Steven Griles, embraced the task force's endorsement of more drilling. A Griles memo to the White House's Council on Environmental Quality on August 22, 2001, said Interior was "fully committed to playing a role in this effort" and had a "special interest and expertise" in expanding production.

During Norton's tenure, the department adopted regulations aimed at spurring deepwater drilling in the western and central Gulf of Mexico. A 2002 rule allowed oil and gas firms to apply for additional royalty relief; two years later, another rule reduced royalty payments for companies drilling for gas in deeper water.

At the time, MMS began receiving reports that raised concerns about underwater blowout preventers, which serve as the primary device for cutting off the flow of oil in an accident. The equipment relies on a brute-force component known as a blind-shear ram to sever and crimp the pipes of a runaway well. These hydraulic-powered rams are the last line of defense against the pressure rising from deepwater reservoirs, which had proved greater than the members of the 1993 Interior panel had stated.

One study suggested requiring a second blind-shear ram for backup, but in 2003, the agency decided against that. Another report questioned whether remotely operated underwater vehicles could generate enough pressure to cut the pipes. The agency did little to address the concern.

In 2005, finalizing a policy from the end of the Clinton era, MMS told companies that they did not have to provide detailed blowout and response scenarios for each exploration plan. The agency said the plans were "purely speculative or generic." MMS officials did request modest budget increases for regulation. But greater oversight was not a priority, as David Abraham at the Office of Management and Budget (OMB) discovered.

Abraham served as OMB's examiner for offshore programs from 2003 to 2005. When he asked MMS officials about their plans for keeping up with expanded drilling, he said they routinely gave the same answer. "They said, 'Our processes work,'" recalls Abraham, now a fellow at the Council on Foreign Relations. "I said, 'It's like an airplane—everyone always says the wheels will come down, but what happens when they don't?' They should have had people who could say, 'This is what we do when the wheels don't come down.' What they said is, 'Don't worry. Our regulatory regime works.'" Abraham recalls: "They were being pushed by Congress, and they were being pushed by the White House—'Let's go into this area, let's go into that area,' Nobody asked: Did they have the technology" to handle this?

The pressure to increase production came from both ends of Pennsylvania Avenue, says Lynn Scarlett, who was Norton's assistant secretary for policy, management and budget and then deputy secretary under Norton's successor, Dirk Kempthorne. "Those in favor of more drilling," she says, "were saying 'let's go "gung ho" on deepwater. Lots of countries are doing it.' There wasn't a parallel focus at the same time of, 'If we do this, let's have a commensurate effort on regulations for safety.'" Looking back, Scarlett sees the problem not so much as one of complacency but whether MMS "fully focused on the new challenges with deepwater." She wonders: "Was there a failure of imagination of what could happen given the new conditions?" Scarlett says that question never reached her desk. "It just didn't come up," she says. "I honestly didn't really think about it. I wish I had."

In September 2008, the once-obscure agency that provided more money to the Treasury than nearly any other branch aside from the Internal Revenue Service got a burst of negative publicity. Interior's Inspector General released a report detailing blatant corruption in the agency's office in Lakewood, Colorado, which managed the royalty-in-kind program. Under the program, MMS received a portion of the oil and gas collected by companies and sold it on the market. While it was less time-consuming for the industry that way, the probe showed MMS employees were not only accepting improper gifts and trips from the business officials they oversaw, but engaging in drug use and sexual relations with them.

Right after the Obama administration took office in January 2009, the new Interior Secretary Ken Salazar informed reporters he would clean up a firm that had grown too close to industry. He delivered a sharply worded speech to Lakewood employees in which he promised a new code of conduct for the agency and announced the end of the royalty-in-kind program following evidence that millions of dollars in revenue had been lost. "The public knows of what happened here in Lakewood," Salazar told the quiet crowd. "The 'anything goes' will end. And this department, and the Minerals Management Service, will lead the way in ending it." But Salazar and his deputies became consumed with other priorities, including promoting renewable energy on public land and in federal waters. They did not have time to overhaul MMS in the first year and-a-half of the administration.

The Deepwater Horizon explosion changed all that. On May 19, 2010, Salazar signed a secretarial order eliminating MMS and replacing it with the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE).[2] He placed Michael Bromwich—a former Justice Department official known for cleaning up troubled institutions, who was serving as a partner in a prominent law firm in D.C.—as head of the agency.[3] And Salazar and Bromwich began to untangle the ties that complicated MMS's mission for years.

Less than five months later, the administration announced sweeping changes to its offshore drilling regulatory regime. The Office of Natural Resources Revenue, which resides under the Interior Department's Office of Policy, Management and Budget, would oversee revenue collection.[4] The remaining agency would be split between the Bureau of Ocean Energy Management (BOEM), charged with managing U.S. offshore resources, and the Bureau of Safety and Environmental Enforcement (BSEE),

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2. Press Release, Kendra Barkoff, Deputy Commc'n Dir. & Press Sec'y, U.S. Dep't of the Interior, Salazar Divides MMS's Three Conflicting Missions (May 19, 2010), *available at* http://www.doi.gov/news/pressreleases/Salazar-Divides-MMSs-Three-Conflicting-Missions.cfm.

3. Press Release, Kendra Barkoff, Deputy Commc'n Dir. & Press Sec'y, U.S. Dep't of the Interior, Salazar Swears-In Michael R. Bromwich to Lead Bureau of Ocean Energy Management, Regulation and Enforcement (June 21, 2010), *available at* http://www.doi.gov/news/pressreleases/Salazar-Swears-In-Michael-R-Bromwich-to-Lead-Bureau-of-Ocean-Energy-Management-Regulation-and-Enforcement-Secretarial-Order-begins-reorganization-of-former-mms.cfm.

4. Press Release, Kendra Barkoff, Deputy Commc'n Dir. & Press Sec'y, U.S. Dep't of the Interior, Interior Establishes Office of Natural Resources Revenue (Oct. 1, 2010), *available at* http://www.doi.gov/news/pressreleases/Interior-Establishes-Office-of-Natural-Resources-Revenue.cfm.

charged with enforcing safety and environmental regulations.[5]

In announcing the change, Interior issued a press release saying regulators would no longer be torn by the conflict of overseeing the operations of the same firms they depended on for revenue: "The reorganization of the former MMS is designed to remove those conflicts by clarifying and separating missions across three agencies and providing each of the new agencies with clear missions and additional resources necessary to fulfill those missions."[6]

Interior has issued a series of new rules aimed at preventing future disasters, including requirements that operators demonstrate that they are prepared to deal with the potential for a blowout and worst-case discharge; that permit applications for drilling projects meet new standards for well design, casing, and cementing, and be independently certified by a professional engineer; that offshore operators maintain comprehensive safety and environmental programs; and that BOEMRE will begin to use multiple-person inspection teams for offshore oil and gas inspections.

BOEMRE is slowly beginning to approve deepwater drilling operations in the gulf again. It still remains unclear what course the Obama administration will pursue in the coming months, as it navigates the tension between safeguarding the region's environment and satisfying the nation's demand for natural resources. But it has begun to reorient the way the nation regulates offshore energy exploration in an effort to provide clearer ground rules for those who plumb the depths of the ocean and avoid tragedies like the one that illuminated the weaknesses in a system that had endured for nearly three decades.

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5. Id.

6. Press Release, Michael R. Bromwich, BOEMRE Director Discusses Future of Offshore Renewable Energy at Offshore Wind Power Conference (July 14, 2010), *available at* http://www.boemre.gov/ooc/press/2011/press0201.htm.