

C O M M E N T S

Conflict of Interest That Led to the Gulf Oil Disaster

by Peter Jan Honigsberg

Peter Jan Honigsberg is a Professor of Law, University of San Francisco.

On April 20, 2010, BP's Deepwater Horizon drilling rig in the Gulf of Mexico exploded, killing 11 people and spilling billions of gallons of oil into the Gulf. In the days and weeks that followed, the media pointed to the Minerals Management Services (MMS), the regulatory agency responsible for managing offshore drilling, as being complicit with BP. The MMS issued permits for deepwater drilling in violation of its regulations, provided hundreds of exemptions to the regulations, and had allowed the companies to draft the regulations that suited their interests and objectives.¹ The MMS was accused of being in bed, both literally and figuratively, with BP and other oil companies.²

Consequently, the origin of the oil disaster can be traced, in significant part, to the MMS and its close relationship with the industry it had been charged with regulating. The roots of the disaster date back to the early years of the Ronald Reagan Administration when, in 1982, controversial U.S. Department of the Interior (DOI) Secretary James Watt restructured the agencies responsible for revenue collection and regulatory oversight of the oil and gas industry, merging the responsibilities of two agencies into one. Even if we ascribe the best intentions to President Reagan and James Watt, the road they paved in 1982 led directly to the BP disaster nearly 30 years later. The only question left open after they restructured the agencies in 1982 was, when would the disaster strike?

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1. Jason DeParle, *Minerals Management Service Had a Mandate to Produce Results*, N.Y. TIMES, Aug. 7, 2010, <http://www.nytimes.com/2010/08/08/us/08mms.html> (last visited Mar. 30, 2011).
2. Juliet Eilperin & Scott Hingham, *How The Minerals Management Service's Partnership With Industry Led to Failure*, WASH. POST, Aug. 24, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/24/AR2010082406754.html> (last visited Mar. 30, 2011); CONG. RESEARCH SERV., REORGANIZATION OF THE MINERALS MANAGEMENT SERVICE IN THE AFTERMATH OF THE DEEPWATER HORIZON OIL SPILL (Nov. 10, 2010) [hereinafter CRS REORGANIZATION].

I. James Watt and His Natural Resources Agenda Leading to the Creation of the MMS

By the time President Reagan assumed office in January 1981, he had selected James Watt as his Secretary of the Interior. Watt, who had earned his B.A. and J.D. degrees at the University of Wyoming and had been an aide to Sen. Alan Simpson (R-Wyo.), came with experience and controversy.³ Prior to his DOI appointment, Watt had been the Secretary to the Natural Resources Committee and Environmental Pollution Advisory Panel of the U.S. Chamber of Commerce, the Deputy Assistant Secretary of Water and Power Development in the DOI, and Vice-Chairman of the Federal Power Commission.⁴ Watt was a fervent supporter of private development of federal lands.⁵ Because of his background, environmentalists challenged Watt's selection as guardian of our natural resources and the environment.⁶

Soon after he was confirmed, Watt—conjuring up the recent memory of the Iran hostage crisis and the consequent long lines of frustrated Americans lining up around city blocks waiting for their turn at the gas pumps—announced that the United States would never again be beholden to the oil-rich states in the Middle East.⁷ The United States would henceforth embark on its own domestic oil production and pursue independent oil policies. And Secretary Watt was determined to “drill more” and “mine more”⁸ to achieve the nation's independence from foreign oil.

The Administration's initial goal was to promote deepwater drilling along the extended coastlines on three sides. However, when Watt encountered resistance from the states along the eastern and western seaboard, the Reagan Administration shifted its focus to deepwater drilling in the Gulf of Mexico. The Gulf states, particu-

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3. James G. Watt, in CONTEMPORARY AUTHORS ONLINE (Gale 2003).
 4. *Id.*
 5. *Id.*
 6. *Id.*
 7. Eilperin & Hingham, *supra* note 2.
 8. *Id.*

larly Louisiana, welcomed the increased opportunities for jobs and revenue.⁹

In addition to drilling in the Gulf and increasing America's supply of oil, Secretary Watt sought assurances that the nation was collecting its full and fair share of oil revenues. There were indications that the U.S. Geological Survey (USGS)—the agency in charge of offshore oil and gas revenues when President Reagan assumed office—had not only underreported its earnings, but had committed fraud and theft in its collection process.¹⁰ A commission created by the DOI had reported shortfalls in the hundreds of millions of dollars from deepwater oil drilling.¹¹ Secretary Watt was intent on ramping up the potentially lucrative nation's oil revenues and royalties.¹² In the process of raising revenues, generating incentives for more resource development, and creating efficiencies, Secretary Watt also claimed that the DOI needed to improve its oversight of our natural resources. He was laying the groundwork for the creation of the MMS and its intrinsic conflict of interest.¹³

II. Administrative Agencies' Broad Discretion: A Brief Primer

As students of administrative law know, there are few, if any, crystal clear guidelines regarding agency actions and management. The U.S. Constitution does not address the creation of administrative agencies. The founders, in articulating their vision of separation of powers, apparently did not conceive of an unwieldy "fourth branch" of government that had legislative, executive, and judicial powers.¹⁴ Yet, through these powers, agencies have become the dominant forces in much of our lives.

The tension between the U.S. Congress and the executive about who is in charge of an agency's decisionmaking powers and who speaks for the policy of a particular agency always bubbles near the surface. Congress drafts the legislation, provides the funding, and authorizes the

powers of the agency. However, for very practical reasons, Congress usually does not have the final word on agency actions.

Instead, Congress provides the agencies with considerable autonomy in carrying out their powers.¹⁵ One obvious reason is that the agencies have the expertise and experience that Congress lacks. Another is that Congress, although it passes legislation, does not speak with one voice. To the extent that compromises are necessary in order for legislation to pass, the legislation is written in general terms, allowing the agencies to fill in the gaps with specific regulations and through policies developed as they enforce the law. In addition, agencies are often presumed most able to apply and interpret the law and regulations through their enforcement and adjudicatory powers.

The president controls agency policies through his power to appoint and remove agency heads. Necessarily, the directors of agencies, intent on keeping their jobs, look over their shoulders at the president's directives and policies when making decisions. Although Congress has the authority to revise or shut down agency decisions through adopting new legislation, squeezing agency funding, holding congressional hearings, and contacting department heads directly *ex parte*, it usually defers to the independent actions of the agencies. Of course, when things go south, everyone runs the other way and points fingers at the other branch of government or at the agency itself. After the oil spill in the Gulf, everyone pointed at the MMS. However, no one confronted the larger procedural and institutional structures at play that could have avoided the conflict of interest in the first place.

III. The Chronology of the Conflict of Interest, and the Day Everything Changed

The DOI's authority over offshore drilling began with the Outer Continental Shelf Lands Act.¹⁶ From 1953 until 1982, both onshore and offshore minerals and mining operations, including oil and gas interests, were divided between the USGS and the Bureau of Land Management (BLM). BLM was responsible for the regulatory oversight and permitting process of all onshore and offshore resources while the USGS was responsible for revenue and

9. *Id.*

10. Daniel F. Cuff, *Interior Department Adds Royalty Collector*, N.Y. TIMES, June 9, 1982; Eilperin & Hingham, *supra* note 2; CRS REORGANIZATION, *supra* note 2.

11. Cuff, *supra* note 10.

12. See Cass Peterson, *Watchdog on Royalties*, WASH. POST, Feb. 4, 1982; see also Cuff, *supra* note 10.

13. Myron Struck & Dale Russakoff, *Watt, in Search of Energy Efficiency, Fattens Mineral Management Service*, WASH. POST, May 12, 1982.

14. Several agencies were created in George Washington's presidency: the Departments of State, War, Treasury, and Post Office, as well as the Attorney General's Office. However, nearly 100 years went by before the first "modern" regulatory agency, the Interstate Commerce Commission, appeared in 1887. The early part of the 20th century saw further expansion of regulatory agencies, but the impact of agency influence did not move to the forefront until the New Deal. Then, in the 1960s and 1970s, "social regulation" agencies, such as those monitoring consumer fraud and discrimination burst forth. RONALD A. CASS ET AL., *ADMINISTRATIVE LAW, CASES AND MATERIALS* 3-4 (5th ed. 2006).

15. For example, Congress granted the Secretary of the Interior the power to redelegate responsibilities within the Department. See comments in *infra* note 18.

16. Congress created the DOI to handle the nation's internal affairs in 1849. *DOI History*, U.S. DEPARTMENT INTERIOR, <http://www.doi.gov/archive/history.html> (last visited on Mar. 21, 2011). The Secretary of the Interior is a member of the cabinet. WhiteHouse.gov, *The Cabinet* <http://www.whitehouse.gov/administration/cabinet> (last visited Mar. 29, 2011).

royalty collections.¹⁷ The Reagan Administration began its restructuring in January 1982.

On January 1, 1982, Secretary Watt transferred the USGS revenue and royalty functions to his newly created MMS.¹⁸ Although BLM continued its regulatory oversight of both offshore and onshore oil and gas resources, its days were numbered.

May 10, 1982, is as important a day as April 20, 2010, in the chronology of the Gulf disaster. On May 10, 1982, Secretary Watt created the conflict of interest in the MMS.¹⁹ Although Watt maintained regulatory oversight of onshore oil and gas resources in BLM and revenue collection in the MMS, he withdrew offshore regulatory oversight from BLM's duties. Instead, he merged the offshore oil and gas regulatory oversight and permitting process together with the revenue collection duties under the umbrella of only one agency: the MMS.

With deregulation a prominent policy of the Reagan Administration, Watt's decision to merge the responsibilities of offshore drilling may have been justified on the theory of creating a more efficient operation and management oversight. And given the problems with the USGS, perhaps his actions in removing that agency from the playing field were seen as reasonable. However, if Watt really believed that combining the regulatory and revenue functions was an improvement in agency efficiency and oversight, he would have combined the regulatory and revenue functions in onshore mining as well, something he never did.

Curiously, Congress did not take any action in response to Watt's structuring of the MMS. In fact, Congress apparently supported and perhaps even endorsed, the new agency arrangement when it appropriated funds to MMS in 1983.²⁰

IV. 1982-1983 and the Years to 2010

From 1983²¹ until 2010, the MMS maintained its conflict-of-interest role, with minimal regulatory oversight over the

oil and gas companies as they drilled relentlessly into the waters of the Gulf of Mexico in search of oil.²² The MMS had only 60 inspectors in the Gulf of Mexico delegated to check on 3,795 offshore production platforms at the time of the explosion, compared to 10 inspectors for 23 facilities off the Pacific Coast.²³

In the 17-year period from 1983 to 2010, the MMS managed the collection of over \$210 billion in revenues, including not only oil and gas, but also metals, coal, and renewable energy sources.²⁴ Over time, and prior to the Gulf Oil disaster, the MMS was the second largest revenue collector for the U.S. government. Only the Internal Revenue Service collected more money.²⁵

In 1993 the MMS was granted authority to fund the discretionary portion of its budget by relying on offsetting collections from revenues it collected. Since 1998, the collections often comprised 40-50% of its discretionary budget.²⁶

According to the Center for Progressive Reform, the structural conflict of interest within MMS—where it strongly identified with corporate interests, relied on industry in developing standards, maintained lax monitoring and enforcement procedures, and engaged in inappropriate relationships, including the acceptance of gifts, with industry—caused it to become a “captive agency.” A captive agency serves the interests of the industry it is charged with regulating, rather than serving the public interest.²⁷

V. The Demise of the MMS

On May 19, 2010, one month after the Gulf Oil disaster, President Barack Obama's Secretary of the Interior, Kenneth L. Salazar, reconfigured the regulatory structure of the agencies.²⁸ In essence, the new Administration closed the barn door after the horse escaped. Under the new system, onshore regulation and revenue collection were split: BLM would continue to be responsible for regulatory oversight while a new agency, the Office of Natural Resources Revenue (NRR), would be responsible for revenue collection.²⁹

For offshore management of resources, Salazar significantly revised the structure: three agencies replaced the

17. See Eilperin & Hingham, *supra* note 2 (noting that the USGS managed revenues and royalties prior to the MMS). See also *About the BLM*, BUREAU LAND MANAGEMENT, http://www.blm.gov/wo/st/en/info/About_BLM.html (last visited Mar. 19, 2011).

18. 47 Fed. Reg. 4751, Secretarial Order No. 3071 (Feb. 2, 1982). Secretary Watt exercised his authority under the Reorganization Plan No. 3 of 1950 to redelegate authority within his Department without congressional or presidential approval. CRS REORGANIZATION, *supra* note 2, at 6.

19. 47 Fed. Reg. 26031, Secretarial Order No. 3071, Amendment No. 1 (June 16, 1982).

20. See CONG. RESEARCH SERV., DEEPWATER HORIZON OIL SPILL: SELECTED ISSUES FOR CONGRESS 33-36 (June 18, 2010), citing U.S. Congress, House Committee on Appropriations, *Department of the Interior and Related Agencies Appropriation Bill, 1983*, report to accompany H.R. 7356, 97th Cong., 2d sess. 40 (Washington: GPO, 1982) [hereinafter CRS SELECTED ISSUES]. In our research, we could not find any cases in which federal courts reviewed the reorganization of the MMS.

21. There were several minor changes to the agency structure from 1982 and 1983. On December 3, 1982, Secretary Watt directed the Bureau of Indian Affairs (BIA) to regulate onshore Indian lands. 48 Fed. Reg. 8983, Secretarial Order No. 3087 (Mar. 2, 1983). Nothing changed in the offshore regulatory regime. Two months later, on February 7, 1983, Secretary Watt removed the BIA from this responsibility and BLM was reassigned regulatory oversight of the federal and Indian lands. 48 Fed. Reg. 8983, Secretarial Order No. 3087, Amendment No. 1 (Mar. 2, 1983).

22. See DeParle, *supra* note 1.

23. ALYSON FLOURNOY ET AL., CTR. FOR PROGRESSIVE REFORM, REGULATORY BLOWOUT: HOW REGULATORY FAILURES MADE THE BP DISASTER POSSIBLE, AND HOW THE SYSTEM CAN BE FIXED TO AVOID A RECURRENCE 24 (2010).

24. CRS REORGANIZATION, *supra* note 2, at 2.

25. Eilperin & Hingham, *supra* note 2 (“MMS grew to become one the government's largest revenue collectors, after the Internal Revenue Service.”). According to Secretary Ken Salazar, the MMS collects \$13 billion annually in revenue from the oil and gas companies. CRS SELECTED ISSUES, *supra* note 20, at n.153, citing a U.S. Senate Committee on Energy and Natural Resources hearing on issues involving offshore oil and gas exploration including the Deepwater Horizon accident, 111th Cong., 2d sess., May 18, 2010, archive webcast available at http://energy.senate.gov/public/index.cfm?Fuseaction=Hearings.LiveStream&Hearing_id=69f3a508-9c1a-a3d4-ffa5-fd397b02c93b. Comments at approximately 35:30.

26. FLOURNOY ET AL., *supra* note 23.

27. *Id.*

28. SECRETARY KEN SALAZAR, DEP'T OF INTERIOR, Order No. 3299 (May 19, 2010), available at <http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=32475>.

29. *Id.*

MMS. Both the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement would be responsible for regulatory oversight in their respective spheres. Revenue and royalty collection would, as with onshore revenue, be collected by the newly formed NRR.³⁰

The MMS—the agency that had been accused of pandering to the oil and gas companies, rather than protecting the environment, ocean resources, and the continental shelf—was no more.

VI. Reporting Structure Changes

Although it may appear that Secretary Salazar's restructuring of the agencies has remedied the conflict of interest problem, the jury is still out. The new agency reporting structure created by Secretary Salazar does not necessarily inspire confidence.³¹

After the MMS was abolished, Secretary Salazar revised the reporting structure. Under the new system, the NRR reports to the Assistant Secretary of Policy, Management, and Budget. The Safety and Environmental Enforcement agency and the Ocean Energy Management agency report to the Assistant Secretary for Land and Minerals.

The two assistant secretaries report to the Secretary of the Interior. It is too early to tell whether the addition of these two assistant secretaries avoids a conflict of interest. One could argue that the wall separating the revenue collection agency from the regulatory oversight agencies—where all agencies report to assistant secretaries of interior and both assistant secretaries then report to the Secretary of the Interior—is thin. Might there still be pressure from the Secretary of the Interior on the Assistant Secretaries of the Interior to turn a blind eye to the regulatory oversight in order to maximize the collection of revenue?³² That is, the problem may be more systemic and institutional than Secretary Salazar perceived.

VII. Other Conflicts of Interest in Administrative Agencies Overseeing Natural Resources

Interestingly, the conflict in the oil and gas industry is not an anomaly. For example, although there is no conflict

in onshore mining management,³³ there are conflicts of interest in the management of grazing and timber natural resources on our public lands. In managing these resources, the same agency, BLM, is responsible for both revenue collection and regulatory oversight.³⁴ One could argue that these conflicts are not as problematic as in oil and gas, since the revenue is substantially lower.³⁵ However, when the fragile environment is at stake, any conflict of interest has the potential for encouraging an agency head to make decisions that favor commercial enterprises in the pursuit of profits over the environment and the nation's resources. One does not need an oil well explosion to create environmental damage and destruction.³⁶

VIII. The Potential Problem Today

Where large amounts of money are involved, as in the case of the MMS and its collection of over \$13 billion annually, abolishing an agency such as the MMS and replacing it with three new agencies does not necessarily resolve the conflict of interest. Thirteen billion dollars is huge in this economy. The government will still want to be assured that this amount of money, and more, will continue to flow into government coffers from the regulation of offshore oil and gas resources. And, of course, it is possible that many of the same supervisory personnel from the MMS now staff the new agencies. If so, do these government administrators still maintain close contacts with BP and other oil and gas companies?³⁷

30. *Id.*

31. Under the former regime, on January 1, 1982, the MMS reported to the Minerals Management Board, which reported to the Secretary of the Interior. 47 Fed. Reg. 4751, Secretarial Order No. 3071 (Feb. 2, 1982). On December 3, 1982, the Minerals Management Board was disbanded and replaced with a permanent reporting structure wherein the MMS reported to the Assistant Secretary of Energy and Minerals, who reported to the Secretary of the Interior. 48 Fed. Reg. 8983, Secretarial Order No. 3087 (Mar. 2, 1983). According to the secretarial orders creating the MMS, it looks like the Minerals Management Board was intended to be a temporary oversight group to be replaced by a permanent reporting structure at the end of the year. See Secretarial Order No. 3071.

32. For suggestions on what actions Congress can take to improve organizational and management problems, see CRS REORGANIZATION, *supra* note 2, at 16.

33. From the time of the Reagan Administration until the Gulf oil disaster, BLM maintained regulatory oversight, and the MMS was in charge of revenue collection. After the Gulf oil disaster, on May 19, 2010, the reorganization of the MMS also affected onshore oil and gas management: BLM continued regulatory oversight, but the Office of Natural Resources Revenue replaced the MMS as the agency responsible for revenue collection.

34. *About the BLM*, BUREAU OF LAND MANAGEMENT, http://www.blm.gov/wo/st/en/info/About_BLM.html (last visited Mar. 19, 2011).

35. BLM collected an estimated \$55.4 million from timber receipts in fiscal year 2007. Royalties from onshore mineral leasing, in comparison, generated about \$4.5 billion. *About the BLM*, BUREAU OF LAND MANAGEMENT, http://www.blm.gov/wo/st/en/info/About_BLM.html (last visited Mar. 19, 2011). We could not find revenue numbers for grazing. BLM does not include it when discussing its sources of revenue.

36. Whether other agencies have also been designed with inherent conflicts of interest is outside the scope of this Article. Researchers and scholars may want to investigate the presence of conflicts of interest in other agencies.

37. Following the oil disaster, Secretary Salazar requested that Congress enact legislation to create or, at least, sanction his restructuring plan and the demise of the MMS. He believed that "an agency the size of the [MMS] that collects an average of \$13 billion a year . . . should not exist by fiat of a secretarial order that was signed almost 30 years ago." He added that although he had the power to reorganize the agency structure, "it's important that Congress take up that responsibility." CRS SELECTED ISSUES, *supra* note 20, at 34-35. Near the end of the 111th Congress, a bill was passed providing for the Secretary of the Interior to "establish accounts, transfer funds among and between the offices and bureaus affected by the reorganization and take any other administrative actions necessary in conformance with Appropriations Committee reprogramming procedures described in the joint explanatory statement of the managers accompanying Public Law 111-88." H.R. 3082, 111th Cong. §1 (2010) (enacted as Pub. L. No. 111-88). As of April 2, 2011, Congress has not made any structural or institutional administrative agency changes regarding the regulatory bodies responsible for monitoring oil and gas exploration in the Gulf of Mexico. However, proposed bill H.R. 501, entitled "Implementing the Recommendations of the BP Oil Spill Commission Act of 2011," seems to be consistent with the recommendations of the commission President Obama created in response

This Article does not propose, or even suggest, that Congress or the president control the management of agencies. Nevertheless, there may be a need for either federal legislation or an Executive Order creating procedural guarantees that all agency revenue collections be institutionally separate from all agency regulatory oversight.

IX. Conclusion

Secretary Salazar abolished the MMS after the Gulf Oil disaster and eliminated the conflict of interest inherent in that agency's management of regulatory oversight

and revenue collection. However, the question remains: how much of a fix was it? Might there still be institutional problems today or in the future as long as billions of dollars are collected each year from the oil companies? Although it is beyond the scope of this Article to design a procedural scheme that would prevent conflicts of interest among agencies, Congress and the executive would be wise to study the institutional frameworks of agencies and perhaps provide ways to intrinsically protect against possible conflicts of interest. We need to be assured that the laws that protect our natural resources are, at all times, properly implemented.

to the spill. This bill, still in subcommittee, reflects the structure Secretary Salazar initiated through secretarial order. The bill would establish a Bureau of Ocean Energy Management; a Bureau of Safety and Environmental Enforcement; a National Oil and Gas Health and Safety Academy; and an Office of Natural Resources Revenue. The bill also abolishes the Minerals Management Services, transferring functions to the new bureaus and office.