

# BP'S DEEPWATER HORIZON: "THE GOLDMAN SACHS OF THE SEA"

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## I. INTRODUCTION

Once described as a "lucky" and "charmed" vessel, BP's much celebrated \$560 million *Deepwater Horizon* oil rig was charged with drilling one of the world's deepest wells in the middle of the Gulf of Mexico.<sup>1</sup> At approximately 1:00 AM on the morning of April 20, 2010, BP executives in Houston, Texas, received news that cementing on the well's final casing was complete.<sup>2</sup> What began as a joyous day for the crew of the *Deepwater Horizon* ended in disaster, as escaping gas from the well exploded, eventually causing the rig to vanish in a fireball visible from thirty-five miles away.<sup>3</sup> By 11:00 PM, 115 crewmen from the *Deepwater Horizon* had escaped by lifeboat; however, eleven others went missing, and their bodies were never recovered.<sup>4</sup>

Two days after the explosion, the 33,000-ton *Deepwater Horizon* sank under nearly 5,000 feet of water, causing a five-mile oil slick to form and ultimately triggering the "worst environmental disaster America has ever faced."<sup>5</sup> The first containment efforts focused on closing the blowout preventer valves on the

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<sup>1</sup> See Mark Washburn, *A Huff and Boom Ended Deepwater Horizon's Good Luck*, MCCLATCHY NEWSPAPERS (May 14, 2010), <http://www.mcclatchydc.com/2010/05/14/94184/a-huff-and-boom-ended-deepwater.html>; see also Elizabeth Kolbert, *Oil Shocks*, THE NEW YORKER (May 31, 2010), [http://www.newyorker.com/talk/comment/2010/05/31/100531taco\\_talk\\_kolbert](http://www.newyorker.com/talk/comment/2010/05/31/100531taco_talk_kolbert).

<sup>2</sup> See Washburn, *supra* note 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See President Barack Obama, Address to the Nation on the BP Oil Spill (June 15, 2010), *available at* <http://www.reuters.com/article/2010/06/16/us-oil-spill-obama-text-idUSTRE65F02C20100616> [hereinafter Address to the Nation]; see also *Timeline: Oil Spill in the Gulf*, CNN, <http://www.cnn.com/2010/US/05/03/timeline.gulf.spill/index.html> (last visited Mar. 20, 2012).

wellhead, but rough seas, bad weather, and intense pressures in the deep water rendered these attempts unsuccessful.<sup>6</sup> Several later containment efforts also failed, including attempts to place a containment dome over the spewing well and pumping 7,000 barrels of drilling mud into the busted pipes.<sup>7</sup> It was not until July 15—nearly three months after the explosion—that BP stopped the leak with a new tight-sealing containment cap.<sup>8</sup> The relief well was completed one month later.<sup>9</sup> By that point, however, nearly 4.9 million barrels of crude oil had leaked into the Gulf of Mexico, “penetrat[ing] deep into the Louisiana marshes, devastating environmentally sensitive and important wetland areas” and reaching the shorelines of four Gulf states.<sup>10</sup> Arguably adding to the devastation, the Obama administration imposed a moratorium on deepwater drilling permits in new areas and expanded fishing restrictions to cover 26% of U.S. federal waters.<sup>11</sup>

The blame game began almost immediately as people sought to hold someone accountable for the largest and most destructive oil spill in U.S. history. In President Obama’s first remarks to the public in the wake of the disaster, he vowed to “make BP pay for the damage their company has caused.”<sup>12</sup> BP, on the other hand, blamed Transocean, the owner of the *Deepwater Horizon*. In an interview in May 2010, BP Chief Executive Tony Hayward insisted that “[t]he drilling rig was a

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<sup>6</sup> See generally *Methods That Have Been Tried to Stop the Leaking Oil*, NYTIMES.COM (Aug. 17 2010), <http://www.nytimes.com/interactive/2010/05/25/us/20100525-topkill-diagram.html>.

<sup>7</sup> *Id.*

<sup>8</sup> *BP Says Oil Stops Leaking into Gulf for First Time Since Spill Began*, FOXNEWS.COM (July 15, 2010), <http://www.foxnews.com/us/2010/07/15/bp-begins-critical-pressure-test-new-cap-oil>.

<sup>9</sup> See Harry R. Weber, *Relief Well Reaches Deepwater Horizon Hole in Gulf, Final Plus Is Near*, CLEVELAND.COM (September 17, 2010, 9:25 AM), [http://www.cleveland.com/nation/index.ssf/2010/09/relief\\_well\\_reaches\\_deepwater.html](http://www.cleveland.com/nation/index.ssf/2010/09/relief_well_reaches_deepwater.html).

<sup>10</sup> Scott Summy, *The Legal Challenges and Ramifications of the Gulf Oil Spill*, in 2010 GULF COAST OIL DISASTER: LITIGATION AND LIABILITY 5, 5 (Phyllis Lipka Skupien & Rita Ann Cicero eds., Thomson West 2010).

<sup>11</sup> *Obama Extends Moratorium on Offshore Drilling*, CBSNEWS.COM (May 27, 2010, 4:05 PM), <http://www.cbsnews.com/stories/2010/05/27/politics/main6523412.shtml>; see also Brian Wagner, *Oil Spill Threatening Fishing Economy, Culture in Louisiana*, VOICE OF AMERICA (June 1, 2010), <http://www.voanews.com/english/news/usa/Oil-Spill-Threatening-Fishing-Economy-Culture-in-Louisiana-95374619.html>.

<sup>12</sup> Address to the Nation, *supra* note 5.

Transocean drilling rig; it was their equipment that failed, it was their systems and processes that were running it."<sup>13</sup> Halliburton, the contractor for the cement work on the well, also garnered some blame after the failure of the cementing was cited as a factor that contributed to the spill.<sup>14</sup> In January 2011, the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling released its final report, tracing the immediate causes of the well blowout "to a series of identifiable mistakes made by BP, Halliburton, and Transocean that reveal such systematic failures in risk management that they place in doubt the safety culture of the entire industry."<sup>15</sup> While the report stressed the necessity of significant reform in the regulatory oversight of leasing, energy exploration, and production, the government placed most of the blame on the oil and gas industry.<sup>16</sup>

In this article, I explain how the oil and gas industry effectively captured the Minerals Management Service ("MMS"), the federal agency charged with regulating offshore drilling in the outer continental shelf.<sup>17</sup> I intend to show that, as a result of this capture, the government should take more responsibility for its role in causing the BP oil spill. Part II will explain the history of regulatory capture theory and broadly define the factors that typically lead to regulatory capture. Part III will discuss the MMS, with emphasis on the historical context in which the agency was created and its conflicting responsibilities. Part IV will expand on the factors set forth in Part II and use them to illustrate how the oil and gas industry gradually captured the MMS. Part V will discuss the future of regulating the offshore oil industry and will summarize reform measures that have already been instituted to correct the shortcomings of the MMS. This Part will also consider whether the BP oil spill was the result of "big government" failures, as well as highlight a study of

<sup>13</sup> Christopher Helman, *The BP Oil Spill Blame Game*, FORBES.COM (May 4, 2010, 7:32 PM), <http://www.forbes.com/2010/05/04/bp-oil-transocean-business-energy-gulf-spill.html>.

<sup>14</sup> John M. Broder, *Panel Says Firms Knew of Cement Flaws Before Spill*, NYTIMES.COM (Oct. 28, 2010), <http://www.nytimes.com/2010/10/29/us/29spill.html>.

<sup>15</sup> NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING, RECOMMENDATIONS vii (2011), *available at* [http://www.oilspillcommission.gov/sites/default/files/documents/OSC\\_Deep\\_Water\\_Summary\\_Recommendations\\_FINAL.pdf](http://www.oilspillcommission.gov/sites/default/files/documents/OSC_Deep_Water_Summary_Recommendations_FINAL.pdf) [hereinafter RECOMMENDATIONS].

<sup>16</sup> *See id.*

<sup>17</sup> Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 167 (1990).

how costs and benefits might be incorporated into an assessment of regulatory policies affecting deepwater drilling. Finally, Part VI will discuss how the U.S. government must accept the reality of regulatory capture in order to prevent similar disasters in the future.

## II. THE THEORY OF REGULATORY CAPTURE

The theory of regulatory capture is based on the concept that “government regulation reflects the influence of special interests, and is created and operated for their advantage.”<sup>18</sup> Capture theory first appeared in the 1950s as an alternative to the “public interest” theories of regulation, which were criticized as being naïve about government behavior and motives.<sup>19</sup> The classical public interest theory, premised on the traditional belief that governmental policy-makers are essentially “public” individuals, assumes that political actors seek to further the interests of society as a whole.<sup>20</sup> This theory “is both a positive theory about what motivates policy-makers and a normative theory about what *should* motivate them.”<sup>21</sup> On the other hand, capture theory posits that the agencies charged with protecting the public interest actually come to identify with the regulated industry, protecting its interests over those of the public.<sup>22</sup> In fact, Richard Posner, an early critic of the public interest theory of regulation, defined regulatory capture as “[t]he theory that economic regulation is not about the public interest at all, but is a process by which interest groups seek to promote their (private) interests.”<sup>23</sup> Similarly, George Stigler, in arguably the most famous essay on industry’s power over the regulatory state, argued that “regulation is acquired by the industry and is designed and operated primarily for its benefit.”<sup>24</sup>

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<sup>18</sup> *Id.* at 169.

<sup>19</sup> *Id.* at 167-68.

<sup>20</sup> *See id.* at 168-69.

<sup>21</sup> *Id.* (emphasis in original).

<sup>22</sup> *See* Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 341-42 (1974).

<sup>23</sup> *Id.* at 341.

<sup>24</sup> George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971).

Central to the theory of regulatory capture is the idea that regulators can be swayed by private interests. "Generally, an agency may be considered 'captured' when it has moved too far toward accommodating industry interests and away from the policies enshrined in its guiding statutes or freestanding policy norms, such as efficiency."<sup>25</sup> Several factors are often cited as encouraging the agency to make decisions favored by regulatory interests. First, capture cannot occur without broad discretion given to the agency by its governing statutes.<sup>26</sup> Discretion is necessary because it "allows agencies to cave-in to regulated interests, as they are not constrained by enforceable legal authority."<sup>27</sup> Moreover, "Broad discretion also deprives agencies of the law as a shield: the regulator cannot claim to be bound by law to policies opposed by regulated entities."<sup>28</sup>

A second factor leading to regulatory capture is "the array of active interest groups."<sup>29</sup> Generally, the more active interest groups making claims on regulators, the less likely the agency is to adopt policies in favor of any one group.<sup>30</sup> The opposite is also true, however, as the regulator is likely to favor the interests of the regulated community if the voices of countervailing interest groups, such as environmentalists or consumer advocates, are not heard.<sup>31</sup> Furthermore, a third factor is the agency's scarcity of resources, which often forces regulators to rely on the regulated industry itself for assistance.<sup>32</sup> As a result of information asymmetries and a lack of resources necessary to access this information, regulators must call on the more knowledgeable interest groups in the course of carrying out their regulatory

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<sup>25</sup> Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 107 (2002).

<sup>26</sup> *Id.* at 109.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *See id.*; *see also* Paul Sabatier, *Social Movements and Regulatory Agencies: Toward a More Adequate—and Less Pessimistic—Theory of "Clientele Capture"*, 6 POL'Y SCI. 301, 318 (1975) (arguing that "the presence of an organized constituency (supportive of aggressive regulation) capable of monitoring the agency and of mobilizing in its defense is a necessary and, within certain broad limits, even a sufficient condition for forestalling [regulatory capture]").

<sup>31</sup> Zinn, *supra* note 25, at 109.

<sup>32</sup> *Id.*

functions.<sup>33</sup> Not only could this cooperation illegitimate the agency's authority, but it could also result in the regulator being more concerned about the views of the regulated industry, thus opening the door to capture.<sup>34</sup>

A fourth factor making a regulatory agency susceptible to capture is the regulated industry's influence on elected officials. Oftentimes, "an executive or legislator may be a more effective conduit for influencing an agency than is direct lobbying of the agency."<sup>35</sup> For example, if an executive figure shares the interests of the regulated industry, the executive may be able to further that industry's agenda and undercut the regulatory agency's effectiveness by utilizing policy tools such as appointments, budget requests, and executive orders.<sup>36</sup>

Finally, a regulated industry may gain influence over regulatory agencies through the movement of personnel between the roles of regulator and regulatee—often referred to as the "revolving door" hypothesis.<sup>37</sup> Popularized by Ralph Nader in the 1970s, "the idea [is] that regulatory agencies become captives of industry because former business executives take influential positions in government agencies whose job it is to regulate business, but perhaps more fundamentally because regulators are seduced by prospects of moving to more lucrative employment in the industries they were regulating."<sup>38</sup> The first half of the theory, the "revolving door-in," suggests that regulators coming from industry may be induced "to make pro-industry decisions because of . . . having been 'socialized' in an industry

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<sup>33</sup> See *id.* at 109-10 (citing the example of a regulator charged with the adoption of workplace safety regulations who must rely on industry for an adequate "understanding of the production processes involved, epidemiological or accident data, and knowledge of the costs, mechanics, and effectiveness of competing preventative measures").

<sup>34</sup> See *id.* at 110.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*; see also MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 266-67 (1955) ("The extent to which regulation becomes the handmaiden of private interests depends in large measure on the existing balance among interest groups and the success of these groups in joining forces with . . . powerful political leaders.").

<sup>37</sup> See Zinn, *supra* note 25, at 110-11.

<sup>38</sup> Toni Makkai & John Braithwaite, *In and Out of the Revolving Door: Making Sense of Regulatory Capture*, 12 J. PUB. POL'Y 61, 62 (1992).

environment."<sup>39</sup> Similarly, the "revolving door-out" suggests that "regulators may bias their decisions in order to enhance their chance of future employment in industry."<sup>40</sup> In the latter scenario, regulators may attempt to signal their interest in industry employment by being lenient when discharging their regulatory duties.<sup>41</sup>

### III. THE MINERALS MANAGEMENT SERVICE

Shortly after the *Deepwater Horizon* exploded, many commentators began placing blame on regulators and describing the oil spill as the "most recent in a string of disasters caused by the failure of regulatory authorities."<sup>42</sup> At the heart of the crisis, they argued, was the theory of regulatory capture. They claimed that the MMS, the federal agency charged with regulating offshore drilling activity and protecting the public from its potential undesirable consequences, was essentially "operat[ing] as a rubber stamp for BP."<sup>43</sup> Throughout the remainder of this article, I will use the factors described above to support the argument that the MMS was effectively captured by the offshore drilling industry.

The Reagan administration created the MMS in 1982 "[a]gainst a backdrop of rising inflation, record interest rates, further turbulence in the oil market following the 1979 Iranian revolution, and a severe recession."<sup>44</sup> Contrary to his predecessors'

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<sup>39</sup> Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y 203, 214 (2006). For a unique study on whether the revolving door theory leads to capture in Australia's nursing home industry, see Makkai & Braithwaite, *supra* note 38, at 63-77, concluding that hopes of going out the revolving door, while not indicative of regulator toughness, did lead to identification with the industry and sympathy with the nursing home's problems.

<sup>40</sup> Dal Bó, *supra* note 39, at 214.

<sup>41</sup> *Id.*

<sup>42</sup> Lara Marlowe, *Oil Spill is Just Latest US Disaster Caused by Regulatory Failures*, IRISHTIMES.COM (May 5, 2010), <http://www.irishtimes.com/newspaper/world/2010/0529/1224271392641.html>, reprinted in SHELL TO SEA, <http://www.shelltosea.com/content/oil-spill-just-latest-us-disaster-caused-regulatory-failures> (last visited Apr. 25, 2012); see also Gerald P. O'Driscoll, *The Gulf Spill, the Financial Crisis and Government Failure*, WSJ.COM (June 12, 2010), <http://online.wsj.com/article/SB10001424052748704575304575296873167457684.html>.

<sup>43</sup> O'Driscoll, *supra* note 42.

<sup>44</sup> NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING, REPORT TO THE PRESIDENT 65 (2011), available at <http://www.oilspillcommission.gov/sites/default/files/>

beliefs, President Reagan made it clear that government regulation was a primary cause of many of the nation's problems and was stifling the development of its rich natural resources.<sup>45</sup> As a result, Secretary of the Interior James Watt<sup>46</sup> focused his initial reform efforts on offshore drilling and “quickly vowed to lease a billion acres of the outer continental shelf—virtually the entire area—for oil and gas exploration.”<sup>47</sup> The MMS was the vehicle by which the federal government would realize “the financial fruits of its plan for this massive expansion in offshore drilling.”<sup>48</sup> The plan was a success, too. In fact, just one year after the birth of the MMS, the federal government brought in just over \$10 billion in leasing revenue from the outer continental shelf—nearly \$4 billion more than in the previous year.<sup>49</sup>

From its inception, it was evident that the focus of the MMS would be on generating revenue for the federal government.<sup>50</sup> The problem was that revenue collection was not the only responsibility of the MMS. It was also charged with offshore leasing, permitting and operational safety, and environmental protection.<sup>51</sup> The devastating result of these conflicting responsibilities was that “the same agency became responsible for regulatory oversight of offshore drilling—and for collecting revenue from that drilling.”<sup>52</sup> Because safety and environmental concerns were subordinate to revenue collection, the MMS was ill-equipped to “adequately address the risks generated by the offshore industry’s new technologies and exploration,

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documents/DEEPWATER\_ReporttothePresident\_FINAL.pdf [hereinafter REPORT TO THE PRESIDENT].

<sup>45</sup> *Id.* at 63.

<sup>46</sup> James Watt’s disdain for environmentalists was well known across political circles. A few days after the BP oil disaster, Ian Masters, the host of a public radio show in Los Angeles, suggested that “putting Watt’s agency in charge of protecting the environment from oil spills might be ‘like putting Count Dracula in charge of the blood bank.’” WILLIAM R. FREUDENBURG & ROBERT GRAMLING, BLOWOUT IN THE GULF: THE BP OIL SPILL DISASTER AND THE FUTURE OF ENERGY IN AMERICA 54-55 (2010).

<sup>47</sup> REPORT TO THE PRESIDENT, *supra* note 44, at 63.

<sup>48</sup> *Id.*

<sup>49</sup> *See id.* at 64 fig.3.2.

<sup>50</sup> *See id.* at 63.

<sup>51</sup> *See id.* at 67.

<sup>52</sup> *Id.* at 65.

development, and production activities, including industrial expansion into deeper waters."<sup>53</sup>

#### IV. REGULATORY CAPTURE OF THE MINERALS MANAGEMENT SERVICE

##### *A. Broad Discretion Given to the MMS by its Governing Statutes*

As mentioned above, the first factor making an agency susceptible to regulatory capture is broad discretion given to the agency by its governing statutes.<sup>54</sup> Discretion allows regulators to succumb to industry pressures without the threat of any enforceable legal authority.<sup>55</sup> In regards to offshore drilling, there are many federal laws designed to protect the environment; however, these laws are littered with exceptions, loopholes, and other provisions that ultimately undermine the essence of the safeguards. The 1978 Outer Continental Shelf Lands Act Amendments ("1978 Act"), which led to the creation of the MMS, is the most obvious example of offshore legislation that failed to live up to its promise of full consideration of environmental protection concerns.<sup>56</sup> The 1978 Act

requires that the timing and location of exploration, development, and production of oil and gas take environmental factors into consideration, including: existing ecological characteristics; an equitable sharing of development benefits and environmental risks among the regions; the relative environmental sensitivity and marine productivity of areas; and relevant environmental and predictive information.<sup>57</sup>

While the 1978 Act requires *consideration* of these environmental concerns, it also affords the Secretary of the Interior great discretion in deciding what weight to assign to them.<sup>58</sup> As the National Commission on the BP Oil Spill noted in its final

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<sup>53</sup> *Id.* at 68.

<sup>54</sup> *See supra* notes 26-28 and accompanying text.

<sup>55</sup> Zinn, *supra* note 25, at 109.

<sup>56</sup> *See* REPORT TO THE PRESIDENT, *supra* note 44, at 64, 79.

<sup>57</sup> *Id.* at 79 (citing 43 U.S.C. § 1344(a)(2) (2006)).

<sup>58</sup> *Id.* at 80 (citing 43 U.S.C. § 1344 (2006)).

report to the President, “The balance ultimately struck depends largely on the politics of the moment.”<sup>59</sup>

Furthermore, some provisions in the 1978 Act actually make it *more difficult* to give full consideration to environmental concerns. For instance, the Secretary of the Interior “must approve a lessee’s exploration plan within thirty days of [its] submission.”<sup>60</sup> Such a timetable, however, makes it unfeasible to review these plans with the level of scrutiny required to take into account many of the aforementioned environmental concerns.<sup>61</sup> Additionally, the 1978 Act exempts lessees in the Gulf of Mexico from more rigorous environmental oversight, including having to submit to the Secretary a development and production plan that sets forth “the environmental safeguards to be implemented.”<sup>62</sup> By exempting the lessees from the development and production plans, the 1978 Act also exempted them from the related, but more comprehensive, environmental impact statement required under the National Environmental Policy Act (“NEPA”).<sup>63</sup> These exemptions were the result of a political compromise between the Carter administration, Congress, the Gulf states, and the oil and gas industry, who were concerned that NEPA and the development and production plans would unnecessarily lengthen the interval between leasing and production from three to six years.<sup>64</sup> This political jockeying is another example of how Congress and the regulatory bodies succumbed to industry pressures even when fashioning environmental safeguards.

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (citing 43 U.S.C. § 1340(c)(1) (2006)).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 62 (citing 43 U.S.C. § 1351 (2006)).

<sup>63</sup> *Id.* (citing 43 U.S.C. § 1351(e)(1) (2006)). NEPA’s environmental impact statements were required of “all major federal actions significantly affecting the human environment” and were to “include not only discussion of the immediate adverse impacts on the natural environment that might result from the federal action, but also the ‘socio-economic’ effects of those impacts.” *Id.* at 79-80 (citing 42 U.S.C. § 4332 (2006); 40 C.F.R. § 1508.8 (2011)). While exploration plans in the central and western Gulf of Mexico were “‘categorically excluded’” from NEPA review, the MMS conceded that such review would be necessary in “‘extraordinary circumstances.’” *Id.* at 81-82. However, MMS staff “reported that leasing coordinators and managers discouraged them from reaching conclusions about potential environmental impacts that would increase the burden on lessees.” *Id.* at 82. There were even reports that “some MMS managers reportedly ‘changed or minimized the [MMS] scientists’ potential environmental impact findings in [NEPA] documents to expedite plan approvals.’” *Id.*

<sup>64</sup> *Id.* at 62.

In addition to the 1978 Act and NEPA, several other equally promising laws were significantly eroded by the MMS and industry representatives. The Endangered Species Act, for example, limits (or bans altogether) offshore oil and gas activity that has an adverse impact on endangered or threatened species.<sup>65</sup> Likewise, the Clean Water Act requires additional permits for any activity that results in the discharge of pollutants into navigable waters.<sup>66</sup> Both the Endangered Species and Clean Water Acts, however, "ha[ve] only a narrow, discrete focus and statutory trigger" that enables the oil and gas industry to shirk compliance.<sup>67</sup> Also, rather than imposing any substantive limitations on offshore drilling, both the Magnuson-Stevens Act and the Marine Sanctuaries law "authorize[] the National Oceanic and Atmospheric Administration (NOAA) to make recommendations to MMS about possible adverse environmental impacts (to fish habitat and marine sanctuaries) and appropriate conservation measures."<sup>68</sup> The problem with these acts is that the MMS is not legally obligated to heed the NOAA's advice, and, in fact, NOAA officials have reported that the MMS gives essentially no weight to their opinions.<sup>69</sup> In sum, while most of these laws create the potential for comprehensive environmental protection, "[w]hether they have achieved their statutory objectives has . . . historically depended . . . entirely on *the discretionary determinations* of MMS officials."<sup>70</sup> This broad discretion afforded to the agency by its governing statutes allowed the MMS to surrender to private interests.

#### B. Influence on Elected Officials

The ineffectiveness of the environmental protection statutes could be the result of the oil and gas industry's influence on elected officials. The more the interests of elected officials and industry are aligned, the more likely it is that the regulating agency will be forced into a captive situation.<sup>71</sup> In the context of the BP oil spill, the *Washington Post* released a report less than a month after the explosion,

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<sup>65</sup> *Id.* at 80-81.

<sup>66</sup> *Id.* See generally *Additional Permit Resources*, U.S. ENVTL. PROTECTION AGENCY, <http://cfpub.epa.gov/npdes/vessels/permitresources.cfm> (last visited Mar. 20, 2012).

<sup>67</sup> See REPORT TO THE PRESIDENT, *supra* note 44, at 81.

<sup>68</sup> *Id.* at 81.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (emphasis added).

<sup>71</sup> See Zinn, *supra* note 25, at 110.

stating that “[n]early 30 members of the congressional committees overseeing oil and gas companies held personal assets in the industry totaling \$9 million to \$14.5 million late last year.”<sup>72</sup> The investments included at least \$400,000 in the three companies directly involved in the *Deepwater Horizon* disaster—the same companies that have been under the microscope from these lawmakers since the explosion.<sup>73</sup> Given the financial interests at stake, one may question how relentless these legislators will be in holding the industry accountable for the worst environmental disaster in U.S. history. Additionally, it begs the question of whether the lawmakers and their conflicting interests are truly to blame.

Examples of industry influence on elected officials extend beyond the officials’ investment portfolios. For instance, several legislative officials have been guilty of actively promoting the private interests of oil and gas companies, as well as soliciting campaign contributions from these sources.<sup>74</sup> One noted Congressman with pro-industry sentiments is Rep. Joe Barton (R-Texas), the senior Republican on the House Energy and Commerce Committee.<sup>75</sup> “When BP’s CEO, Tony Hayward, appeared before that Committee, Barton said that what he considered a ‘tragedy’ was not so much the spill itself, but the fact that a [sic] ‘a private corporation can be subjected to what I would characterize as a shakedown’ by the Obama administration.”<sup>76</sup> For over twenty-five years, Barton has faced little competition for his Congressional seat, which is largely due to the \$1.5 million donated to his campaign from the oil and gas industry, \$150,000 of which came from Andarko Petroleum, BP’s partner in drilling the ill-fated Macondo well.<sup>77</sup>

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<sup>72</sup> Paul Kane & Karen Yourish, *Congress Members Overseeing Firms Involved in Gulf Spill Held Oil, Gas Stock*, THE WASH. POST (June 17, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/16/AR2010061605369.html>. Interestingly, the report cited Sen. John F. Kerry (D-Mass) as among Congressional members owning the most oil and gas industry stocks. *Id.* “Kerry—the Senate Democrats’ lead negotiator on energy legislation—had at least \$6 million in assets from a dozen big oil and gas companies, including BP, Royal Dutch Shell, Exxon Mobil and ConocoPhillips.” *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *See, e.g.*, FREUDENBURG & GRAMLING, *supra* note 46, at 58.

<sup>75</sup> *See id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

The legislative branch is not the only branch of government that has been influenced by the oil and gas industry. To illustrate this point, consider the following:

From 2001 to early 2009, . . . MMS reported to an administration that was headed by two Texas oil men, George W. Bush and Richard Cheney, both of whom were famously hostile toward federal regulations, preferring to trust the Magic of the Marketplace and pushing for an 'Energy Plan' that relied heavily on secret input from some of the nation's biggest oil companies.<sup>78</sup>

Furthermore, despite President Obama's vow to prevent more damage to the Gulf region in the aftermath of the BP oil spill, the MMS continued granting "categorical exclusions" at a rate of one per day, which exempted oil companies from providing detailed environmental impact studies before commencing exploratory drilling.<sup>79</sup> Even more alarming were reports stating that Martin Feldman, the district judge who overturned the initial proposal for a six-month ban on deepwater drilling, held stock in Transocean, Halliburton, and several other companies that would have been affected by the ban.<sup>80</sup> Suggesting that this problem was not limited to Feldman, the *Associated Press* reported that "[m]ore than half of the federal judges in districts where the bulk of Gulf oil spill-related lawsuits are pending have financial connections to the oil and gas industry."<sup>81</sup>

The regulated community's influence on elected (and even non-elected) government officials through monetary and other incentives often increases the likelihood of regulatory capture, and, unfortunately for those whose lives were adversely affected by the BP oil spill, the MMS was not immune from the trend.<sup>82</sup> The fact that "three out of every four of the [oil and gas] industry's Washington

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<sup>78</sup> *Id.* at 56.

<sup>79</sup> *Id.* at 57.

<sup>80</sup> *Id.* at 59; Curt Anderson & Michael Kunzelman, *Judge Who Nixed Drilling Ban Has Oil Investments*, THE WASH. TIMES (June 23, 2010), <http://www.washingtontimes.com/news/2010/jun/23/judge-who-nixed-drilling-ban-has-oil-investments>.

<sup>81</sup> Curt Anderson, *AP IMPACT: Many Gulf Federal Judges Have Oil Links, Complicating Assignments on Spill Lawsuits*, ASSOC. PRESS (June 6, 2010), [http://www.ap.org/oil\\_spill/Manygulf\\_61010.html](http://www.ap.org/oil_spill/Manygulf_61010.html), reprinted in COMMON DREAMS, <http://www.commondreams.org/headline/2010/06/06-6>.

<sup>82</sup> See *supra* notes 72-81 and accompanying text.

lobbyists ha[ve] previously worked in one capacity or another for the federal government” only makes matters worse for the broader public who put their faith in regulatory bodies.<sup>83</sup> As noted by one commentator, “The result is a system in which people move back and forth among the available positions, and the distinctions between regulators and the regulated sometimes get so blurred that they disappear.”<sup>84</sup>

### C. *Active Interest Groups*

A third factor that made the MMS susceptible to regulatory capture was the absence of any countervailing interest groups in the Gulf region to challenge the interests of the oil and gas companies. As noted above, “If an agency need not accommodate competing interest groups, it is more likely to adopt the views of the single, loud voice it hears.”<sup>85</sup> *The New York Times* reported on the unique circumstances along the Louisiana gulf coast, explaining:

Seldom do regulators work in a place so dependent on the industry they oversee. From the top of Louisiana’s tallest building (One Shell Square) to the bottom of its largest aquarium (with a sunken rig), oil saturated the state’s culture long before it covered its marshes. It is prized as a source of jobs and as a source of tax revenue.<sup>86</sup>

This special bond that Louisiana and its people have for the petroleum industry—referred to by Chris Oynes, a former top official with the MMS, as the “900-pound gorilla”—has largely destroyed any significant political opposition.<sup>87</sup> In fact, Oynes stated that the MMS “would issue standard notices to environmental groups, and they would never even come to a meeting . . . . Arguing against oil and gas [was not] going to get them anywhere.”<sup>88</sup>

Several characteristics make Louisiana different than other coastal regions across the country where environmentalists and consumer protection groups have

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<sup>83</sup> FREUDENBURG & GRAMLING, *supra* note 46, at 59-60.

<sup>84</sup> *Id.* at 59.

<sup>85</sup> Zinn, *supra* note 25, at 109.

<sup>86</sup> Jason DeParle, *Minerals Service Had a Mandate to Produce Results*, NYTIMES.COM (Aug. 7, 2010), <http://www.nytimes.com/2010/08/08/us/08mms.html>.

<sup>87</sup> *See id.*

<sup>88</sup> *Id.*

had success in making their case against offshore drilling.<sup>89</sup> First, the offshore oil industry in the United States was born in Louisiana, well before the emergence of today's environmental concerns.<sup>90</sup> Second, Louisiana is physically different than most other coastal regions.<sup>91</sup> Because the state is home to the most extensive system of coastal marshes in the United States, coastal living is practically non-existent, and it is almost impossible to get within ten miles of the coast by road.<sup>92</sup> Furthermore, serving as "artificial reefs," oil rigs provide a significant advantage for commercial fishing operations in the area, attracting fish populations that would otherwise not survive in a habitat where silt naturally covers the sea floor.<sup>93</sup> Third, coastal Louisiana is socially distinctive from other coastal regions.<sup>94</sup> The area has historically had some of the lowest educational levels in the country, and studies show that "better-educated individuals in the United States generally express higher levels of environmental concern."<sup>95</sup> Finally, nearly everyone living in coastal Louisiana has either worked for the oil industry or has friends, relatives, or other acquaintances who have worked in the industry.<sup>96</sup> Given these facts, it is no surprise that while others across the country were "demand[ing] the heads of BP executives on pikes,"<sup>97</sup> Louisiana residents were shaping their own arguments against the Obama administration's six-month ban on deep water drilling.<sup>98</sup> Clearly, in this environment, the only voice the MMS was hearing was that of the oil and gas industry.

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<sup>89</sup> For a summary of a sociological analysis of the factors that underlie the differing reactions to proposals for offshore oil exploration and development in northern California and southern Louisiana, see generally William R. Freudenburg & Robert Gramling, *Socioenvironmental Factors and Development Policy: Understanding Opposition and Support for Offshore Oil*, 8 SOC. FORUM 341 (1993).

<sup>90</sup> FREUDENBURG & GRAMLING, *supra* note 46, at 131.

<sup>91</sup> *See id.* at 133-35.

<sup>92</sup> *Id.* at 133.

<sup>93</sup> *Id.* at 135.

<sup>94</sup> *See id.* at 135-36.

<sup>95</sup> *Id.* at 136.

<sup>96</sup> *Id.* at 137.

<sup>97</sup> Opinion, *Feel the Rage: Liberals Discover the Right's Critique of Regulation*, WALL ST. J., June 9, 2010, at A16, available at <http://online.wsj.com/article/SB10001424052748703302604575295051484827946.html>.

<sup>98</sup> DeParle, *supra* note 86.

*D. Scarcity of Resources*

A fourth, and arguably the most important, factor that encouraged the MMS to make decisions favored by the oil and gas industry was the scarcity of agency resources. Particularly, the depleted budget within the MMS forced regulators to turn to the regulated community itself for assistance, opening the door for regulatory capture.<sup>99</sup> The primary problem was that “[d]uring the 1990s, the resources available to the MMS decreased precipitously just as it faced a dramatic increase in the offshore activity it was charged with overseeing—and matters only deteriorated thereafter.”<sup>100</sup> Between 1990 to 2009, oil production in the Gulf of Mexico more than doubled, with 80% of the 2009 total coming from deepwater wells (up from just 4.4% in 1990).<sup>101</sup> “As MMS’s resources lagged behind the industry’s expansion into deepwater drilling—with its larger-scale and more demanding technology, greater pressures, and increasing distance from shore-based infrastructure and environmental and safety resources—the agency’s ability to do its job was seriously compromised.”<sup>102</sup> The industry held the informational resources needed to adopt new safety regulations pertaining to the evolving drilling technology.<sup>103</sup> As a result, the MMS was forced to accept their contention that the technology was reliable and warranted less frequent testing.<sup>104</sup> This assumption proved costly for BP, the MMS, and the millions of people across the Gulf coast when, on April 25, 2010, BP’s blowout preventer failed, ultimately releasing 4.9 million barrels of oil into the Gulf of Mexico.<sup>105</sup>

Furthermore, oil and gas companies exploited the MMS’s depleted resources and undermined its oversight authority through a process known as “permit shopping.”<sup>106</sup> As offshore activity expanded further into the Gulf of Mexico, the

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<sup>99</sup> See REPORT TO THE PRESIDENT, *supra* note 44, at 72-76.

<sup>100</sup> *Id.* at 72.

<sup>101</sup> *Id.* at 73.

<sup>102</sup> *Id.*

<sup>103</sup> See *id.*

<sup>104</sup> *Id.* at 73-74.

<sup>105</sup> See *supra* Part I.

<sup>106</sup> See REPORT TO THE PRESIDENT, *supra* note 44, at 74; see also OUTER CONT’L SHELF SAFETY OVERSIGHT BD., U.S. DEP’T OF THE INTERIOR, REPORT TO SECRETARY OF THE INTERIOR KEN

number of applications for drilling permits in the New Orleans office rapidly increased.<sup>107</sup> Because the office lacked a sufficient number of engineers to process permit reviews with necessary scrutiny, operators would "shop around" in other district offices to find an engineer who would grant approval.<sup>108</sup>

With that said, depleted resources proved to be most costly in diminishing the effectiveness of the MMS's inspections. While the population of deepwater rigs in the Gulf was expanding, the total number of inspections decreased from nearly 7,500 in 1994 to less than 5,000 in 2009.<sup>109</sup> Not surprisingly, the frequency of unannounced inspections also plummeted during this time period, as less than 3% of inspections conducted by the MMS in 2009 were unannounced.<sup>110</sup> Moreover, even if an unannounced inspection was performed, the United States Coast Guard required that 24-hour notification be given on some facilities, while a 20-minute followed by a 5-minute notification was required on all other facilities.<sup>111</sup> Part of the problem was that the MMS was significantly understaffed.<sup>112</sup> At the time of the *Deepwater Horizon* explosion, there was a ratio of one inspector for every fifty-four facilities in the Gulf.<sup>113</sup> As a result, nearly half of the inspections were conducted by a single inspector, which increased the likelihood of operators successfully pressuring the inspector to not issue an Incident of Noncompliance ("INC").<sup>114</sup>

The scarcity of agency resources also affected the training and professional development of inspectors, often leading to improper industry influence on agency representatives. The MMS did not have a formal training, testing, or certification program for its inspectors, opting instead for on-the-job training provided by more

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SALAZAR 6 (2010), available at <http://www.noia.org/website/navdispatch.asp?id=40069> [hereinafter REPORT TO SALAZAR].

<sup>107</sup> REPORT TO THE PRESIDENT, *supra* note 44, at 74. From 2005 to 2009, the number of applications in the district office grew from 1,246 to 2,136—an increase of 71%. *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *See id.* at 75 fig.3.4.

<sup>110</sup> *Id.*

<sup>111</sup> REPORT TO SALAZAR, *supra* note 106, at 9.

<sup>112</sup> *See id.* at 13.

<sup>113</sup> *Id.*

<sup>114</sup> *See id.* at 9.

experienced inspectors.<sup>115</sup> As a result, “the agency . . . look[ed] for new inspectors who already ha[d] experience, usually through prior work in the oil and gas industry.”<sup>116</sup> Ironically, this preference actually encouraged the “revolving door hypothesis” (detailed in the following section) by bringing inspectors into the MMS that likely already possessed pro-industry sentiments.<sup>117</sup> Even then, the training programs were not enough to keep pace with the rapidly changing deepwater technology; thus, many inspectors were forced to rely on industry representatives to explain the technology at a facility.<sup>118</sup>

While much of the ineffectiveness of the inspection process can be attributed to a depleted budget, some of it was caused by the unique circumstances in the Gulf described in the previous section.<sup>119</sup> Inspections become particularly difficult when the inspectors have either worked in the oil and gas industry or have friends or family members that work in the industry.<sup>120</sup> “For example, one inspector reported arriving at a facility to find that his brother, who worked for the operator elsewhere, had been flown to the facility to act as the compliance officer.”<sup>121</sup> Additionally, many inspectors reported that “personnel on a facility [would] make comments such as ‘there goes my bonus,’ or ‘my wife is sick and I’ll lose my job’” in order to pressure inspectors not to issue an INC.<sup>122</sup> In the event that an operator did receive an INC, they would often complain about the inspector’s behavior to MMS managers.<sup>123</sup> At times, this would result in the INC being rescinded.<sup>124</sup> As a result of this practice, “A

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<sup>115</sup> *Id.* at 11.

<sup>116</sup> *Id.*

<sup>117</sup> *See infra* Part IV.E.

<sup>118</sup> REPORT TO SALAZAR, *supra* note 106, at 11.

<sup>119</sup> *See id.* at 15.

<sup>120</sup> *See id.*

<sup>121</sup> *Id.* Fortunately, in this situation “[t]he inspector informed the company that he could not conduct the inspection with his brother present.” *Id.* However, given the lack of formal training specific to the inspection process, one wonders how another less ethical inspector would handle the same situation.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

number of inspectors felt they were not sufficiently supported by their management and that in some cases management would give the benefit of the doubt to industry."<sup>125</sup> This lack of managerial support is a prime example of a regulatory agency moving too far toward accommodating industry interests and represents yet another factor that made the MMS susceptible to regulatory capture.<sup>126</sup>

#### *E. In and Out the Revolving Door*

Many have pointed to the revolving door hypothesis as one of the primary factors leading to regulatory capture of the MMS.<sup>127</sup> The theory suggests that MMS officials would tend to favor the oil and gas industry if they had a background in the industry or if they expected rewards in the form of future employment with the industry.<sup>128</sup> Multiple sources and studies indicate that this was exactly what was happening at the MMS in the years preceding the BP oil spill.<sup>129</sup> For example, a report by the *New York Times* mentioned several high-profile government officials who had bolted for industry jobs:

Gale Norton, secretary of Interior under President Bush, became Shell's general counsel, and J. Steven Griles, a deputy secretary of Interior, lobbied for numerous oil and gas industries—including BP—before he went to jail for obstructing a Senate investigation. Randall Luthi, the most recent director of M.M.S., is now president of the National Oceans Industries Association, whose mission is to secure a "favorable regulatory and economic environment for the

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<sup>125</sup> *Id.*

<sup>126</sup> See *supra* notes 22-23 and accompanying text.

<sup>127</sup> See, e.g., DeParle, *supra* note 86; Dan Eggen & Kimberly Kindy, *Three of Every Four Oil and Gas Lobbyists Worked for Federal Government*, THE WASH. POST (July 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/21/AR2010072106468.html>; Frederic J. Frommer, *'Revolving Door' Between MMS, Oil Industry*, MOTHER NATURE NETWORK (May 26, 2010), <http://www.mnn.com/earth-matters/politics/stories/revolving-door-between-mms-oil-industry>; Editorial, *Rules, Revolving Doors and the Oil Industry*, NYTIMES.COM (May 5, 2010), <http://roomfordebate.blogs.nytimes.com/2010/05/05/rules-revolving-doors-and-the-oil-industry>.

<sup>128</sup> See Dal Bó, *supra* note 39, at 204.

<sup>129</sup> See *supra* note 127.

companies that develop the nation's valuable offshore energy resources."<sup>130</sup>

The problem does not appear to be limited to the higher ranks of government employment, however, as ethical issues have surfaced among the inspecting ranks of the MMS as well. An Inspector General's investigation in 2010 revealed that "one employee had conducted inspections on a company's oil platforms while in the process of negotiating (and later accepting employment) with the company."<sup>131</sup> Moreover, lending credence to the revolving door-in theory of regulatory capture, Michael Bromwich, the first director of the newly revamped MMS, suggested in a statement to the *Washington Post* that some regulators actually conducted inspections of their former employers.<sup>132</sup> Depending on their prior relationship, one could imagine these inspectors being lenient on their former bosses.

As might be expected, much of the reason the MMS and other regulatory officials go out the revolving door and into industry jobs involves the prospects of better compensation. In 1981, Don Kash, the Chief of the Conservation Division for the U.S. Geological Survey, expressed concern that "the government could not retain 'geologists and geophysicists associated with [outer continental shelf] activities' because they 'can move to an industrial or business concern for a substantial increase in pay, almost at will.'"<sup>133</sup> Even today, the engineers' salaries are still "far too low to attract individuals possessing the experience and expertise needed to oversee the increasingly complicated oil and gas drilling activities in the deepwater Gulf."<sup>134</sup> Assuming the government can eliminate these pay differences, further reaching reforms will still be necessary to defeat the revolving door problem troubling regulation of the oil and gas industry. As noted by Mandy Smithberger, an investigator with the Washington-based Project on Government Oversight, "The

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<sup>130</sup> *Rules, Revolving Doors and the Oil Industry*, *supra* note 127.

<sup>131</sup> REPORT TO THE PRESIDENT, *supra* note 44, at 78.

<sup>132</sup> See Eggen & Kindy, *supra* note 127.

<sup>133</sup> REPORT TO THE PRESIDENT, *supra* note 44, at 64-65.

<sup>134</sup> *Id.* at 79.

revolving door has spun so readily in this case that the lines between the regulators and the regulated are now virtually nonexistent."<sup>135</sup>

#### F. Degeneration of Ethical Culture

A final factor that made the MMS susceptible to industry influence, ultimately making it a victim of regulatory capture, was the gradual degeneration of the ethical culture surrounding the agency. The agency's preoccupation with generating revenues not only diverted its attention from drilling safety, but it also led to "serious charges of abuse of government authority and even charges of criminal misconduct by a few individuals."<sup>136</sup> Many of these claims stemmed from a March 31, 2010 report by the U.S. Department of the Interior, which addressed a number of allegations that MMS employees in the Lake Charles District office had accepted gifts from oil and gas companies.<sup>137</sup> These employees "went hunting and fishing on the companies' tab, accepted company meals, went skeet shooting at the companies' expense, and in one case flew on a private plane to watch Louisiana State University in the Peach Bowl."<sup>138</sup> When asked about these allegations, the District Manager for the Lake Charles office responded:

"Obviously, we're all oil industry . . . . We're all from the same part of the country. Almost all of our inspectors have worked for oil companies out on these same platforms. They grew up in the same towns. Some of these people, they've been friends with all their life. They've been with these people since they were kids. They've hunted together. They fish together. They skeet shoot together . . . . They do this all the time."<sup>139</sup>

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<sup>135</sup> Frommer, *supra* note 127.

<sup>136</sup> REPORT TO THE PRESIDENT, *supra* note 44, at 77.

<sup>137</sup> OFFICE OF INSPECTOR GEN., U.S. DEP'T OF THE INTERIOR, INVESTIGATIVE REPORT: ISLAND OPERATING COMPANY ET AL. 1 (2010), *available at* <http://www.doi.gov/images/stories/reports/pdf/IslandOperatingCo.pdf> [hereinafter ISLAND OPERATING CO.].

<sup>138</sup> DeParle, *supra* note 86. To illustrate the extent of the casual, friendly relationship these MMS officials had with the industry they were charged with regulating, consider this email exchange on government computers concerning the all-expense-paid trip to the Peach Bowl: "The 40 to 3 ass whipping LSU put on Miami was a lot more impressive in person. My daughter and I had a blast." ISLAND OPERATING CO., *supra* note 137, at 2.

<sup>139</sup> ISLAND OPERATING CO., *supra* note 137, at 3.

While this unique industry/government dynamic in the Gulf region might explain part of the problem, it does not help explain some of the more alarming allegations. For example, during the course of the investigation, a few employees admitted to using drugs, including methamphetamine and cocaine, while offshore on company platforms.<sup>140</sup> The investigation also “discovered 314 instances where . . . employees received or forwarded pornographic images and links to Internet websites containing pornographic videos to other federal employees and individuals outside of the office using their government e-mail accounts.”<sup>141</sup>

Furthermore, a 2008 Inspector General’s report uncovered more unethical and criminal conduct associated with the “royalty in kind” program, based in the MMS’s Denver office.<sup>142</sup> This program allowed the MMS to accept royalty payments “‘in kind’” rather than in cash.<sup>143</sup> Similar to the report from the Lake Charles office, this investigation “discovered what the report called ‘a culture of substance abuse and promiscuity’ in which employees accepted gratuities ‘with prodigious frequency.’”<sup>144</sup> The report found that officials had “accepted gifts, engaged in drug use, and . . . even had sex with employees of the energy firms from which they were expected to collect royalties.”<sup>145</sup>

Not only did these unfortunate acts of unethical conduct give the industry the upper hand in its dealings with the MMS, but they also gave the oil and gas companies the ability to better promote and market their businesses.<sup>146</sup> For example, the MMS issued “‘safe awards’” to those companies with the lowest number of violations and civil penalties in each district.<sup>147</sup> “[I]n 2009, the MMS gave its regional Safety Award for Excellence (SAFE) . . . to Transocean—the company that owned the *Deepwater Horizon*, and that Lloyd’s Register had found to have ‘critical equipment

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<sup>140</sup> See *id.* at 6.

<sup>141</sup> *Id.*

<sup>142</sup> REPORT TO THE PRESIDENT, *supra* note 44, at 77.

<sup>143</sup> *Id.*

<sup>144</sup> FREUDENBURG & GRAMLING, *supra* note 46, at 51-52.

<sup>145</sup> *Id.* at 52.

<sup>146</sup> See generally ISLAND OPERATING CO., *supra* note 137.

<sup>147</sup> See *id.* at 1.

items that may lead to loss of life, serious injury or environmental damage.”<sup>148</sup> Ironically, BP was a contender for two safety awards at the 2010 Awards luncheon, which was scheduled to take place less than two weeks after the explosion of the *Deepwater Horizon*.<sup>149</sup> While the exact effect that the degeneration of the ethical culture at the MMS had on the BP oil spill is uncertain, it is clear that it was yet another factor that encouraged the agency to make decisions favored by regulated interests.

## V. REGULATING THE OFFSHORE OIL INDUSTRY IN THE FUTURE

Like the Interstate Commerce Commission, the Food and Drug Administration, and the Securities and Exchange Commission before it,<sup>150</sup> the MMS is a striking example of regulatory capture in the United States. As discussed throughout this article, several factors made the MMS susceptible to influence by the oil and gas industry and opened the door for capture, including broad discretion given to the agency by its governing statutes, influence on elected officials, absence of active interest groups, scarcity of resources, the revolving door hypothesis, and the degeneration of the ethical culture within the agency.<sup>151</sup> We are now two years removed from the most devastating environmental disaster on record in the United States, and while BP, Halliburton, and Transocean have taken much of the blame (and rightfully so), more attention should be shifted to the government for allowing the industry to be captured in the first place. In its recommendations to President Obama on the causes of the oil spill, the National Commission on the BP Oil Spill recognized that “[f]undamental reform will be needed in both the structure of those in charge of regulatory oversight and their internal decisionmaking [sic] process to ensure their political autonomy, technical expertise, and their full consideration of environmental protection concerns.”<sup>152</sup> Some reform of the agency began just prior to the explosion of the *Deepwater Horizon*, when the Department of the Interior

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<sup>148</sup> FREUDENBURG & GRAMLING, *supra* note 46, at 52.

<sup>149</sup> *Id.*

<sup>150</sup> See, e.g., Thomas Frank, Op-Ed., *Obama and 'Regulatory Capture'*, WALL ST. J., June 24, 2009, at A13, available at <http://online.wsj.com/article/SB124580461065744913.html>.

<sup>151</sup> See *supra* Part IV.

<sup>152</sup> RECOMMENDATIONS, *supra* note 15, at vii.

terminated the “Royalty in Kind” program and instituted measures to improve the MMS’s ethics program.<sup>153</sup>

Furthermore, on May 19, 2010, Interior Secretary Salazar signed an order reassigning the responsibilities of the MMS to a new Bureau of Ocean Energy Management, Regulation and Enforcement (“BOEMRE”).<sup>154</sup> Recognizing the conflicting tasks that the former MMS was charged with overseeing, Secretary Salazar created three new divisions within the BOEMRE to cope with the bureaucratic inadequacies and shortcomings that had plagued regulation of the offshore oil and gas industry in the past.<sup>155</sup> One of the divisions is “responsible for conventional and renewable offshore energy development, including resource evaluation, planning and leasing.”<sup>156</sup> Another division handles “oversight, inspections, safety and environmental protection in all offshore energy activities[,]” and a third, which is housed in a different Interior division, carries out “both onshore and offshore royalty and revenue functions, including the collection and distribution of revenue, auditing and compliance, and asset management.”<sup>157</sup> Secretary Salazar also pledged \$29 million to upgrade enforcement and improve oversight, including hiring hundreds of new inspectors to patrol the 3,500 drilling rigs and platforms in the Gulf of Mexico.<sup>158</sup> On June 18, 2010, the MMS was officially abolished;<sup>159</sup> however, one could conclude that the MMS had been effectively abolished years before, when it succumbed to the interests of the industry it was responsible for regulating.

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<sup>153</sup> REPORT TO SALAZAR, *supra* note 106, at 2.

<sup>154</sup> See U.S. DEP’T OF THE INTERIOR, ORDER ESTABLISHING THE BUREAU OF OCEAN ENERGY MANAGEMENT, THE BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, AND THE OFFICE OF NATURAL RESOURCES REVENUE, No. 3299 (2010), *available at* <http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=32475>; *see also* REPORT TO SALAZAR, *supra* note 106, at 2; Noelle Straub, *Interior Unveils Plan to Split MMS Into 3 Agencies*, NYTIMES.COM (May 20, 2010), <http://www.nytimes.com/gwire/2010/05/20/greenwire-interior-unveils-plan-to-split-mms-into-3-agen-72654.html>.

<sup>155</sup> Straub, *supra* note 154.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Dan Froomkin, *Regulatory Capture of Oil Drilling Agency Exposed in Report*, HUFFINGTON POST (Sept. 8, 2010), [http://www.huffingtonpost.com/2010/09/08/report-illustrates-regula\\_n\\_709681.html](http://www.huffingtonpost.com/2010/09/08/report-illustrates-regula_n_709681.html).

<sup>159</sup> REPORT TO SALAZAR, *supra* note 106, at 2.

Many have said that the BP oil spill is just another example of the failings of big government, particularly its regulatory regimes.<sup>160</sup> However, the proper role of government in our society has been fiercely debated since our country's founding and "marks the most profound division between Republicans and Democrats, and perhaps the biggest difference between the US and Europe."<sup>161</sup> Shortly after oil began leaking into the Gulf of Mexico, some right-wing commentators laughed at the irony of liberals criticizing President Obama for not "demand[ing] the heads of BP executives on pikes."<sup>162</sup> As one commentator put it:

The liberals' fury at the President is almost as astounding as their outrage over the discovery that oil companies and their regulators might have grown too cozy. . . . Perhaps if liberals read more conservative economists, they might understand that this is a common consequence of the regulatory state that they have so diligently constructed over the decades.<sup>163</sup>

Similarly, others believe that the cause of the BP oil spill is simple: "Making government more powerful, makes it more corruptible. . . . [And s]ince laws, rules and regulations affect peoples [sic] lives, they create an incentive for those most affected to be able to influence those that are making the laws, rules and regulations."<sup>164</sup>

With that said, it is obvious that some regulation of the offshore oil industry is necessary to deal with the negative externalities, which, as we have seen, includes the possibility of 4.9 million barrels of crude oil leaking into our waters and threatening our valuable ecosystems.<sup>165</sup> In January 2011, a private study was released "provid[ing] a conceptual framework for understanding how costs and benefits

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<sup>160</sup> See, e.g., *Feel the Rage*, *supra* note 97, at A16; Marlowe, *supra* note 42; O'Driscoll, *supra* note 42; *The BP Gulf Oil Spill, Regulatory Capture and Government Failure*, THE SEA OF SYRAH (June 10, 2010, 1:09 AM), <http://theseaofsyrah.blogspot.com/2010/06/bp-gulf-oil-spill-regulatory-capture.html>; Joseph P. Tomain, *Let Government Govern*, CINCINNATI.COM (Feb. 25, 2011), [http://www.progressivereform.org/articles/Tomain\\_CincyEnq\\_REINS\\_022511.pdf](http://www.progressivereform.org/articles/Tomain_CincyEnq_REINS_022511.pdf).

<sup>161</sup> Marlowe, *supra* note 42.

<sup>162</sup> See *Feel the Rage*, *supra* note 97, at A16.

<sup>163</sup> *Id.*

<sup>164</sup> *The BP Gulf Oil Spill, Regulatory Capture and Government Failure*, *supra* note 160.

<sup>165</sup> See *supra* Part I.

might be incorporated into an assessment of regulatory policies affecting deepwater drilling.”<sup>166</sup> The authors considered three potential regulatory cases in the study: “(1) a permanent ban on drilling applicable to all deepwater and ultradeepwater areas; 2) a ‘high-cost intermediate regulation’ that supposes that raising U.S. safety standards increases the costs of exploration, development, and production by 20 percent; and [3)] a ‘low-cost intermediate regulation,’ where production costs rise by 10 percent.”<sup>167</sup> According to their findings, by 2035, a permanent ban would reduce offshore oil production by 79%, while the intermediate regulations would reduce it by 8% or 4% respectively.<sup>168</sup> Such decreases in offshore oil production would almost certainly cause an increase in the price of oil, decrease the negative externalities associated with transportation and other activities, and make efforts to identify alternative sources of energy more attractive.<sup>169</sup> However, these new energy sources would have their own negative externalities, which would offset some of the potential benefits associated with reducing offshore oil production.<sup>170</sup>

The study further determined that annual costs are \$65 billion for the deepwater ban, \$22 billion for the high-cost intermediate regulation, and \$11 billion for the low-cost intermediate regulation.<sup>171</sup> Assuming these regulations prevent one catastrophic spill every ten years, welfare benefits can range anywhere from \$16.1 billion to \$29.5 billion.<sup>172</sup> Thus, the study indicates that a permanent ban on deepwater drilling would never pass a cost-benefit test and is therefore not the best solution for efficient regulation of the offshore oil and gas industry.<sup>173</sup> On the other hand, heightened safety regulations that raise the price for oil production could pass the cost-benefit test, depending on the estimate of welfare benefits.<sup>174</sup>

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<sup>166</sup> Alan Krupnick et al., *Understanding the Costs and Benefits of Deepwater Oil Drilling Regulation*, RESOURCES FOR THE FUTURE 4 (2011), available at <http://www.rff.org/RFF/Documents/RFF-DP-10-62.pdf>.

<sup>167</sup> *Id.* at 2.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 52.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 3.

<sup>172</sup> *Id.*

<sup>173</sup> *See id.*

<sup>174</sup> *See id.*

## VI. CONCLUSION

In conclusion, having just experienced “the most wrenching financial disaster in decades,”<sup>175</sup> in which many accused the SEC of turning its back on the public in the interests of Wall Street banks and hedge funds, the BP oil spill is now “being called the ‘Goldman Sachs of the Sea.’”<sup>176</sup> In order to prevent similar disasters in the future, it is necessary for the government to recognize that regulatory capture seriously undermines the effectiveness of regulatory bodies like the MMS.<sup>177</sup> While the Obama administration’s lawsuit against BP and other operators for their role in causing the BP oil spill could help recover billions of dollars in cleanup costs and damages, it will not address the concerns of the millions of Americans across the country who put their faith in regulatory bodies to protect them from overreaching by private industry. Regardless of what the government does, the MMS will remain a striking example of regulatory capture.

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<sup>175</sup> Frank, *supra* note 150, at A13.

<sup>176</sup> Marlowe, *supra* note 42.

<sup>177</sup> See generally *Feel the Rage*, *supra* note 97.