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## **BP Disaster a Product of ‘Regulatory Blowout,’ Says New Study; Scholars Point to Multiple Regulatory Failures, Call for Precautionary Principle**

Washington, DC – The BP Oil Spill and its attendant environmental and economic harm were entirely preventable, and indeed, would have been avoided had government regulators over the years been pushed and empowered by determined leadership and given sufficient resources to enforce the law. To help avoid similar disasters in the future, regulators should apply the “precautionary principle” to assessing risks and needed safeguards, rather than essentially dismissing catastrophic outcomes as too unlikely to warrant serious consideration. These are among the chief conclusions of a new report by Member Scholars of the Center for Progressive Reform.

The study, *[Regulatory Blowout: How Regulatory Failures Made the BP Disaster Possible, and How the System Can Be Fixed to Avoid a Recurrence](#)*, examines the performance of multiple regulatory agencies, most conspicuously, the Minerals Management Service (MMS), since reorganized and rebranded as the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE).

“BP is responsible for this disaster, without question,” said study co-author Alyson Flournoy, CPR Member Scholar and law professor at the University of Florida. “But the Minerals Management Service’s permissive approach to its regulatory responsibilities together with inadequate legislative mandates for safety and environmental protection, and Congress’s inadequate funding of MMS created an environment that allowed BP to take shortcuts with safety, with disastrous results. Catastrophes like this spill are unlikely, but they happen, particularly when we repeatedly ignore small risks with dire consequences. Regulators need to apply the ‘precautionary principle,’ and not ignore low-probability risks or those about which we lack complete information. Rather we need to take these risks seriously and account for them.”

The study documents a series of regulatory failures dating back long before the Obama Administration, and offers specific reforms needed to avoid similar catastrophes in the future. Specifically, it finds:

- The MMS routinely accepted assurances that a blowout was unlikely and adopted safety and environmental standards developed by industry. The absence of any technology-forcing mandate in the Outer Continental Shelf Lands Act (OCSLA) meant that industry lacked any incentive to develop new and better safety technology.
- Compliance with regulatory standards has been far from consistent, and the threat of enforcement has not been a meaningful deterrent. The industry has operated in a climate in which costs were routinely balanced against safety and environmental protection. To motivate compliance with regulatory standards in such a climate, the cost of a failure to comply must be high. Several provisions of the OCSLA ensured that the cost of noncompliance was minimal—

most notably the feeble fine structure for violators – a maximum of \$35,000 per day in civil penalties does little to deter a multi-billion dollar industry.

- The MMS routinely ignored a requirement in the regulations implementing the National Environmental Policy Act (NEPA) that it consider reasonably foreseeable significant adverse impacts—catastrophic ones, in particular—even when they are improbable. In the BP case, the MMS completely ignored the risk of a serious oil spill, examining in its Environmental Impact Statement the prospect of spills no larger than 4,600 barrels of oil. Further, in assessing the aggregate risks of oil and gas drilling in the Gulf over the 40-year life of its plan for the region, it contemplated only that 11,000 to 31,000 barrels might be spilled. In the actual event, the BP spill unleashed an estimated 4.9 million barrels into the Gulf.

“There’s no question that the Obama Administration had its work cut out for it when its appointees took over these regulatory agencies,” said CPR President and study co-author Rena Steinzor, professor of law at the University of Maryland. “MMS, for example, had come to regard the oil industry as its constituents, which no doubt contributed to the egregious ethical lapses of its staff. But somewhere along the line, they’d gotten the message that they were there to serve the industry, not to protect the public and the environment, or to make sure that industry exercised due caution. For all intents and purposes, they were captured by industry, doing its bidding, not the people’s. That’s been an historic problem with a number of agencies, long before President Obama came to the White House. His people have an awful lot of work left to accomplish turning that around, and the White House has not given this crucial work nearly enough emphasis so far.”

Other findings from the study:

- The OCSLA authorizes the Secretary of the Interior to cancel oil leases or permits if they “would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment.” But the provision requires an extremely high level of proof to trigger protective action, proof that is rarely available, hindering the MMS’s ability to protect the environment from potentially dangerous wells.
- Like its predecessor, the new Bureau of Ocean Energy Management, Regulation and Enforcement lacks important resources it needs to do the job of protecting the public and the environment, particularly in light of the scientific and engineering complexities inherent in deepwater and ultra deepwater drilling. In addition to funding to develop the technical expertise needed by regulators, resources for enforcement are lacking. According to one Department of the Interior official, the agency has just 60 inspectors charged with covering almost 4,000 facilities in the Gulf of Mexico. By contrast, BOEMRE employs 10 inspectors to oversee just 23 facilities on the Pacific Coast.”
- Over the course of several administrations, the MMS was “captured” by the oil industry, and came to see industry as its constituency, not the public. That made regulators particularly subject to pressure and influences from industry, and led to an appalling lack of energy in its efforts to protect against industry excesses.
- In 1986, the White House Council on Environmental Quality (CEQ) rescinded a 1978 NEPA regulation that required agencies to conduct a “worst case analysis” in their Environmental Impact Statements when important information regarding the potential consequences of a proposed action was unknown or missing. Had that provision still been in place, it would have forced more rigorous planning by the MMS and BP and its industry colleagues, which in turn might have prevented the disaster or at least led to a more effective response.

- Over the years, some agencies, including the MMS, have abused language in the CEQ's regulations allowing them to use "categorical exclusions" to avoid preparing Environmental Impact Statements and Environmental Assessments for whole classes of activities. Such exclusions are sometimes appropriate, but their excessively broad application in instances in which agency actions pose serious environmental risks has meant that many environmentally hazardous activities are approved and implemented without any consideration of potential adverse consequences. The MMS was a serial abuser of the process, and that contributed to the inadequate review of BP's exploration plan for the Macondo well.
- In enforcing the Endangered Species Act (ESA), the National Marine Fisheries Service and the U.S. Fish and Wildlife Service (collectively, "the Services") generally rely on the "action agencies"—in the BP case, the MMS—to provide information to complete their assessments of the dangers of certain actions to wildlife. Since the MMS routinely underestimated the likelihood and magnitude of a spill, the Services were handicapped in their assessments. Moreover, the Services tend to discount risks, even catastrophic ones, if they are deemed to be low probability events, instead focusing on more predictable impacts, opening the door to disastrous results.
- The Services, when carrying out ESA consultations, have failed to aggregate low probability risks of multiple federal or federally approved actions, despite regulations requiring consideration of such aggregate effects.
- Despite language in multiple statutes imposing the "Precautionary Principle" on federal decision-making, the MMS proceeded in precisely the manner that the principle is designed to protect against—an indication that the principle is largely unobserved. That is true not just at the MMS, but at other agencies charged with protecting against harm to people and the environment.

The report calls for a series of specific reforms, some regulatory, some legislative. Among them:

- Congress should amend the OCSLA to overhaul environmental review procedures, require inter-agency consultation, extend deadlines for review, increase penalties, and create incentives for continual safety innovation.
- The President should request, and Congress should provide, adequate funding for BOEMRE so that it can perform its regulatory functions and hire, train, and retain competent staff. In addition, the reorganization that led to the creation of BOEMRE should be built upon with further organizational reforms, including further separating several of the new agency's existing programs into separate shops.
- The OMB Office of Information and Regulatory Affairs should press regulatory agencies to apply the Precautionary Principle.
- The Department of the Interior Secretary Ken Salazar and BOEMRE Director Michael Bromwich should continue to implement new ethics standards, end the revolving door, and create a culture in BOEMRE that supports the agency's regulatory mission.
- The CEQ should reinstate the regulatory requirement for worst-case analysis planning.
- With respect to the ESA, the Services should revise their regulations to ensure better assessment of low probability risks of harm to listed species, and to account for the aggregate impacts of low probability risks of serious harm.
- Congress should ensure that BOEMRE undertakes an ongoing, systematic evaluation of the lessons learned elsewhere in the wake of serious accidents off the shores of other nations, and of alternative regulatory measures and techniques that have proven effective in those settings.

The study is available online at [http://www.progressivereform.org/articles/BP\\_Reg\\_Blowout\\_1007.pdf](http://www.progressivereform.org/articles/BP_Reg_Blowout_1007.pdf).

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