

***BLOWOUT:***  
**THE LEGAL LEGACY OF THE DEEPWATER HORIZON CATASTROPHE**

**BACKGROUND DOCUMENT FOR PANEL IV: THE LEGAL LEGACY**

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## I. Introduction

On April 20, 2010, there was an explosion on BP's Deepwater Horizon offshore oil-drilling rig, causing one of the worst oil spills in the history of the United States. Almost five million barrels of crude oil discharged into the Gulf of Mexico over the following 86 days.<sup>1</sup> The disaster in the Gulf of Mexico led to numerous Executive, Legislative, and Judicial responses. There was agency restructuring and three Executive orders that will impact how future offshore drilling will be managed.<sup>2</sup> Additionally, there was great activity in Congress, both in the House and Senate, responding to the oil spill. Furthermore, to date, there have been 495 law suits filed following the Deepwater Horizon Catastrophe.<sup>3</sup> With such large response in all branches of Constitutional power, the extent of the legal legacy upon the nation's environmental laws and regulations will be extremely influential. This document, prepared for Panel IV of the Marine Affairs Institute's conference, *Blowout: Legal Legacy of the Deepwater Horizon Catastrophe*, will explore some Executive, policy, and legal responses to the Deepwater Horizon disaster.

## II. Restructuring the Minerals Management Service

The Mineral Management Service (MMS) has been implicated by some as playing a role in the Deepwater Horizon catastrophe. Some news sources cited accusations that MMS engaged in immoral practices amid the oil and gas industry, and did not follow *National Environmental Policy Act* (NEPA) guidelines when permitting a company for offshore exploration and drilling.<sup>4</sup>

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<sup>1</sup> Congressman Edward Markey, *Feb 1, 2011: Markey to BP: Drop Challenge to Size of Spill, Or Drop Dividend Restart*, available at, [http://markey.house.gov/index.php?option=com\\_content&task=view&id=4211&Itemid=141](http://markey.house.gov/index.php?option=com_content&task=view&id=4211&Itemid=141) (last visited Mar. 27, 2011).

<sup>2</sup> Exec. Order No. 13,543, 75 Fed. Reg. 29397 (May. 21, 2010) (National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling); Exec. Order No. 13,597, 75 Fed. Reg. 43023 (Jul. 19, 2010) (Stewardship of the Ocean, Our Coasts, and the Great Lakes); Exec. Order No. 13,554, 75 Fed. Reg. 62313 (Oct. 5, 2010) (Gulf Coast Ecosystem Restoration Task Force).

<sup>3</sup> Environmental Law Institute: Deepwater Horizon Oil Spill Litigation Database: *Litigation Data Spreadsheet*, available at, [http://www.eli.org/program\\_areas/deepwater\\_horizon\\_data\\_export.cfm](http://www.eli.org/program_areas/deepwater_horizon_data_export.cfm) (last visited Mar. 27, 2011).

<sup>4</sup> See generally The Huffington Post: HuffPost Green: *Gulf Oil Spill Exceeds BP's 'Worst-Case Scenario,' Drilling Supporters on Defensive*, available at, [http://www.huffingtonpost.com/2010/04/29/gulf-oil-spill-exceeds-bp\\_n\\_556798.html](http://www.huffingtonpost.com/2010/04/29/gulf-oil-spill-exceeds-bp_n_556798.html) (last visited Mar. 27, 2011); The New York Times: Energy & Environment: *GAO Audit: MMS Withheld Offshore Drilling Data, Hindered Risk Analyses in Alaska*, available at,

Following these allegations, a complaint was filed against the United States Department of Interior by Gulf Restoration Network, Inc. and Sierra Club, Inc.<sup>5</sup> The complaint stated that the approval of BP's *Gulf of Mexico Regional Oil Spill Response Plan* "grossly exaggerate[d] [the] company's oil spill response and recovery capabilities in the event of a major blow-out during the drilling of a deep water exploration well."<sup>6</sup> In light of this criticism of MMS's failure to properly perform, Department of Interior Secretary Kenneth Salazar issued orders 3302 and 3299 to reconstruct the agency in an effort to better serve the purposes of the MMS.<sup>7</sup> Following Secretary Salazar's orders, the Minerals Management Service (MMS) was renamed the Bureau of Ocean Energy Management, Regulation and Enforcement,<sup>8</sup> and three discrete agencies were created to carry out the objectives of the former MMS: Bureau of Ocean Energy Management; Bureau of Safety and Environmental Enforcement; and Office of Natural Resources Revenue.<sup>9</sup> The restructuring will greatly impact future offshore energy citing and management. However, the Department of Interior was not the only Executive power examining the Deepwater Horizon catastrophe.

### **III. *The National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling***

#### **A. Creation and Purpose of the Commission**

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<http://www.nytimes.com/gwire/2010/04/07/07greenwire-gao-audit-mms-withheld-offshore-drilling-data-h-3483.html> (last visited Mar. 27, 2011).

<sup>5</sup> Complaint, Gulf Restoration Network, Inc. and Sierra Club Inc. v. United States Department of the Interior, et. al., No. 2:10-cv-1630, (E.D. La. 2010).

<sup>6</sup> *Id.*

<sup>7</sup> Electronic Library of Interior Policies (ELIPS): *Secretary's Orders*, Order No. 3302 (Jun. 18, 2010), available at, [http://elips.doi.gov/app\\_so/act\\_getfiles.cfm?order\\_number=3302](http://elips.doi.gov/app_so/act_getfiles.cfm?order_number=3302) (last visited Mar. 27, 2011); Electronic Library of Interior Policies (ELIPS), Secretary's Orders, *Order No. 3299* (Jun. 18, 2010), available at, [http://elips.doi.gov/app\\_so/act\\_getfiles.cfm?order\\_number=3299A1](http://elips.doi.gov/app_so/act_getfiles.cfm?order_number=3299A1) (last visited Mar. 27, 2011).

<sup>8</sup> Electronic Library of Interior Policies (ELIPS): *Secretary's Orders*, Order No. 3302 (Jun. 18, 2010), available at, [http://elips.doi.gov/app\\_so/act\\_getfiles.cfm?order\\_number=3302](http://elips.doi.gov/app_so/act_getfiles.cfm?order_number=3302) (last visited Mar. 27, 2011).

<sup>9</sup> Electronic Library of Interior Policies (ELIPS), Secretary's Orders, *Order No. 3299* (Jun. 18, 2010), available at, [http://elips.doi.gov/app\\_so/act\\_getfiles.cfm?order\\_number=3299A1](http://elips.doi.gov/app_so/act_getfiles.cfm?order_number=3299A1) (last visited Mar. 27, 2011).

On May 21, 2010, President Barack Obama signed Executive Order 13543, establishing the *National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling* (Commission).<sup>10</sup> The Commission's mission was to "examine the relevant facts and circumstances concerning the root causes of the Deepwater Horizon oil disaster"<sup>11</sup> and "develop options for guarding against, and mitigating the impact of, oil spills associated with offshore drilling, taking into consideration the environmental, public health, and economic effects of such options."<sup>12</sup> The Commission was tasked with making recommendations of: necessary improvements to Federal laws, regulations, and policy; improvements to the practices of the oil industry as applied to offshore drilling in order to ensure the implementation of efficient oversight, monitoring, and response capabilities; and improvements needed for the protection of public and occupational health and safety as well as environmental and natural resource protection.<sup>13</sup> The Commission's secondary focus was to make recommendations for organizational or other changes that Federal agencies or other processes must make, to ensure all findings of the primary purpose were executed and maintained.<sup>14</sup> Lastly, the Commission was directed to submit a final public report to the President with its findings and options for changes for consideration.<sup>15</sup>

President Obama appointed seven distinguished individuals to the Commission. Their experiences and expertise captured public and private sectors, as well as the scientific, engineering, environmental, and the oil and gas industry communities.<sup>16</sup> The Commission

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<sup>10</sup> Exec. Order No. 13,543, 75 Fed. Reg. 29397 (May. 21, 2010) (National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling).

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

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

contained two co-chairs: Senator Bob Graham (retired D-FL) and Mr. William K. Reily. Senator Graham was chosen due to his widely recognized leadership on environmental issues. Mr. Reily was appointed due to his experience in both the public and private sector, and role of founding partner of a private equity fund dedicated to investing in renewable energy companies. Furthermore, Mr. Reily served as the Administrator of the U.S. Environmental Protection Agency and president of the World Wildlife Fund.<sup>17</sup> The remaining five members of the Commission were also selected to bring diversity of experience to the Commission.<sup>18</sup> The broad scope of experiences of the Commission's members ensured a comprehensive examination of the BP oil spill and ambition for effective recommendations.

### **B. Focus of the Commission**

To best address President Obama's mandate, the Commission inquired into six key areas of the Deepwater Horizon catastrophe.<sup>19</sup> First, the Commission explored the Deepwater Horizon well explosion and the overall safety of drilling for oil in the United States.<sup>20</sup> Second, the Commission examined the nation's domestic energy policy and the role of offshore drilling in that policy.<sup>21</sup> Third, the Commission addressed the regulatory oversight of the offshore drilling industry.<sup>22</sup> Fourth, the Commission examined the actual response to an oil spill.<sup>23</sup> Fifth, the

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<sup>17</sup> *Id.*

<sup>18</sup> Ms. Frances G. Beinecke worked for the Natural Resources Defense Council (NRDC) for 35 years and is serving as the current president. Professor Donald Boesch, the President of the University of Maryland Center for Environmental Science, is also a Professor of Marine Science and Vice Chancellor for Environmental Sustainability for the University System of Maryland. Mr. Terry D. Garcia, former General Counsel at NOAA, led the implementation of the Exxon Valdez Oil Spill Restoration Plan for Prince William Sound and the Gulf of Alaska. Ms. Cherry A. Murray, Dean of the Harvard School of Engineering and Applied Sciences (SEAS) and John A. and Elizabeth S. Armstrong Professor of Engineering and Applied Sciences, has a background in engineering and applied sciences as well as physical sciences and has held positions on many boards and advisory committees dealing with such sciences. Ms. Frances Ulmer, Chancellor of the University of Alaska Anchorage (UAA), has a background in environmental conservation for the State of Alaska and as state legislator she served as a member on the Special Committee on the Exxon Valdez Oil Spill Claims Settlement.

<sup>19</sup> National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling: *About the Commission*, available at, <http://www.oilspillcommission.gov/page/about-commission> (last visited Mar. 27, 2011).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

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

Commission looked specifically at the impacts of BP's oil spill, and oil spills generally, as well as the original damage assessment of the Macondo well blow out.<sup>24</sup> Lastly, the Commission addressed the available options for different restoration approaches in the Gulf of Mexico.<sup>25</sup>

### **C. The Commission's Final Report: The Seven Conclusions**

The Commission released its final report on January 11, 2011;<sup>26</sup> there were seven conclusions regarding the BP Deepwater Horizon Disaster and offshore drilling in general:

- (1) The explosive loss of the Macondo well could have been prevented.
- (2) The immediate causes of the Macondo well blowout can be traced 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.
- (3) Deepwater energy exploration and production, particularly at the frontiers of experience, involve risks for which neither industry nor government has been adequately prepared, but for which they can and must be prepared in the future.
- (4) To assure human safety and environmental protection, regulatory oversight of leasing, energy exploration, and production require reforms even beyond those significant reforms already initiated since the *Deepwater Horizon* disaster. Fundamental reform will be needed in both the structure of those in charge of regulatory oversight and their internal decisionmaking process to ensure their political autonomy, technical expertise, and their full consideration of environmental protection concerns.
- (5) Because regulatory oversight alone will not be sufficient to ensure adequate safety, the oil and gas industry will need to take its own, unilateral steps to increase dramatically safety throughout the industry, including self-policing mechanisms that supplement governmental enforcement.
- (6) The technology, laws and regulations, and practices for containing, responding to, and cleaning up spills lag behind the real risks associated with deepwater drilling into large, high-pressure reservoirs of oil and gas located far offshore and thousands of feet below the ocean's surface. Government must close the existing gap and industry must support rather than resist that effort.
- (7) Scientific understanding of environmental conditions in sensitive environments in deep Gulf waters, along the region's coastal habitats, and in areas proposed for more drilling, such as the Arctic, is inadequate. The same is true of the human and natural impacts of oil spills.<sup>27</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Report to the President, Deepwater: The Gulf Oil Disaster and the Future of Offshore Drilling* (2011)

<sup>27</sup> *Id.* To view the report directly, see [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) (last visited Apr. 6, 2011).

When the final recommendations of the Commission were released, Congress quickly responded.

#### **IV. Congress Responds to the Commission's Final Report: *Implementing the Recommendations of the BP Oil Spill Commission Act of 2011***

In the 112<sup>th</sup> Congress there are a number of active bills that would have a great impact on offshore oil exploration and the hazards it poses: *Stand by Your Oil Pollution Act of 2011* (STOP);<sup>28</sup> *Gulf Stream Protection Act of 2011*;<sup>29</sup> and most notably, legislation introduced by Congressman Edward Markey (D-MA), the *Implementing the Recommendations of the BP Oil Spill Commission Act of 2011*.<sup>30</sup> On January 26, 2011 Congressman Markey introduced the Act as a response to the Commission's recommendations.<sup>31</sup> The bill reflects the Commission's recommendations and also builds upon the *Consolidated Land, Energy, and Aquatic Resources Act of 2010* (CLEAR), a bill introduced by Markey during the 111<sup>th</sup> Congress in response to the BP Deepwater Horizon Oil Spill.<sup>32</sup> The Natural Resources Committee Democratic website provides a detailed summary to the 12 major elements of Congressman Markey's legislation all of which reflect the Commission's recommendations.<sup>33</sup> The legislation currently proposes to:

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<sup>28</sup> The Stand by Your Oil Pollution Act of 2011, H.R. 54, 112th Cong., 1st Sess. (2011) ("To amend the Oil Pollution Act of 1990 to extend liability to corporations, partnerships, and other persons having ownership interests in responsible parties, and for other purposes."). This bill was introduced before the final recommendations of the Commission.

<sup>29</sup> The Gulf Stream Protection Act of 2011, S. 405, 112th Cong., 1st Sess. (2011) ("To amend the Outer Continental Shelf Lands Act to provide a requirement for certain lessees, and for other purposes.").

<sup>30</sup> The Implementing the Recommendations of the BP Oil Spill Commission Act of 2011, H.R. 501, 112th Cong., 1st Sess. (2011) ("To provide for the implementation of the recommendations of the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, and for other purposes.").

<sup>31</sup> The Implementing the Recommendations of the BP Oil Spill Commission Act of 2011, H.R. 501, 112th Cong., 1st Sess. (2011) ("To provide for the implementation of the recommendations of the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, and for other purposes.").

<sup>32</sup> The Consolidated Land, Energy, and Aquatic Resources Act of 2010, H.R. 3534, 111<sup>th</sup> Cong., 2d Sess. (2010) ("To provide greater efficiencies, transparency, returns, and accountability in the administration of Federal mineral and energy resources by consolidating administration of various Federal energy minerals management and leasing programs into one entity to be known as the Office of Federal Energy and Minerals Leasing of the Department of the Interior, and for other purposes.").

<sup>33</sup> The Natural Resources Committee Democrats: *Summary of Democratic Legislation to Implement the Recommendations of the BP Oil Spill Commission*, available at, [http://democrats.naturalresources.house.gov/sites/democrats.resourcescommittee.house.gov/files/2011-01-26\\_SummaryOfDemocraticSpillResponseBill.pdf](http://democrats.naturalresources.house.gov/sites/democrats.resourcescommittee.house.gov/files/2011-01-26_SummaryOfDemocraticSpillResponseBill.pdf) (last visited Mar. 27, 2011)

- (1) strengthen safety oversight by reorganizing the Department of Interior and strengthening the department's agency for offshore oil safety;<sup>34</sup>
- (2) establish unlimited liability for companies who have played a role in a spill; this will act as a deterrent against industry practices that are risky;<sup>35</sup>
- (3) create a restoration plan for the Gulf of Mexico and fund the restoration efforts by dedicating 80 percent of the fines that are generated from the disaster;<sup>36</sup>
- (4) increase the fees paid by the oil and gas industry to create a dedicated funding stream for the federal agencies that are responsible for the regulation and oversight of the safety of offshore drilling;<sup>37</sup>
- (5) make science a more important priority by increasing "the role of scientific experts in the U.S. Coast Guard and National Oceanic and Atmospheric Administration in the decision-making process for where new oil drilling can occur."<sup>38</sup>
- (6) "[m]ake response plans real . . ." <sup>39</sup> by requiring "the federal government to develop realistic worst-case flow-rate models and for oil companies to use them when they create real, worst-case scenario oil spill response plans;"<sup>40 41</sup>
- (7) establish a funding stream with a dedicated use for research and development of oil spills;<sup>42</sup>
- (8) raise the allowable payouts from the oil spill liability trust fund in order to ensure that payouts for spills are proper;<sup>43</sup>
- (9) "[c]reate permanent government expertise on estimating and measuring the flow rates from deepwater spills;"<sup>44</sup>
- (10) close the " . . . gaps in scientific data and response capabilities in the Arctic"<sup>45</sup> through required research;<sup>46</sup>
- (11) strengthen the standards for Blowout Preventers (BOPs), for well design and for how the industry conducts cementing;<sup>47</sup> and

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<sup>34</sup> "This provision would enact a key commission recommendation." *Id.*

<sup>35</sup> "This provision passed the House last year and follows the commission's recommendation that the liability cap be significantly increased." *Id.*

<sup>36</sup> "This provision would implement a key commission recommendation." *Id.*

<sup>37</sup> "This provision would implement a key commission recommendation." *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> "This provision reflects the commission's conclusions." *Id.*

<sup>42</sup> This provision is "consistent with the commission's report." *Id.*

<sup>43</sup> This provision is a direct implementation of the commission's recommendation. *Id.*

<sup>44</sup> This provision is a direct implementation of the commission's recommendation. *Id.*

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

<sup>46</sup> The commission has called for more research in order to obtain a better understanding of the Arctic. *Id.*

<sup>47</sup> "The commission has recommended better well design." *Id.*



(12) require the extensive study of the effects of the dispersant used as applied to aquatic life and the environment.<sup>48</sup>

The last major action on the bill was on February 25, 2011, when it was referred to the House Subcommittee on Workforce Protections.

## V. Environmental Litigation

While there has been numerous tort law litigation following the Deepwater Horizon disaster, there has also been a great deal of environmental litigation. To date, 165 of the 495 cases filed in response to the Deepwater Horizon catastrophe are based upon Federal environmental statutes. Specifically, six environmental statutes form the basis for these causes of action.<sup>49</sup> These six statutes consist of the *Outer Continental Shelf Lands Act* (OCSLA),<sup>50</sup> the *Migratory Bird Act*,<sup>51</sup> the *Clean Water Act* (CWA),<sup>52</sup> the *Oil Pollution Act* (OPA),<sup>53</sup> the *Clean Air Act* (CAA),<sup>54</sup> and the *Submerged Lands Act*.<sup>55</sup> However, as time passes more environmental statutes may be the basis of further litigation. For example, in its complaint against BP, the United States has indicated that it reserves the right to invoke more statutes than the ones it already has.<sup>56</sup> The complaint specifically names the *Endangered Species Act*,<sup>57</sup> the *Marine Mammals Protection Act*,<sup>58</sup> the *National Marine Sanctuaries Act*,<sup>59</sup> and the *Park System*

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<sup>48</sup> “[F]ollowing conclusions of the commission.” *Id.*

<sup>49</sup> Environmental Law Institute: Deepwater Horizon Oil Spill Litigation Database: *Litigation Data Spreadsheet*, available at [http://www.eli.org/program\\_areas/deepwater\\_horizon\\_data\\_export.cfm](http://www.eli.org/program_areas/deepwater_horizon_data_export.cfm) (last visited Mar. 27, 2011).

<sup>50</sup> 43 U.S.C. § 1331 *et. seq.* (LexisNexis 2011 through Pub. L. 111-383).

<sup>51</sup> 16 U.S.C. § 703 (LexisNexis 2011 through Pub. L. 111-383).

<sup>52</sup> 33 U.S.C. §§ 1251 *et. seq.* (LexisNexis 2011 through Pub. L. 111-383).

<sup>53</sup> 33 U.S.C. §§ 2701 *et. seq.* (LexisNexis 2011 through Pub. L. 111-383).

<sup>54</sup> 42 U.S.C. §§ 7401 *et. seq.* (LexisNexis 2011 through Pub. L. 111-383).

<sup>55</sup> 43 U.S.C. §§ 1301 *et. seq.* (LexisNexis 2011 through Pub. L. 111-383).

<sup>56</sup> Complaint at 25, *United States of America v. BP Exploration & Production INC., et. al.*, No. 2:10-cv-04536, (E.D. La. 2011).

<sup>57</sup> 16 U.S.C. §§ 1531 *et. seq.* (LexisNexis 2011 through Pub. L. 111-383).

<sup>58</sup> 16 U.S.C. §§ 1361 *et. seq.* (LexisNexis 2011 through Pub. L. 111-383).

<sup>59</sup> 16 U.S.C. §§ 1431 *et. seq.* (LexisNexis 2011 through Pub. L. 111-383).

*Resource Protection Act.*<sup>60</sup> The amount of environmental laws involved in current and potential future litigation demonstrates not only the complexity of law and policy issues involved with the oil spill, but the breadth of environmental impact the oil spill has caused.

## **VI. Conclusion**

As time passes and more information is gathered in the aftermath of the BP Deepwater Horizon disaster, there is likely to be more Executive, Legislative, and Judicial response. The Marine Affairs Institute's conference on April 13, 2011, *Blowout: Legal Legacy of the Deepwater Horizon Catastrophe*, is meant to be the start of an ongoing dialogue on the legal legacy of the Deepwater Horizon catastrophe. For more information and to view presentations from panel IV and the other panels, please visit the Marine Affairs Institute's website.<sup>61</sup> While the Deepwater Horizon well has stopped discharging oil into the Gulf, it is only beginning to seep into the nation's laws and policies.

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<sup>60</sup> 16 U.S.C. §§ 1911 *et. seq.* (LexisNexis 2011 through Pub. L. 111-383).

<sup>61</sup> <http://law.rwu.edu/academics/institutes-programs/marine-affairs-institute/symposia/april-2011-deepwater-horizon-catastr>