

Exposing Corruption Exploring Solutions
Project On Government Oversight

Testimony of
Danielle Brian, Executive Director
Project On Government Oversight (POGO)
before
the Subcommittee on Energy and Mineral Resources
on
“The Deepwater Horizon Incident: Proposals to Split Up the Minerals Management Service”

June 17, 2010

Thank you for inviting me to testify today. I am the Executive Director of the Project On Government Oversight, also known as POGO. Since 1995, POGO has issued five reports about the federal government’s inadequate oversight of the major oil and gas companies, primarily with a focus on the Minerals Management Service (MMS) and the loss of royalty revenue.¹ Most recently, we issued a report tracing the troubled history of the Department of the Interior’s Royalty-In-Kind (RIK) program and recommending the abolition of the program. Investigations conducted by POGO, the Inspector General (IG), the press, and this and other congressional committees have long found that MMS is broken. The Deepwater Horizon disaster is a direct result of MMS’s failure to do its job. It is important that Interior and Congress do what they can to learn from this catastrophe and make sure it never happens again.

The reforms proposed by the Consolidated Land, Energy, and Aquatic Resources (CLEAR) Act of 2009 (H.R. 3534) to split some of the conflicted missions of MMS² anticipated many of the operational problems the Deepwater Horizon disaster has revealed. Interior Secretary Ken

¹ Project On Government Oversight, *Drilling the Taxpayer: Department of Interior’s Royalty-In-Kind Program*, September 18, 2008, <http://www.pogo.org/pogo-files/reports/natural-resources/drilling-the-taxpayer/nr-rik-20080918.html>; *Drilling For The Truth: More Information Surfaces On Unpaid Oil Royalties*, January 1, 1997, <http://www.pogo.org/pogo-files/reports/natural-resources/drilling-for-the-truth-more-information-surfaces-on-unpaid-oil-royalties/nr-oil-1997.html>; *Wait! There Is More Money to Collect...Unpaid Oil Royalties Across the Nation*, January 1, 1996, <http://www.pogo.org/pogo-files/reports/natural-resources/wait-there-is-more-money-to-collect/nr-oil-1996.html>; *With A Wink And A Nod: How the Oil Industry and the Department of Interior Are Cheating the American Public and California School Children*, March 1, 1996, <http://www.pogo.org/pogo-files/reports/natural-resources/with-a-wink-and-a-nod/nr-oil-19960301.html>; *Department of Interior Looks the Other Way: The Government’s Slick Deal for the Oil Industry*, January 1, 1995, <http://pogoarchives.org/m/ep/doi-looks-the-other-way-19950401.pdf>

² Consolidated Land, Energy, and Aquatic Resources (CLEAR) Act of 2009, H.R. 3534, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3534ih.txt.pdf (Downloaded June 15, 2010) (Hereinafter H.R. 3534)

Salazar's ethics reforms³ and new proposal to split MMS⁴ could also help make Interior more effective. But reducing these structural conflicts will not fix the most significant conflict of interest at MMS: the agency's disturbingly close relationship with the industry they are entrusted to oversee. In a recent report, the Interior IG found that MMS's inappropriate relationship with industry—which included “gifts and gratuities”—compromised its objectivity.⁵ Secretary Salazar's ethics reforms should prevent this specific problem from recurring, and POGO applauds Chairman Rahall for pursuing information “regarding rotation practices designed to ensure that inspectors maintain arms-length relationships with offshore facility personnel.”⁶ But these actions do not fix the two primary causes of the inappropriate closeness: the revolving door and an over dependence on industry for expertise.

Revolving Door

One of the most problematic causes of the inappropriate closeness between MMS and industry is the number of the individuals who have gone through the revolving door. Several have been sentenced to prison for violations of conflict-of-interest laws or obstruction of justice.⁷ As long as the door continues to revolve between industry and Interior or MMS, the public cannot be sure their interests are being served.

The most egregious example of this problem is the last Director of MMS under the previous administration, Randall Luthi—who recently came before your committee as the president of an offshore drillers trade association, the National Oceans Industries Association.⁸ As a disturbing sidenote, his predecessor at the Association, Tom Fry, was also a former MMS Director.⁹ These two cases are emblematic of what is wrong with MMS. When the Director of MMS joins a trade association whose explicit mission was to secure a “favorable regulatory and economic environment for the companies that develop the nation's valuable offshore energy resources,”¹⁰ taxpayers have to question whose interests were actually being served when he was at MMS. In

³ Department of the Interior, “Secretary Salazar Outlines High Ethical Standards for Interior Department in Memo to All Employees,” January 26, 2009. http://www.doi.gov/archive/news/09_News_Releases/012609a.html (Downloaded June 15, 2010)

⁴ Department of the Interior, “Salazar Divides MMS's Three Conflicting Missions,” May 19, 2010. <http://www.doi.gov/news/pressreleases/Salazar-Divides-MMSs-Three-Conflicting-Missions.cfm> (Downloaded June 15, 2010)

⁵ Department of the Interior, *Investigative Report: Island Operating Company et al*, March 31, 2010. <http://www.doi.gov/images/stories/reports/pdf/IslandOperatingCo.pdf>; See also: Department of the Interior, *Investigative Report: MMS Oil Marketing Group–Lakewood*,” August 19, 2008. <http://www.doi.gov/images/stories/reports/pdf/RIKinvestigation.pdf> (All downloaded June 15, 2010)

⁶ Letter from Nick J. Rahall, II, Chairman of the House Committee on Natural Resources, to Interior Secretary Ken Salazar, June 8, 2010. <http://www.pogoarchives.org/m/nr/doi/rahall-salazar-20100608.pdf> (Downloaded June 15, 2010)

⁷ Project On Government Oversight, *Drilling the Taxpayer: The Department of Interior's Royalty-In-Kind Program*, September 18, 2008, pp. 12-14. <http://pogoarchives.org/m/nr/rik/report-20080918.pdf>

⁸ National Ocean Industries Association, “Biography: Randall Luthi, President, National Ocean Industries Association.” <http://www.noia.org/website/download.asp?id=38559> (Downloaded June 15, 2010)

⁹ National Ocean Industries Association, “Tom Fry Announces Retirement from the National Ocean Industries Association,” October 9, 2009. <http://www.noia.org/website/article.asp?id=35791> (Downloaded June 15, 2010)

¹⁰ Project On Government Oversight, “Oil Drilling Trade Group Slips the F-Word into Its Mission Statement,” June 11, 2010. <http://pogoblog.typepad.com/pogo/2010/06/oil-drilling-trade-group-slips-the-fword-into-its-mission-statement.html>

the case of Mr. Luthi—who joined the trade association approximately 14 months after leaving MMS—it’s unclear whether he was always ideologically opposed to the agency’s mission.

There have already been several improvements to ethics policies at Interior since our 2008 report. POGO applauds President Barack Obama’s Executive Order for Ethics Commitments by Executive Branch Personnel,¹¹ and Secretary Salazar’s Memorandum to Employees on their ethical responsibilities.¹² POGO particularly wants to praise Secretary Salazar for enhancing the ethical culture of the agency by urging employees to seek the assistance of bureau or office ethics officials for guidance to avoid even the appearance of impropriety. The CLEAR Act also offers meaningful solutions to combat this problem by requiring the Secretary of the Interior to annually certify that all employees involved in leasing activities are in full compliance with all federal employee ethics laws and regulations,¹³ and we hope that in the wake of this disaster this certification would extend to all employees involved in overseeing resource development.

We also recommend that Interior and Congress consider the following recommendations:

- Prohibit government employees from overseeing or regulating their former private sector employer.
- Require government officials to enter into a binding revolving door exit plan that sets forth the programs and projects from which the former employee is banned from working. Like financial disclosure statements, these reports should be filed with the Office of Government Ethics and available to the public. This requirement would benefit government employees who are unaware of or confused by post-government restrictions or who have multiple post-employment bans covering different time periods. It would also enhance public trust in the government.
- Require recently retired government officials and their new employers to file revolving door reports attesting that the former government employee has complied with his or her revolving door exit plan.

MMS’s Dependence on Industry

The second reason for MMS’s closeness to industry is that, as Tyler Priest, clinical professor of business history and director of global studies at the University of Houston’s C.T. Bauer College of Business, has pointed out, MMS has always been a “junior partner” to industry, dependent on industry for the technical knowledge MMS employees need to be able to do their jobs.¹⁴ President Obama has acknowledged that this dependence on industry has been a festering sore for MMS: “What’s also been made clear from this disaster is that for years the oil and gas industry has leveraged such power that they have effectively been allowed to regulate

¹¹ The White House, “Ethics Commitment By Executive Branch Personnel,” January 21, 2009. http://www.whitehouse.gov/the_press_office/Ethics-Commitments-By-Executive-Branch-Personnel (Downloaded June 15, 2010)

¹² Department of the Interior, “Secretary Salazar Outlines High Ethical Standards for Interior Department in Memo to All Employees,” January 26, 2009. http://www.doi.gov/archive/news/09_News_Releases/012609a.html (Downloaded June 15, 2010)

¹³ H.R. 3534, Section 103.

¹⁴ Tyler Priest, “The Ties that Bind MMS and Big Oil,” *Politico*, June 9, 2010. <http://www.politico.com/news/stories/0610/38270.html> (Downloaded June 15, 2010)

themselves.”¹⁵ POGO worries that MMS allowed industry to perform inherently governmental functions by allowing industry’s technical analysis to determine how to adapt or develop regulations.¹⁶

In our own investigations, we found that industry’s promotion of the Royalty-In-Kind program facilitated the program’s expansion against the significant concerns of independent government auditors. The revolving door between MMS and industry has been tolerated, if not encouraged, based on the belief that industry knows best. As a result, MMS has not been an effective enforcer of regulations, but instead has allowed industry to operate largely on an honor system. Billions of dollars in royalty underpayments by industry, and the oil disaster in the Gulf, have demonstrated that this honor system doesn’t work.

Separating Missions and Increasing Independence

In addition to its inappropriate coziness to industry, there are a few other factors that have contributed to MMS’s failure. POGO has long believed MMS suffers from a conflict of mission. For example, the sole mission of a federal royalty management and collection program should be determining and enforcing revenue obligations of private companies operating on public and Indian lands. Prior to the proposed split, auditors and other compliance and enforcement personnel reported to officials within MMS whose responsibilities also include leasing and development, and who may be more inclined to make the royalty management program *look* successful rather than *be* successful. As POGO discovered, in some instances MMS told their professional auditors to stop auditing, even when the auditors had discovered evidence that companies were underpaying royalties. The Deepwater Horizon disaster has demonstrated that similar pressures may have undermined the effectiveness of MMS inspectors.

The CLEAR Act tackles this conflict by separating out the auditing function and giving it to the IG¹⁷; we would still like to see this function moved out of Interior entirely and made part of an independent federal contract audit agency. Secretary Salazar’s proposed reorganization of MMS could also help to improve the agency by separating out these missions and increasing its independence, but this plan’s success will depend upon implementation. For one, these bureaus cannot be allowed to suffer from the lack of resources that crippled MMS—they must have the funding, staff, and expertise they need to be effective. Proposals to augment the inspectors for both MMS and the Bureau of Land Management (BLM) have been quashed in the past. Congress and Interior should:

- Ensure that there will be enough inspectors
- Consider increasing the pay and GS scale for inspectors to be comparable to MMS auditors and IG evaluators and criminal investigators. The disaster in the Gulf has

¹⁵ The White House, Office of the Press Secretary, “Remarks by the President on the Gulf Oil Spill,” May 27, 2010. <http://www.whitehouse.gov/the-press-office/remarks-president-gulf-oil-spill> (Downloaded June 15, 2010)

¹⁶ FAR 7.503(c)(5) (inherently governmental functions include “the determination of agency policy, such as determining the content and application of regulations, among other things”).

https://www.acquisition.gov/far/current/html/Subpart%207_5.html#wp1078196 (Downloaded June 15, 2010)

¹⁷ H.R. 3534, Section 101(h).

demonstrated that rig inspectors perform equally important functions for Interior, and they should be adequately compensated for it.

- Determine whether some functions of the BLM should be incorporated into this reorganization, as the CLEAR Act prescribed.¹⁸ For example, putting all of the inspectors for both onshore and offshore in the same division might focus Interior's inspection mission.

POGO has seen this kind of split improve effectiveness before: in 1974, the Atomic Energy Commission was abolished and divided into two agencies because its dual missions of promotion and regulation of nuclear power was recognized as an inherent conflict of interest.¹⁹ As a result, the Department of Energy (DOE) was given the role of promoting nuclear power, while the Nuclear Regulatory Commission (NRC) was created to regulate, inspect, and enforce regulations of the nuclear power industry. While NRC still faces some challenges to being successful, it has been a more effective regulator than the Atomic Energy Commission.

A large hurdle facing MMS is cultural: this is an agency that has been subservient and dependent on industry for too long. Changing this requires more than reorganization; it requires new leadership. POGO worries that Secretary Salazar's well-intentioned split, creating smaller offices, could also diminish the effectiveness of auditing and inspections, and make it difficult to attract high quality people needed to really create change. But Interior can get the qualified officials it needs if they look beyond industry, the solicitor's office, and MMS. For example, Secretary Salazar could appoint one of the state or tribe auditors who have been frustrated with MMS's lax royalty auditing to head up the new auditing bureau. Someone from the Government Accountability Office or the IG office could be an effective head of the bureau charged with inspections. These critics care about MMS's mission and want it to succeed, and are exactly the kind of people MMS employees and industry need to see in the lead.

Additionally, there must be rigorous enforcement of existing rules and regulations. When it comes to ethics enforcement, the one piece of good news in the most recent IG investigation is that the culture of accepting gifts from the oil and gas industry appeared to decline after one MMS regional supervisor was investigated and terminated for accepting gifts from an offshore drilling contractor. This example demonstrates that a culture can change when people are held accountable for misconduct. Additionally, Congress should consider whether:

- The CLEAR Act's language to increase fines and penalties²⁰ could provide effective tools for improving royalty management.
- Bonuses for MMS employees could improve inspections or royalty collections.

Even without these changes, perhaps we would have had more warning about the looming disaster and the problems at MMS if federal workers and contractors knew they would be protected and have recourse if they faced retaliation for coming forward. A few did come forward about royalty underpayments by oil companies, and when they did, the MMS employees

¹⁸ H.R. 3534, Section 101.

¹⁹ Nuclear Regulatory Commission, "A Short History of Nuclear Regulation, 1946-1999." <http://www.nrc.gov/about-nrc/short-history.html#end> (Downloaded June 15, 2010)

²⁰ H.R. 3534, Section 205.

who came forward alleged retaliation including reassignment and job loss.²¹ The current whistleblower protection law does not provide adequate protections for pursuing their claims. The bipartisan Whistleblower Protection Enhancement Act, H.R. 1507, would strengthen existing whistleblower protections for all federal employees and extend protections to federal government contractor employees who disclose wrongdoing.²² This bill is critical to ensuring more warning of wrongdoing and more accountability at Interior and throughout the government.

No matter what reforms are put in place, they can only be effective with increased transparency about MMS's operations. Interior should provide:

- Congress and the public easy access to non-proprietary information regarding leases, volumes of production, production costs, audits, Environmental Impact Statements, and safety assessments.
- Quarterly public reviews of inspection activities by MMS that would be sent to the Secretary, the IG, and Congress. It is important to note that Interior has not released information about oil and gas leases, despite being given several opportunities to do so by measures outlined in the Open Government Directive.²³ Interior's willingness to increase its openness in the wake of the Gulf disaster should be considered a real acid test as to how committed the Administration is to the kind of transparency measures that will help citizens hold the federal government and industry accountable.

We are happy that Congress and the Administration are taking a serious look at MMS's problems, but it shouldn't have taken a disaster of this magnitude to fix the obvious and well-known problems at this agency. I think that this, above all, is the most important lesson to take away from the Gulf Coast disaster.

Thank you again for your oversight of MMS and for asking me to testify. I look forward to answering any questions you may have, and to working with your Committee on this issue.

²¹ Department of the Interior Office of Inspector General, *Investigative Report: Minerals Management Service, False Claims Allegations*, September 7, 2007, pp. 86-131.

<http://www.doiioig.gov/images/stories/reports/pdf/Qui%20tam.pdf> (Downloaded June 15, 2010)

²² Whistleblower Protection Enhancement Act of 2009, H.R. 1507. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1507ih.txt.pdf (Downloaded June 15, 2010)

²³ The White House, "Open Government Directive," December 8, 2009.

<http://www.whitehouse.gov/open/documents/open-government-directive> (Downloaded June 15, 2010)