

TESTIMONY
OF
DONALD F. BOESCH
PRESIDENT OF THE UNIVERSITY OF MARYLAND CENTER FOR
ENVIRONMENTAL SCIENCE

BEFORE
THE COMMITTEE ON NATURAL RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES

On
HR 2231
THE OFFSHORE ENERGY AND JOBS ACT

JUNE 11, 2013

I. Introduction

Chairman Hastings, Ranking Member Markey, Chairman Lamborn, Ranking Member Holt and members of the Subcommittee, my name is Donald F. Boesch, President of the University of Maryland Center for Environmental Science. I was one of seven commissioners who comprised the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling. I thank you for the opportunity to testify today in respect to H.R. 2231, the Offshore Energy and Jobs Act.

The explosion that tore through the *Deepwater Horizon* drilling rig on April 20, 2010, as the rig's crew completed drilling the exploratory Macondo well deep under the waters of the Gulf of Mexico, began a human, economic, and environmental disaster.

Eleven crew members died, and others were seriously injured, as fire engulfed and ultimately destroyed the rig. And, although the nation would not know the full scope of the disaster for weeks, the first of more than four million barrels of oil began gushing uncontrolled into the Gulf—threatening livelihoods, the health of Gulf coast residents and of those responding to the spill, precious habitats, and even a unique way of life. A treasured American landscape, already battered and degraded from years of mismanagement, faced yet another blow as the oil spread and washed ashore. Five years after Hurricane Katrina, the nation was again transfixed, seemingly helpless, as this new tragedy unfolded in the Gulf. Now, three years later, the costs from this one industrial accident are still not yet fully counted, but it is already clear that the impacts on the region's natural systems and people were enormous, and that economic losses will total tens of billions of dollars.

On May 22, 2010, President Barack Obama announced the creation of the National Commission on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling (the Commission): an independent, nonpartisan entity, directed to provide thorough analysis and impartial judgment. The President charged the Commission to determine the causes of the disaster, and to improve the country's ability to respond to spills, and to recommend reforms to make offshore energy production safer. And the President said we were to follow the facts wherever they led.

After an intense six-month effort to fulfill the President's charge, the Commission released its final report on January 10, 2011. As a result of our investigation, we concluded:

- The explosive loss of the Macondo well could have been prevented.
- The immediate causes of the Macondo well blowout could 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.
- 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.

- To assure human safety and environmental protection, regulatory oversight of leasing, energy exploration, and production require reforms even beyond those significant reforms the Department of the Interior (DOI) has already initiated since the *Deepwater Horizon* disaster.
- 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 that effort.
- 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.

We reached these conclusions and made our recommendations in a constructive spirit. Our goal was to make American offshore energy exploration and production far safer, today and in the future.

Since we released our report, several other highly qualified committees and organizations have also completed analyses of what went wrong with the Macondo well and what should be done to protect against such a catastrophe happening again. These include the Department of the Interior-Coast Guard Joint Investigation, a National Academy of Engineering study, and even some industry analyses. We are pleased that all of these studies have supported and often reinforced the Commission's findings and recommendations.

The Commissioners, however, were not satisfied with merely issuing a report. Too many task forces and commissions, after devoting significant time and effort to their assignments, watch the value of their contribution diminish as other issues and priorities command public attention. As a group, we vowed not to let the spotlight fade from our work and elected to do what we can to advance the implementation of our recommendations so that the nation can move forward to secure the oil off our shores in a safer, more environmentally responsible manner.

To this end, we established an Oil Spill Commission *Action* (OSCA) project to monitor progress in making offshore drilling safer and more environmentally protective, and to meet with many of the actors responsible for implementing the recommendations. On the second and third anniversaries of the explosion, OSCA issued "report cards" – the most recent was released on April 17th – addressing the progress that has been made in implementing the Commission's recommendations. I have brought copies of this report for Committee members and would like to request that it be entered into the record.

As our report cards have indicated, we have been pleased with the positive response to many of our recommendations. The oil industry, for instance, has established a Center for Offshore Safety, implementing one of our major recommendations. Similarly the Department of the Interior has implemented many of our recommendations to reduce conflicting incentives that had existed in the Minerals Management Service (MMS), and improve the efficacy of its regulatory programs. Just last month, it announced the implementation of its own Ocean Energy Safety Institute.

As noted in our report cards, however, the lack of response to many of our recommendations by Congress has largely been a disappointment. Many of the management and safety improvements should be codified and some of our recommendations, such as liability limits, are yet to be addressed.

On the positive side, Congress did pass the RESTORE Act last year which, as the Commission recommended, will channel eighty percent of the fines administered under the Clean Water Act to restoration efforts in the Gulf. We are concerned that these funds may be diverted from the purpose the Commission intended – restoring the Gulf’s natural ecosystems – and intend to monitor their use closely to diminish such diversions to the extent we can. The Gulf has suffered serious degradation over the past decades, and the RESTORE Act provides perhaps our last opportunity to restore its natural health.

We are also pleased to see that HR 2231 addresses two of our other major recommendations: reorganizing the offshore energy management structure in the Department of the Interior and establishing a funding scheme to support the oversight of the offshore energy industry.

Before commenting on those elements of HR 2231 which are found in Title IV of the proposed legislation, let me make a brief comment about Titles I and II which would substantially expand the areas of the outer continental shelf being leased for oil and gas development. The Commission recognized the possibility that new offshore areas will be opened to oil and gas exploration and production. However, before these areas are opened they should be carefully studied to determine their environmental sensitivity, guide responsible planning within the region, and define a baseline against which damages caused by offshore energy development can be accurately assessed. The compressed schedules set forth in Titles I and II do not seem sufficient to accommodate such a properly informed process.

II. Restructuring Regulatory Oversight

As I already indicated, DOI has administratively implemented many of the Commission’s recommendations on how its offshore energy management, safety and environmental enforcement operations should be structured. However, we believe it to be very important to have the improved structure codified in legislation.

As you are aware, over the course of many years, political pressure generated by industry and a demand for lease and royalty revenues to expand access and expedite permit approvals and other regulatory processes often combined to push MMS to elevate revenue and permitting

goals over safety and environmental goals. As a result, the safety of U.S. offshore workers has suffered. The United States has the highest reported rate of fatalities per hours worked in offshore oil and gas drilling among its international peers (the U.K., Norway, Canada, and Australia) but has the lowest reporting of injuries. This striking contrast suggests a significant under-reporting of injuries in the United States.

These problems were compounded by an outdated organizational structure, a chronic shortage of resources, a lack of sufficient technological expertise, and the inherent difficulty of coordinating effectively with all of the other government agencies that have had statutory responsibility for some aspect of offshore oil and gas activities. Besides MMS, the Departments of Transportation, Commerce, Defense, and Homeland Security, and the Environmental Protection Agency (EPA) were involved in some aspects of the industry and its many-faceted facilities and operations, from workers on production platforms to pipelines, helicopters, drilling rigs, and supply vessels.

To remedy this conflict of interest, we recommended that Congress create an independent agency with enforcement authority to oversee all aspects of offshore drilling safety (operational and occupational) as well as the structural and operational integrity of all offshore energy production facilities, including both oil and gas production and renewable energy production. The Department of the Interior took steps to accomplish this by the administrative creation of the Bureau of Safety and Environmental Enforcement (BSEE) separate from the Bureau of Ocean Energy Management (BOEM).

Title IV of HR 2231 accomplishes some of the Commission's recommendations with respect to the reorganization of the former Mineral Management Service. For instance, to a degree, it would codify the separation of the management, regulatory and revenue collection functions as the Commission recommended. We are also pleased to see that it establishes a robust training program within the new Bureau, and makes the Outer Continental Shelf Energy Safety Advisory Board a permanent advisory board.

The training program is important because of the rapid technological and environmental changes that are occurring in offshore drilling. Both the regulators and the new generation of operators will require high quality training to manage these new challenges effectively. We would expect to see many opportunities for cooperation between industrial organizations such as the Center for Offshore Safety and the regulators in providing this training.

For the same reasons, we would support the permanent establishment of an Outer Continental Shelf Energy Safety Advisory Board (which I presume is a replacement for the Ocean Energy Safety Advisory Committee that BSEE established administratively). The regulators need this informed input in order to remain current with all the changes taking place in the industry and the appropriate manner of addressing the challenges the industry is facing and creating.

Regarding the reorganization proposed in HR 2231, it is instructive to compare it both to the reorganization put into place administratively by the Department of the Interior and to the Commission's recommendations. HR 2231 would elevate the present Assistant Secretary for Land and Minerals Management to Under Secretary for Energy, Lands, and Minerals, create a new Assistant Secretary of Ocean Energy and Safety, and establish a Bureau of Ocean Energy (BOE) and an Ocean Energy Safety Service (OESS), both reporting to the Assistant Secretary. BOE and OESS have responsibilities seemingly consistent with BOEM and BSEE, both reporting to the Assistant Secretary for Land and Minerals Management under the present administrative arrangement.

The Commission recommended an even greater separation of these management and safety and environmental enforcement functions, with an Offshore Safety Authority, reporting directly to the Secretary and headed by an officer appointed to a fixed term that cuts across any one Presidential term. Specifically, the Commission recommended that this authority have primary statutory responsibility for overseeing the structural and operational integrity of all offshore energy-related facilities and activities, including both oil and gas offshore drilling and renewable energy facilities. We recommended that Congress should enact an organic act to establish its authorities and responsibilities, consolidating the various responsibilities now under the OCSLA, the Pipeline Safety Act, and Coast Guard authorizations. This should include responsibility for all workers in energy related offshore activities. The Department of the Interior separated and consolidated such functions into BSEE, but kept this responsibility under the Assistant Secretary for Land and Minerals Management.

From the perspective of the Commission's recommendation, HR 2231 reduces rather than increases the separation and independence of offshore energy development and safety compared to the present administrative organization. The directors of both BOE and OESS would report to Assistant Secretary for Ocean Energy and Safety, who would be one level deeper in the organization of the Department of the Interior than under the present structure. It would be in effect a return to the organization model of the Minerals Management Service by placing both responsibilities to an officer whose responsibility is the development of energy and minerals on the Outer Continental Shelf.

The Commission also recommended the formation of a Leasing and Environmental Science Office, with responsibilities roughly analogous to the present BOEM and proposed BOE. It would be charged with fostering environmentally responsible and efficient development of the Outer Continental Shelf and would act as the leasing and resource manager for conventional renewable energy and other mineral resources on the OCS. The Office would also be responsible for conducting reviews under the National Environmental Policy Act (NEPA). The Commission further recommended that this bureau include an Office of Environmental Science, led by a Chief Environmental Scientist, with specified responsibilities in conducting all NEPA reviews, coordinating other environmental reviews, and whose expert judgment on environmental protection concerns would be accorded significant weight in leasing decision-making. Given the

importance of ensuring environmental responsibility at every state of planning, leasing and development, we would urge consideration of inclusion of these functions into the statute.

We also recommended that Congress review and consider amending where necessary the governing statutes for all the agencies involved in offshore activities to be consistent with the responsibilities functionally assigned to those agencies. For example, under the Outer Continental Shelf Lands Act (OCSLA), it is up to the Secretary of the Interior to choose the proper balance between environmental protection and resource development. In making leasing decisions, the Secretary is required to solicit and consider suggestions from any interested agency, but he or she is not required to respond to the comments or accord them any particular weight. Similar issues arise at the individual lease sale stage and at the development and production plan stage. As a result, the National Oceanographic and Atmospheric Administration (NOAA)—the nation’s ocean agency with the most expertise in marine science and the management of living marine resources—effectively has the same limited role as the general public in the decisions on selecting where and when to lease portions of the OCS. The Commission recommended that Congress amend OCSLA to provide a more robust and formal interagency consultation process in which NOAA, in particular, is provided a heightened role, but ultimate decision-making authority is retained at DOI.

III. Ensuring Adequate Resources

A second major focus of the Commission’s recommendations was on ensuring that there would be adequate resources available for funding effective and efficient offshore energy oversight programs and for responding to any spills that might occur.

Here we had three major recommendations:

1. Congress should enact legislation creating a mechanism for offshore oil and gas operators to provide ongoing and regular funding of the agencies regulating offshore oil and gas development.
2. Congress should significantly increase the liability cap and financial responsibility requirements for offshore facilities.
3. Congress should increase the limit on per-incident payouts from the Oil Spill Liability Trust Fund.

Funding the government oversight agencies

One of the Commission’s major concerns was that the agencies overseeing offshore oil exploration and production have adequate resources to accomplish their responsibilities effectively and efficiently. The agency responsible for ensuring the safety of offshore energy production cannot be expected to succeed in meaningfully overseeing the oil and gas industry if Congress does not ensure it has the resources to do so. Agencies cannot conduct the scientific and environmental research necessary to evaluate impacts of offshore development if they do not

receive adequate support from Congress. In short, Congress needs to make funding the agencies regulating offshore oil and gas development a priority in order to ensure a safer and more environmentally responsible industry in the future.

The Commission strongly recommended that the oil and gas industry be required to pay for its regulators, as is the case with some other regulated industries. For instance, the fees paid by the telecommunications industry largely support the work of the Federal Communications Commission. Regulation of the oil and gas industry should no longer be funded by taxpayers but instead by the industry that is being permitted to have access to a publicly owned resource. This includes the costs of agencies such as BSEE and BOEM primarily charged with overseeing the offshore energy operations — ensuring their safety and compliance with environmental protection requirements — and also the incremental costs of other agencies such as NOAA who help in the review and oversight of offshore operations.

We are pleased to see that HR 2231 addresses the agency funding issue. However, we would recommend that the proposed system be modified in several respects:

- a) The fees should pay for the entire management and oversight process, not just inspections. Inspections are only one component, though of course a very important component, of an effective oversight system. Substantial resources are also necessary for research, investigation, planning, training, and the many other activities that combine to create an effective oversight program. The Commission recommended that the fees be sufficient to cover all these aspects. And this should include those activities undertaken by other agencies, not just the Department of the Interior.
- b) The fees should be dedicated to this purpose and should not require annual appropriation by Congress.
- c) We see no reason for the fees to sunset in 2022. The costs will continue well beyond that year.
- d) We recommended that the fees be based on actual costs. The amount of funding needs to keep pace as industry moves into ever-more challenging depths and geologic formations because the related challenges of regulatory oversight likewise increase. If Congress is to set the fee amounts, it should also establish a process for annually reviewing the adequacy of those fees. The annual report required in section 409 requires a thorough accounting of the fees received, but no accounting of the costs of carrying out the responsibilities the fees are intended to pay for. We would recommend that this information combined with an annual Congressional assessment of the adequacy of the fees be included in the legislation.

We note that the legislation does specify the fees that would be charged in the initial year the legislation would take effect and allows them to be adjusted based on the consumer price index for the subsequent years. We do not have the capability to judge either whether the initial fee levels are adequate or whether the consumer price index is an appropriate adjustment. As

indicated above, we would recommend that the fees be adjusted to reflect actual costs rather than using some arbitrary price index.

Oil Spill Liability and Financial Responsibility Limits

Oil spills cause a range of harms, including personal, economic and environmental injuries, to individuals and ecosystems. The Oil Pollution Act makes the party responsible for a spill liable for compensating those who suffered as a result of the spill—through human health and property damage, lost profits, and other personal and economic injuries—and for restoring injured natural resources.

The Oil Pollution Act, however, imposes limits on the amount for which the responsible party is liable. It caps liability for damages from spills from offshore facilities at \$75 million unless it can be shown that the responsible party was guilty of gross negligence or willful misconduct, violated a federal safety regulation, or failed to report the incident or cooperate with removal activities, in which case there is no limit on damages.

The Oil Pollution Act also requires responsible parties to establish and maintain evidence of financial responsibility, generally based on a worst-case discharge estimate. In the case of offshore facilities, necessary financial responsibility ranges from \$35 million to \$150 million.

In the case of the *Deepwater Horizon* spill, BP (a responsible party) placed \$20 billion in escrow to compensate private individuals and businesses through the independent Gulf Coast Claims Facility. But if a less well capitalized company had caused the spill, neither a multi-billion dollar compensation fund nor the funds necessary to restore injured resources, would likely have been available.

There are two main problems with the current liability cap and financial responsibility dollar amounts. First, the relatively modest liability cap and financial responsibility requirements provide little incentive for oil companies to improve safety practices. Second, as noted, if an oil company with more limited financial means than BP had caused the *Deepwater Horizon* spill, that company might well have declared bankruptcy long before paying fully for all damages.

Any discussion of increasing liability caps and financial responsibility requirements must balance two competing public policy concerns: first, the goal of ensuring that the risk of major spills is minimized, and in the event of a spill, victims are fully compensated; and second, that increased caps and financial responsibility requirements do not drive competent independent oil companies out of the market. A realistic policy solution also requires an understanding of the host of complex economic impacts that could result from increases to liability caps and financial responsibility requirements.

To address both the incentive and compensation concerns noted above, Congress should significantly raise the liability cap. Financial responsibility limits should also be increased, because if an oil company does not have adequate resources to pay for a spill, the application of increased liability has little effect. Should a company go bankrupt before fully

compensating for a spill, its liability is effectively capped. If, however, the level of liability imposed and the level of financial responsibility required are set to levels that bear some relationship to potential damages, firms will have greater incentives to maximize prevention and minimize potential risk of oil spills and also have the financial means to ensure that victims of spills do not go uncompensated.

The Oil Spill Liability Trust Fund

The Oil Pollution Act also establishes an Oil Spill Liability Trust Fund, and provides an opportunity to make claims for compensation from this fund when the responsible party is not able to cover the legitimate claims. Claims up to \$1 billion for certain damages can be made to, and paid out of, this Trust Fund, which is currently supported by an 8-cent per-barrel tax on domestic and imported oil.

However, in the case of a large spill, the Oil Spill Liability Trust Fund would likely not provide sufficient backup. Thus, a significant portion of the injuries caused to individuals and natural resources, as well as government response costs, could go uncompensated.

Therefore, the Commission recommended that Congress increase the limit on per-incident payouts from the Oil Spill Liability Trust Fund. If liability and financial responsibility limits are not set at a level that will ensure payment of all damages for spills, then another source of funding will be required to ensure full compensation. The federal government could cover additional compensation costs, but this approach requires the taxpayer to foot the bill. Therefore, Congress should raise the Oil Spill Liability Trust Fund per-incident limit. Raising the Oil Spill Liability Trust Fund's per-incident limit will require the Fund to grow through an increase of the per-barrel tax on domestic and imported oil production. An alternative would be to increase the Trust Fund through a surcharge by mandatory provisions in drilling leases triggered in the event that there are inadequate sums available in the Fund.

In addition to these three areas, the Commission also recommended that Congress ensure that adequate funding is provided:

- a) For oil spill research and development. This should be mandatory funding (not subject to the annual appropriations process);
- b) To support a comprehensive federal research effort to provide a foundation of scientific information on the Arctic;
- c) To establish adequate Coast Guard response capabilities in the Arctic, based on the Coast Guard's review of current and projected gaps in capacity.

IV. Continuing Congressional Oversight

In the years between the *Exxon Valdez* spill and the spring of 2010, Congress, like much of the nation, appeared to have developed a false sense of security about the risks of offshore oil and gas development. Congress showed its support for offshore drilling in a number of ways, but did not take

any steps to mitigate the increased perils that accompany drilling in ever-deeper water or into icy Arctic seas. Until the *Deepwater Horizon* exploded, 11 rig workers lost their lives, and millions of barrels of oil spilled into the Gulf of Mexico, Congress had not introduced legislation to address the risks of deepwater drilling.

The congressional committee structure makes it much harder to focus on safety and environmental issues associated with offshore oil and gas development. In the 111th Congress, multiple committees in both chambers claimed jurisdiction over offshore energy development. The House Natural Resources Committee, for example, had jurisdiction over “mineral land laws and claims and entries thereunder” and “mineral resources of public lands.” Your Subcommittee on Energy and Mineral Resources was specifically charged with oversight of “conservation and development of oil and gas resources of the Outer Continental Shelf.” But the House Committee on Energy and Commerce oversaw “exploration, production, storage, supply, marketing, pricing, and regulation of energy resources, including all fossil fuels,” as well “national energy policy generally.” Similarly, the jurisdiction of the Senate Committee on Energy and Natural Resources included “extraction of minerals from oceans and Outer Continental Shelf lands,” and its Subcommittee on Energy was responsible for oversight of “oil and natural gas regulation” generally. By contrast, the Senate Committee on Environment and Public Works claimed oversight over “environmental aspects of Outer Continental Shelf lands.” Yet, none of the subcommittees of environment and public works claimed oversight specifically over OCS lands issues.

In neither the House nor the Senate are any of these committees charged with directly overseeing the safety and environmental impacts of offshore development, separate from the conflicting goal of resource development and royalties. The House Committee on Education and Labor and the Senate Committee on Health, Education, Labor, and Pensions both emphasize occupational safety and health. But neither committee appears to focus on process safety—the vital approach identified by the Commission’s investigation that encompasses procedures for minimizing adverse events such as effective hazard analysis, management of risk, communication, and auditing. Finally, no oversight of any of these matters has been conducted by any of the several House or Senate committees or subcommittees responsible for the nation’s tax policies or overall appropriations process, notwithstanding the significant impact those policies and appropriations have on both the extent of energy industry activities on the OCS and the government’s ability to oversee that activity effectively.

After the *Deepwater Horizon* explosion and resulting oil spill, numerous committees took an interest in offshore safety and environmental issues and held hearings. In short, it took a catastrophe to attract congressional attention. In order to avoid this problem in the future, the Commission recommended that Congress increase and maintain its awareness of the risks of offshore drilling in two ways. First, create additional congressional oversight of offshore safety and environmental risks. Second, require the appropriate congressional committees to hold an annual oversight hearing on the state of technology, application of process safety, and environmental protection to ensure these issues receive continuing congressional attention. The Commission recommended that the House and Senate Rules Committee each assign a specific committee or subcommittee to oversee process safety and

environmental issues related to offshore energy development.

These committees should require the Secretary of the Interior to submit an annual public report on energy offshore development activities to the applicable congressional committees. This report should focus on the Department's progress in improving its prescriptive safety regulations; steps taken by industry and the Department to improve facility management; the Department's progress in implementing a stronger environmental assessment program, including developing improved NEPA guidelines; and on any other steps taken by industry or the Department to address safety and environmental concerns offshore. The report should also detail the industry's safety and environmental record during the previous 12 months. Finally, the report should highlight any areas in which the Department believes industry is not doing all that it can to promote safety and the environment and any areas where additional legislation could be helpful to the Department's efforts.

These committees should also require the Department of the Interior's Office of Inspector General to submit an independent annual public report to the applicable congressional committees. The report should provide an independent description of the Offshore Safety Authority's activities over the previous 12 months, including its efforts to improve offshore safety and to investigate accidents and other significant offshore incidents. The report should also include the Inspector General's evaluation of the Authority's efforts and the Inspector General's recommendations for improvement.

V. Conclusion

Creating and implementing a national energy policy will require enormous political effort and leadership—but it would do much to direct the nation toward a sounder economy and a safer and more sustainable environment in the decades to come. Given Americans' consumption of oil, finding and producing additional domestic supplies will be required in coming years, no matter what sensible and effective efforts are made to reduce demand—in response to economic, trade, and security considerations, and the rising challenge of climate change.

The extent to which offshore drilling contributes to augmenting that domestic supply depends on rebuilding public faith in existing offshore energy exploration and production. The Commission proposed a series of recommendations that will enable the country and the oil and gas industry to move forward on this one critical element of U.S. energy policy: continuing, safe, responsible offshore oil drilling to meet our nation's energy demands over the next decade and beyond. Our message is clear: both government and industry must make dramatic changes to establish the high level of safety in drilling operations on the outer continental shelf that the American public has the right to expect and to demand. We will continue to encourage Congress, the executive branch, and the oil and gas industry to take the necessary steps.