# The BP Gulf Oil Spill: Failed Regulatory and Corporate Governance Systems Analysed Through a Regulatory Capitalist Lens

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## Abstract

This paper critically examines the systemic flaws in the US oil and gas regulation, and BP's corporate governance that we argue predisposed the BP oil spill in the Gulf of Mexico's Outer Continental Shelf. This spill resulted in possibly the worst environmental disaster in United States (US) history overseen by the compromised US Minerals Management Service (MMS), which was restructured by the Reagan Administration during 1980's. Regulatory capitalism is a neo-liberal development based on the ideology of reducing reliance on state regulation for expected efficiencies through fundamentalist 'free-market' capitalist mechanisms, such as competition, unfettered markets, minimal taxes and little government intervention to grease the wheels of industry. Regulatory capitalism is ostensibly from the government, in this instance the Reagan Administration, which gave the MMS a conflicting and ultimately disastrous mandate to regulate and collect revenue from offshore oil leases. BP and other oil companies have flourished under regulatory capitalism, where self-regulated corporate governance mechanisms have been allowed to control nature's destiny. BP Annual Reports 2004 to 2009 and Sustainability Reviews are greenwashed by a company caught up in scandals and the dirty business of oil exploration and extraction. We conclude that the problem with BP's system of internal controls by various corporate governance sub-committees to monitor safety, health and the environment, is self regulation by a few directors with little transparency or critical review of the processes.



**Key words:** BP, environmental, greenwash, un-sustainability,

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## 1. Introduction

On 20 April 2010, an explosion and fire sank the Deepwater Horizon oil rig in the Gulf of Mexico (GOM) Outer Continental Shelf (OCS), killing 11 workers and setting off one of the worst offshore oil spills in United States (US) history (King 2010). The oil well was owned by BP, while Transocean owned the rig and Halliburton had cemented the well. The companies blamed each other for the catastrophe while efforts to plug the leak continued for several weeks and then months. Estimates for the oil spill ranged from 35,000 to 60,000 barrels of oil per day gushing into the Gulf (King 2010). This disaster has put the safety of deep-water oil drilling under review in the US, despite President Obama's continued public commitment to offshore oil drilling (Sutherland 2010). Estimates suggest about 4.9 million barrels of oil gushed into the Gulf waters over the 86 days of leakage (Guarino 2010), destroying hundreds of kilometers of fragile coastlines and threatening the livelihoods of the local population. The well responsible for the Gulf oil spill was finally sealed on 19 September 2010 (Guarino 2010). Some observers have questioned whether oil can be extracted safely under water, while others blamed BP's woes on a culture of cost-cutting and outsourcing citing previous problems in the Gulf, Azerbaijan, Alaska, and Texas City (see for example Bower 2009, Mufson 2010, Webb 2010).

In order to pacify the US public, President Obama announced plans to hold BP accountable while likening the catastrophe to the September 11, 2001 terror attacks for its potential to profoundly affect US domestic policy (Mann 2010). As articulated by Hopwood (2009) much can be done to lessen some of the major environmental concerns if there is a will to act.

> "But that will is only weakly developed in most countries of the world and in most spheres of life. It certainly has been largely absent at the political and the corporate levels…All too often the desire to act has only found a verbal expression, action itself

> being more influenced by political infighting and corporate lobbying and influence. Even now, as the findings of environmentalists and scientists get ever more certain and disturbing, the vast majority of politicians still have difficulty in responding, continuing to put what they see as their short-term economic and political imperatives above the longer term interests of the human race" (Hopwood, 2009, p433).

Estimates suggest that BP could face up to $80 billion in costs, including penalties, damages and clean-up costs. Beyond the financial costs the company could also face tougher scrutiny from regulators and reduced opportunities to drill wells (Mouawad and Krauss 2010). While the US public watches the face-off between BP and the US government, Brooks (2010) argues that essentially these two parties are on the same side. Indeed as articulated by Tony Hayward, the then BP Group Chief Executive (GCE):

> "We continue to show our ability to take on and manage risk, doing the difficult things that others either can't do or choose not to do. This is why we are able to form such strong relationships with governments…." (BP Annual Report 2009, p.7)

When BP spokesman Mark Salt was recently questioned about the company's safety record in the Gulf he noted that according to the US Minerals Management Service (MMS) Incident of Non-Compliance (INC) data, Transocean's Deepwater Horizon has had an unblemished safety record since 2004. MMS figures also show that BP drilling rigs in the GOM outperformed the industry average on safety for six years running. BP has also been a finalist for the MMS National Safety Award for Excellence for the past two years, supporting their reputation for pushing the frontiers of offshore drilling and making it pay for their shareholders (Sutherland 2010).

Prior to the GOM oil spill, BP was infamously known for the Exxon Valdez spill in Prince William Sound in March 1989 that resulted in more than 11 million gallons of crude oil being discharged into the waters of Alaska's gulf coast (Patten 1992). As a consequence of the Exxon Valdez spill approximately 200 lawsuits were filed in state and federal courts in

Alaska seeking compensatory and punitive damages. Most of the lawsuits named Exxon, Alyeska Pipeline Service Company (Alyeska) which operated the oil terminal at Valdez, and the other companies that owned Alyeska as responsible for the oil spill that required more than $2 billion to be spent on the cleanup effort (Patten 1992). At the time BP owned a 50% interest in Alyeska through a subsidiary of BP America Inc and briefly indirectly owned a further 20% interest in Alyeska following BP's combination with Atlantic Richfield (BP Annual Report 2007). While the grounding of the Exxon Valdez in 1989 led to considerable public pressure on US oil companies in regards to environmental concerns, Patten (1998) found that the Alaskan oil spill also triggered substantial increases in both wholesale and retail gasoline prices that appeared to be interpreted as good news for the intra-industry firms, despite increased legislation.

> The Exxon Valdez oil spill led to the development of The Oil Pollution Act of 1990 (OPA 90) in the US, with its innovative protection of coastal waters from oil pollution, enforcement mechanisms, including contingency planning to prevent spills, and insistence upon the principle that "the polluter pays", not only for the actual costs of a clean-up, but also for damage to the public's natural resources (Ornitz and Champ 2002, p.89).

As articulated by Ornitz and Champ (2002) marine oil spills can no longer be regarded as unavoidable accidents, as more than 80% of oil spills are the result of human error. Increased public outcry about the safety of US waters and insistence upon the protection of the world's marine environments, particularly coastal ecosystems has helped to shape the legislative, judicial and regulatory climate of the US today, but to what effect?

The purpose of this paper therefore is to critically examine systemic flaws in regulation and corporate accountability that predisposed the BP oil spill in the GOM OCD. We argue in section 2 that the compromised and at times corrupted regulation of the US oil and gas industry was restructured by the neoliberal Reagan administration during the early 1980's.

This restructure has ideologically supplanted the public interest with regulatory capitalism that supports the business interests of the large oil and gas companies. Section 3 critically examines BP's history of accidents in relation to corporate reporting and sustainability reviews and Section 4 concludes.

## 2. Flawed regulation of oil and gas companies – regulatory capitalism

We argue that the regulatory structure that is supposed to protect the public interest and environmental commons predisposed the BP GOM disaster, the most devastating oil spill in US history (see also King 2010). The moral reasons for the regulation of business, such as social justice, the protection of society, and the public interest have been supplanted by utility – the business of business regulation (Windsor and Warming Rasmussen 2009). Hence the US oil and gas industry is overseen by a flawed regulatory structure or regulatory capitalism introduced by the Reagan Administration during the early 1980's (for a full history of US oil and gas regulation see the Report to the President, National Commission on the BP Deepwater Horizon, January 2011).

> "In January 1982, President Reagan's Interior Secretary, James Watt, created the Minerals Management Service (MMS) in support of his goal to open unprecedented reaches of U.S. territorial waters to oil and gas exploration. MMS had a conflicting and ultimately disastrous mandate: to both regulate offshore energy leases and collect the revenue they generated (Oil Spill Commission, January 2011, p.66)

Regulatory capitalism is a sociological theory that views all society's relationships as market oriented, thus blurring the boundaries between the state, markets and society (Levi-Faur 2005) and advancing vested private interests over the public interest (Windsor and Warming Rasumussen 2009). As a the spawn of neo-liberal doctrine regulatory capitalism is based on the ideology of reduced reliance on state regulation for expected efficiencies through fundamentalist 'free-market' capitalist mechanisms, such as competition, unfettered markets, minimal taxes and little government intervention (Friedman 1962; Hayek 1986/2002). Since

the rise of neo-liberalism in the 1970's and 1980's, regulatory capitalism has been directed, advanced and enforced by state interventionist policies, with competition policy as the most influential public policy in the last three decades.

Friedman (1962) argued against state intervention in a free market, privately owned utopia. Instead, under regulatory capitalism the state has expanded as large bureaucracies administer and enforce competition policy, the operations of the capital markets, 'free' trade policies as well as implement 'regulation lite' to give the public an impression of some control over mammoth multinational corporations. In reality the form (over substance) of regulation greases the wheels of industry to enhance profits over people (Chomsky 1999). The oil industry has a long history of influencing the US government regarding regulatory oversight (Preist 2007) and environmental disclosures (see Cho Chen and Roberts 2008). For example Mayer (2010) describes the embodiment of the US oil industry, billionaire Koch brothers as:

> "… longtime libertarians who believe in drastically lower personal and corporate taxes, minimal social services for the needy, and much less oversight of industry—especially environmental regulation. These views dovetail with the brothers' corporate interests. In a study released this spring, the University of Massachusetts at Amherst's Political Economy Research Institute named Koch Industries one of the top ten air polluters in the United States. And Greenpeace issued a report identifying the company as a "kingpin of climate science denial." The report showed that, from 2005 to 2008, the Kochs vastly outdid ExxonMobil in giving money to organizations fighting legislation related to climate change, underwriting a huge network of foundations, think tanks, and political front groups."

However, the Koch Brothers like many other oil companies build reputations for upstanding corporate citizenship by donating to charities and supporting various community causes, while at the same time destroying swathes of the environment by polluting the air, land and water (Chen 2010; Mayer 2010).

Rather than regulation being administered by a publicly funded and independently fearless public service, guided by a democratically elected government, politicians have supported self-regulation of industry. Hence, industry is controlled by political appointees or outsourced to non-elected 'experts' from that industry itself (often employed by non-government organizations or statutory bodies) to regulate many industrial sectors. Kennedy (2007) points out several questionable Bush administration appointees:

> "Most insidiously, the president *(Bush)* has put representatives of polluting industries or environmental skeptics in charge of virtually all the agencies responsible for protecting America from pollution. Some egregious officials are now gone, often returning to the private sector whose interests they served. But the administrators who remain in place continue to carry the torch—people such as Mark Rey, a timber-industry lobbyist appointed to oversee the U.S. Forest Service; Rejane "Johnnie" Burton, at Interior, a former oil-and-gas-company executive in Wyoming, who has failed to collect billions on leases from oil companies active in the Gulf of Mexico; and Elizabeth Stolpe, a former lobbyist for one of the nation's worst polluters, Koch Industries, who is an associate director (for toxics and environmental protection) at the White House Council on Environmental Quality. …
>
> Reports in *The New York Times* and on *60 Minutes* have highlighted the case of Phillip Cooney, who was the chief of staff for the White House Council on Environmental Quality. His job was to advise the president on the environmental implications of decisions that he makes. Cooney's previous job had been as the chief lobbyist for the American Petroleum Institute. His preoccupation during his four-year White House stint, according to news accounts, was combing scientific documents issued by the various federal agencies in order to remove damaging statements about the oil industry and the coal industry. He suppressed or altered several major studies on global warming in order to protect the interests of his former clients. After the *Times* revealed the alterations, in 2005, Cooney left his job and went to work for ExxonMobil."

These NGOs and statutory regulatory bodies are funded mainly by the very industry that they are overseeing, thus compromising their independence. In addition, the regulated are able to control the regulator through economic power "he who pays the piper calls the tune"; thus subverting and corrupting the regulation of an industry to suit the business objectives of profit, rather than the public good. The US Federal regulators' oversight of the oil and gas industry is essentially self-regulated, overseen by an ethically comprised MMS, an agency of the Department of the Interior. As Lehner, Director of the Natural Resource Defence Council argued:

> "We shouldn't be surprised that corporations are trying to increase their profits. That is what they do. But what is surprising is how free BP was to do as it pleased.
>
> We know BP will act in its own interest, but where were representatives of the American people's interests in the Gulf—our health, fisheries, natural heritage? Where were the forces that hold polluters and bad actors in check? Where were the regulators?
>
> … In the world of offshore oil drilling, those conditions didn't exist. Dedicated regulators were grossly underfunded and stripped of effective enforcement tools, while the rest were too cozy with the industry they were charged with overseeing." (Lehner and Deans, 2010)

### *2.1 US public policy, oil, money, power and greed*

On December 20, 2006, President George Bush signed into law The Gulf of Mexico Energy Security Act (GOMESA) of 2006 (Pub. Law 109-432), which superseded The Oil Pollution Act of 1990. Following this legislation the President lifted US bans on offshore drilling that were enacted in 1990 after the catastrophic Exxon Valdez oil spill in Alaska. President Bush argued that the main reason for allowing deep water oil drilling in the GOM OCS was to lower the oil price for American citizens. Energy security was also put forward as reason, as the US requires oil to wage wars in Iraq and Afghanistan, and to also defend US oil interests in the Persian Gulf – deemed the 'hidden cost' of oil (Dellucci and Murphy 2008). BP has benefited from the Iraq war as highlighted in their 2009 BP sustainability review (p. 2):

> **"How significant is BP's deal in Iraq?** Our deal to increase production from the Rumaila field is significant in several ways. It gives us a great opportunity to work with the people of Iraq and our partner China National Petroleum Company to develop one of the world's great oilfields. We see this as the beginning of a long-term relationship that will be instrumental in helping Iraq to rebuild its economy after years of war and sanctions. The investment in Rumaila will support Iraq in achieving its ambition of becoming a major player in global oil markets once again and will catalyse training and development opportunities for the many thousands of Iraqis working in Rumaila."

BP was also the largest oil producer and leading resource holder in the deepwater GOM as reported by then GFC Tony Haywood (BP Annual Report 2009). He stated that BP's "priorities have remained absolutely consistent – safety, people and performance" yet also

reports that BP is "now the largest producer in deepwater fields globally. In the Gulf of Mexico we ramped up production at Thunder Horse to more than 300,000 barrels of oil equivalent per day. Production started from Atlantis Phase 2, Dorado and King South. And in September we announced the Tiber discovery, the deepest oil and gas discovery well ever drilled" (p.6).

Meanwhile US policy makers appear to have little intention of moving away from fossil fuel to carbon-reducing alternatives, indicating that oil and gas will provide the 'lion's share' of the nation's energy for the foreseeable future.

> "Domestic petroleum production is continuing to decline and imports are continuing to increase. The *AEO 2007* and forecasts by the National Petroleum Council and others project that domestic consumption over the next 5 years and beyond will increase substantially. While alternative sources are expected to contribute a growing portion of the Nation's domestic energy production, no new technology is forecast to make a paradigm-shifting contribution to domestic energy production in the next 15 years. Crude oil and natural gas are expected to provide the lion's share of the Nation's energy for the foreseeable future. The OCS is one of the largest suppliers of crude oil for the United States, and is the third largest supplier of natural gas, after Texas and Alaska. Without the huge increase in deepwater oil and gas production from the GOM OCS since 1995, the recent decline in domestic production would have been twice as severe. The Nation's current and projected energy situation will require continued leasing, exploration, and development of OCS lands in an environmentally sound manner." (MMS Minerals Management Service U.S. Department of the Interior, April 2007 p. 80).

The US imports 65% of its oil, even though it is the third largest oil producer in the world after Saudi Arabia and Russia (Grove, Burgelman and Schifrin, 2008). Grove et al. (2008) point out that many community groups and conservationists were against the opening up of the GOM due to its close proximity to the fragile Louisiana wetlands, the habitat for the fish and shrimp spawning grounds that support the largest fishing industry in the US, as well as several endangered flora and fauna (Nixon et al., 2009). For example

> "Restore or Retreat (Louisiana) comments that without adequate mitigation and a significant, steady funding mechanism in place to address development that is on the brink of economic and environmental disaster, this non-profit coastal advocacy group

> is opposed to the MMS plan. The hurricanes were evidence of inadequate planning and mitigation techniques.
>
> Sierra Club et al comments on behalf of millions of members, and raises eight points of concern, in opposing the MMS program. (1.) New Administrative Boundaries are inequitable, illegal, not subject to proper notice and comment and unacceptable. (2.) The 5-year plan should not include any areas protected by moratoria or executive withdrawal. (3.) Such areas should be granted permanent protection. (4.) No permits for "air gun" inventories should be issued for protected areas. (5.) "Gas-Only-Leasing" proposals are inappropriate and deceptive because they open the door for oil drilling. (6.) Retroactive application of a pre-existing EIS for a prior Lease Sale #181 proposal would fail to address many important concerns, namely the well-known "Loop 125 Currents" in the GOM. (7.) Alaska OCS Leasing proposals would endanger a wide range of resources of national significance. (8.) Lack of Attention to Protecting Living Resources and the "Royalty relief" provisions enacted in the EPAct of 2005 fail to meet the test of ensuring fair return for the U.S. taxpayer. (9.) No acknowledgement of the Carbon-Constrained Future. (10.) Growing scandals over MMS giveaway of taxpayer-owned U.S. resources to the oil industry. This comment opposes most aspects of the MMS proposal." (MMS Minerals Management Service U.S. Department of the Interior April 2007 p. 124).

The MMS[1], an agency within the Department of the Interior (DOI), was responsible for implementing the requirements of the Act. Section 18 of the Act called for the preparation of the oil and gas leasing program indicating a 5-year schedule of lease sales (2007-2012), designed to meet the Nation's energy needs in the newly opened deep water GOM. The MMS in fact had several conflicting responsibilities as stated in its 2009 report:

> "The Minerals Management Service is a responsible steward of U.S. offshore resources by ensuring the receipt of fair market value for the sale of leases, encouraging conservation, evaluating and approving new technology, and regulating drilling and production" (Nixon et al. 2009 p. xi).

The US government received significant income from the auctioning of GOM oil leases to the tune of $67 billion dollars in 2008, with 50% allocated to the US Treasury General Fund, 37.5% to the four Gulf oil and gas producing States of Alabama, Louisiana, Mississippi and

[1] After the BP GOM oil spill and several prior investigations about MMS ethical lapses, the Service was restructured and is now superseded by the Bureau of Ocean Energy Management (BOEMRE) http://www.boemre.gov.

Texas, and 12.5% to the land and water conservation fund (see http://www.boemre.gov/offshore/GOMESARevenueSharing.htm).

The auction of oil and gas leases in now accessible deep water GOM produced a bonanza for the US government. The net benefits from the Central GOM oil and gas program for 2007-2012 was expected to be $US99.52 billion, and from the Western GOM to be $US44.44 billion. However, environmental costs were calculated at a meagre $US0.34 billion in 2007 as reported in DOI, Minerals Management Service April 2007 Report (Table 6 p. 84). Hence, on the one hand the US government received monies for the auction of leases from the oil and gas companies, but with the other hand gave the oil and gas companies major royalty relief for the GOM OCS. Intense lobbying by the oil and gas companies successfully persuaded the Clinton administration to give major royalty relief under the Outer Shelf Deep Water Royalty Relief Act 1995 to promote deep water (1000 feet or more) oil and gas production. The New York Times (26 December 2006) highlighted a report commissioned by the MMS that stated:

> "projects that over a 40-year period beginning in 2003, the incentive program would lead to the discovery of only 1.1 percent more oil reserves than would be found with no incentives at all. This is a tiny impact that is far exceeded by swings in market prices, which have much more to do with whether a company is willing to risk millions of dollars on what could turn out to be dry holes."

The MMS is responsible for collecting oil and gas royalties. However this US government agency has estimated that foregone royalty relief could be as high as $US80 billion in 2004, as testified by the United States Government Accountability Office (USGOA) before the US Senate Committee on Energy and Natural Resources (18 January 2007). The USGOA (2007) reported that the implementation and administration of the royalty relief provisions by the MMS were problematic, marred by inept record keeping, inconsistent enforcement and

bureaucratic incompetence. The USGOA pointed to the MMS allowing companies to escape billions in royalties that they would otherwise have paid for 1998 and 1999 GOM OCS leases. The MMS also had the option of taking a percentage of the actual oil and natural gas, and selling it to themselves or using it for other reasons, such as filling the nation's strategic petroleum reserve. The MMS referred to this option as 'taking royalties in kind' (USGOA, 2007).

The MMS not only received monies from the oil companies for the auction of GOM leases, but also performed the environmental impact studies of the GOM OCS. For example see MMS "Gulf of Mexico OCS Oil and Gas Lease Sales: 2009-2012 Central Planning Area Sales 208, 213, 216, and 222 Western Planning Area Sales 210, 215, and 218, Final Supplemental Environmental Impact Statement" (September 2008). This regulatory structural flaw created a conflict of interest where the same government agency is receiving substantial funding from the auction of oil and gas leases, but at the same time evaluates the environmental impact of those auctioned leases.

Disgraced bankers Lehman Brothers[2] are also quoted by this MMS (2008) environmental impact study:

> "Lehman analysts believe that they *(oil and gas companies)* have recently become more attracted to unconventional gas plays and that increased competition abroad from national oil companies and limited access to some areas of the world is pushing the majors back to the United States (One Offshore, 2005b; 20:9).. … Interest in deepwater oil and gas production continues to grow, with 67 percent of all blocks receiving bids in water depths greater than 400 m (1,312 ft)" (Minerals Management Service Gulf of Mexico OCS 2008, p.3-78)

[2] Lehman Brothers Bank collapsed in September 2008, the largest bankruptcy ever filed, amid accusations of securities and accounting fraud that precipitated the global financial crisis (Valukas, 2010).

Ironically the $US0.34 billion allocated for environmental costs in 2007 is a pittance in relation to the BP oil spill damage to the large environmentally sensitive areas of the South Eastern US, including the Louisiana wetlands and the Mississippi Delta. These areas are home to several endangered flora and fauna, which has yet to be fully accounted for. Moreover this pitiable calculation is vastly inadequate considering President Obama's administration pressure on BP to suspend its dividend for the year and to agree to a $US20 billion oil fund. In fact the cost to BP so far is about $US40 billion and counting. The Guardian reported that:

> "In late July BP set aside $32.2bn to cover the cost of the clean-up, more than the City had expected, a move which pushed the company into a record loss of $17bn for the second quarter of 2010. At that time, though, the Macondo well was still leaking oil into the ocean, and was only finally shut off in mid-September.
>
> Richard Hunter, head of UK equities at Hargreaves Lansdown Stockbrokers, said the additional $7.7bn provision was "a stark reminder that the fallout from the spill will follow BP for some considerable time to come'.
>
> The final cost of one of the worst environmental disasters ever could climb further. BP said that the total charge of $39.9bn was its 'current best estimate of those costs that can be reliably measured at this time." (Weardon 2 November 2010).

As the MMS April 2007 study stated:

> "The immediate environmental risks of OCS oil and gas activities are borne primarily by producing regions and nearby onshore areas, while some of the financial consequences of those risks (e.g., financial losses due to unprofitable endeavors, compensation by responsible parties for natural resource damage and payments into funds established to provide compensation for losses not attributable to specific parties) are shared by companies and individuals throughout the Nation." (MMS Minerals Management Service U.S. Department of the Interior April 2007 p. 96).

A Congressional Research Report disclosed that the MMS were able to provide BP with environmental exceptions for their deep water drilling in Central GOM. Hence "Had this project occurred in a different geographical area, including the eastern area of the Gulf of Mexico, it would have undergone a higher level of environmental scrutiny" (Alexander, June 2010).

### *2.2 Regulatory capitalism compromises the Minerals Management Service (MMS)*

We argue that the flawed regulatory structure and political appointees are evidence of regulatory capitalism that compromised the MMS's oversight of the GOM OCS oil fields. This compromised MMS oversight is evidenced in the LA Times Editorial (May 28, 2010) that reported MMS inspectors accepting meals and gifts from the companies whose work they were overseeing in the Gulf of Mexico. Moreover:

> "less than two years ago, a report revealed that employees at the Denver office were engaging in sex and using drugs with energy company representatives in addition to accepting gifts from them — all while overseeing billions of dollars worth of contracts.
>
> The agency has conflict of interest written into its very job description: It collects royalties for mineral leases at the same time that it recommends which leases should be granted, and then oversees the safety and environmental soundness of the projects. Its position on new Arctic oil exploration leases — suspended Thursday by President Obama — was evidence enough that the Minerals Management Service had lost its sense of mission. The agency never studied what would happen in the case of a catastrophic oil spill in the Arctic because it assumed the chances of such a thing happening were too remote. That's the same decision it made on BP's Deepwater Horizon project".

The ethicality of the MMS was under scrutiny as many congressional and internal investigations have found this oversight agency to be badly mismanaged and at times corrupt. Shockingly the New York Times (14 May 2010) reported,

> "The minerals service short-circuited the process when it granted hundreds of recent drilling permits, according to documents and current and former government officials. The BP well that blew in the gulf in April was granted an exemption from the assessment process because company officials assured regulators that it carried little hazard. Officials went along with the company and granted the permit.
>
> The minerals agency also routinely overruled its staff biologists and engineers who raised concerns about the safety and the environmental impact of certain drilling proposals in the gulf and in Alaska, according to a half-dozen current and former agency scientists. Those scientists said they were also regularly pressured by agency officials to change the findings of their internal studies if they predicted that an accident was likely to occur or if wildlife might be harmed."

Other instances of MMS's lack of ethicality include one of its own auditors blowing the

whistle on one major company cheating millions of royalty dollars in 2006. This auditor was reorganised out of the MMS and he subsequently sued the cheating oil company (Andrews, 2006). In fact since the agency's inception in 1982 by the Reagan Administration, it was criticised only six years later for bad auditing practices and not collecting billions of dollars of outstanding royalties from gas and oil companies (New York Times, 5 October 1988). Like a bad seed, the structural flaws of this agency stemmed from the neo-liberal Reagan administration that introduced regulatory capitalism, where the regulator and the regulated industries became dependently interlocked in complex economic and administrative relationships that support vested interests.

In 2006, the Office of Inspector General (OIG) instigated three separate investigations into allegations of corrupt MMS employees. The US Department of Interior Office of the Inspector General (9 September 2008) reported to the MMS that he found a culture of ethical failure. For example, over 1/3 of the MMS royalty in kind staff socialised with, and received a wide array of gifts and gratuities from the oil and gas companies with whom these MMS staff members were doing business.

Clearly the flawed regulation of the gas and oil industry, provided by the inept and sometimes corrupt MMS, failed in their oversight duties to prevent the catastrophic BP GOM oil spill in April 2010, not long after the BP Texas oil refinery exploded disastrously in March 2005. On June 21, 2010 the MMS was fundamentally restructured and renamed the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) as it undergoes reorganization and reform to split the agency, separating the officials who are responsible for overseeing natural resource extraction from those who are charged with ensuring its safety (see www.boemre.gov). Public governance of the US gas and oil industry clearly failed, but

what was BP's role?

**3. BP's Greenwash – a history of failed sustainability**

Indeed BP has a long history of oil spill accidents that have cost human lives and also caused catastrophic environmental damage particularly since the 1990s. A little-reported giant gas leak in Azerbaijan in September 2008 has recently emerged from leaked US embassy cables (Webb 2010). The leak occurred at the Azeri-Chirag-Guneshi (ACG) Field, Azerbaijan's largest producing oil field in the Caspian where vast undeveloped gas reserves are situated. BP is the operator and largest shareholder in the consortium, which includes US companies Chevron, ExxonMobil and Hess (formerly Amerada Hess), as well as Norwegian firm Statoil and Azerbaijani state owned oil company Socar. BP has been criticized by its partners in the gas field for limiting the information it has made available about the accident, both to the public and to its ACG partners. While BP was able to evacuate its 212 workers safely after the accident, output was cut by 500,000 barrels a day with production disrupted for months. In January 2009 BP blamed a "bad cement job" for the gas leak, which bears a resemblance to Tony Hayward partly blaming a "bad cement job" by contractor Halliburton for the GOM OCS incident. The president of Azerbaijan has also accused BP of stealing $10 billion of oil reserves and using "mild blackmail" to secure the rights to develop vast gas reserves in the Caspian Sea.

Other recent accidents occurred in March and August 2006 (see Table 1), when BP Exploration (Alaska) Inc (BPXA) had two major leaks of crude oil in Prudhoe Bay, Alaska due to corrosion of the pipeline system. On 20 November 2007, BPXA entered into a criminal plea agreement with the Department of Justice (DOJ) relating to these accidents. BPXA pleaded guilty to a misdemeanor violation of the US Federal Water Pollution Control

Act. The penalty included a three year term of probation that required BPXA to meet certain benchmarks relating to replacement of its transit lines, upgrades to its leak detection system and improvements to its integrity management program. On 31 March 2009, the DOJ filed a complaint against BPXA seeking civil penalties and injunctive relief relating to these 2006 oil spills. The complaint alleged violation of various federal environmental and pipeline safety statutes, and associated regulations, as well as its maintenance and operation of the North Slope pipelines. The State of Alaska also filed a complaint on the same date alleging BPXA's corrosion management practices violated various statutory, contractual and common law duties to the State, resulting in penalty liability, damages for lost royalties and taxes, and liability for punitive damages (BP Annual Report 2007).

On 23 March 2005, an explosion and fire occurred at the BP Products' Texas City refinery in the isomerization unit as it was starting up after routine maintenance. The accident claimed the lives of 15 workers and injured many others. BP Products has since resolved all civil injury claims arising from the March 2005 incident. In March 2007, the US Chemical Safety and Hazard Investigation Board (CSB) issued its final report on the accident, which contained recommendations to the Texas City refinery and to the Board of the company. On 25 October 2007, the DOJ announced that it had entered into a criminal plea agreement with BP Products relating to the March 2005 accident. On 4 February 2008, BP Products pleaded guilty to one felony violation of the risk management planning regulations promulgated under the US Federal Clean Air Act. On 12 March 2009, the court accepted the plea agreement and BP Products paid a $50 million criminal fine and was sentenced to three years probation. Conditions of the probation included compliance with a 2005 US Occupational Safety and Health Administration (OSHA) settlement agreement and an agreed order entered into with the Texas Commission on Environmental Quality (BP Annual Report 2007). BP also paid a

fine of $21.3 million to OSHA to resolve more than 300 separate alleged violations of OSHA safety regulations (BP Annual Report 2005).

In the wake of the 2005 Texas explosion, and on the recommendation of the US Chemical Safety and Hazard Investigation Board, the BP US Refineries Independent Safety Review Panel (the Panel) was established in 2006 to review process safety management at the five US refineries and the culture of safety management. The Panel was however, chaired by the former US Secretary of State, James A Baker III, once again indicating a close relationship between BP and the US government. The Panel issued its first report in January 2007 making 10 recommendations, including consistent implementation of risk identification tools, improvements in incident reporting and investigation systems, and enhancements to the group's reporting and monitoring programs (see BP Annual Report 2007 p28). At the Panel's recommendation in May 2007 the Board appointed L Duane Wilson, who was a member of the Panel, as an independent expert to monitor progress. The Panel reports directly to the BP Board's Safety, Ethics and Environment Assurance Committee. In 2006 BP also established the Group Operations Risk Committee, chaired by Tony Haywood to scrutinize the group's safety performance in implementing the operating management system that embraces the recommendations made by the Panel in January 2007 (see Table 2), essentially ensuring a system of self-regulation.

In 2008 Greenpeace recognized BP's attempt to greenwash its brand by awarding the company the first annual Greenpeace 'Emerald Paintbrush' award. Greenpeace highlighted that under Tony Hayward GCE, BP had spent millions of dollars on an advertising campaign announcing its commitment to alternative energy sources, using slogans such as "from the earth to the sun, and everything in between" and "the best way out of the energy fix is an

energy mix". In reality, however, the company had allocated 93 per cent or $20 billion of its total investment fund for the development and extraction of oil, gas and other fossil fuels, while committing a mere 2.79 per cent to wind and 1.39 per cent to solar power. Greenpeace also argued that in reality BP is one of the world's largest corporate emitters, with the company in 2007 releasing over 63 million tonnes of CO2 into the earth's atmosphere, roughly the equivalent of Portugal (see Greenpeace 2008).

### *3.1 BP's financial link to oil accidents and spills*

The BP GOM OCS oil spill demonstrates the direct link between the financial and the non-financial aspects of business as the company teetered on the brink of insolvency, but was rescued by selling off assets and accepting maxima mea culpa at the behest of the US government. BP reported during the 2010 financial year that it had taken a total pre-tax charge of $40.9 billion in relation to the accident and spill. Hence BP was forced to announce the sale of up to $30 billion of assets and by the end of 2010 had agreed to almost $22 billion of disposals. The cancellation of three dividend payments to shareholders was also made, as well as significant changes to the Board, to overcome the threat to the very existence of the company (BP Annual Report 2010).

We would argue that a major reason for BP's vulnerability to major oil spills and accidents was the chase for super growth and profits, boosted by severe cost cutting of maintenance and safety initiated by the then ambitious and ruthless CEO Lord Browne (1998 – 2007)[3]. Super growth was achieved by massive takeovers and mergers of other large oil companies including AMOCO in 1998 (previously Standard Oil). This transaction of $US31 billion was

[3] Since 2001 Lord Browne has been a crossbench member of the House of Lords. He was terminated by BP's Board for dishonesty to the High Court, regarding a messy breakup with a gay lover, to avoid Board and shareholder scrutiny about his lavish lifestyle funded by the company. He left with 32 million pounds compensation and his reputation tarnished.

then the largest financial transaction in history, but saddled BP with a massive debt to service. Investigative historian Tom Bower (2010) writes:

> After his appointment as BP boss in 1998, Lord Browne swiftly transformed the firm from a dying oil corporation with just two fields - in Alaska and the North Sea - into the world's second largest behemoth. By re-focusing on so-called elephants (the big oil reservoirs) and ruthlessly cutting costs, his mastery of financial engineering used BP's rising share price to launch audacious take-overs of failing oil companies, especially in America. His success earned worldwide plaudits. After re-branding BP as Beyond Petroleum - the world's most environmentally friendly oil company - he boasted during visits to Washington that BP was not only the largest producer of oil in America, but also the most successful explorer in the Gulf of Mexico, one of the most difficult places to extract oil.
>
> BP also expanded its operations in Russia, Asia and South America. However, it was Lord Browne's ambition to overtake ExxonMobil and transform BP into the world's biggest oil corporation that sowed the seeds of disaster. Success depended on BP earning high profits, which could be used to set up a merger with Shell. Lord Browne went for broke by cutting costs.
>
> His philosophy was 'more for less': operations would be completed at a cost that was 10 per cent cheaper than the previous time, and so on. Taking his cue from New Labour, targets became the Holy Grail. In July 2000, he announced that production would annually grow over three years by 5.5 to 7 per cent, mostly in the Gulf of Mexico and Angola. This optimism was hailed and BP's share price soared. But, in fact, BP's growth turned out to be only 2.9 per cent and BP could hit its targets only by more ruthless cost-cutting.
>
> Hundreds of engineers were sacked. Budgets for safety and maintenance were slashed. Skilled oil men resigned in disgust. While Lord Browne was busy rebranding BP with a new 'green' logo (a typically vacuous - and expensive - New Labour gimmick), Doug Ford, an American responsible for BP's refineries, attacked what he believed was an increasingly badly-run organisation. After Lord Browne ignored his warnings about the consequences of cost-cutting, Mr Ford resigned and others followed.…
>
> Unwilling to tolerate criticism, Lord Browne favoured only 'the turtles' - the sycophants trusted to deliver his targets. Tony Hayward *(another former CEO 2007-2010 resigned just after the Gulf oil spill)* was one of the chosen ones. Meanwhile, Mr Ford was replaced by John Manzoni, an accountant and Lord Browne 'turtle' with little understanding of the complicated engineering skills required to run refineries properly. And to satisfy Lord Browne's 'more for less' mantra, Mr Manzoni zealously pruned safety and maintenance costs.
>
> There followed an explosion at a refinery in Texas City in March 2005 when 15 sub-contractors were killed and 170 injured. A U.S. government report into the accident blamed systemic lapses' by BP's management and budget cuts which had left 'unsafe and antiquated designs in place, and unacceptable deficiencies in preventive maintenance were tolerated'. This was America's biggest industrial accident for years,"

While BP's accountants were slashing maintenance and firing over 10,000 employees, including experienced engineers and oil men (Bower 2009), BP provided voluntary sustainability reviews that some stakeholders believed to be the result of capitalist enlightened self-interest. As Unerman and O'Dwyer (2007 p. 339) point out though:

> "… for other stakeholders who do not accept this narrative, realisation that enlightened self-interest of corporations has not resulted in, or guaranteed that, business expert systems operate in a manner which does not damage aspects of society and/or the environment, can render ineffective business claims that their voluntary action should be trusted to protect the social and ecological interests of a wide range of stakeholders."

In fact Unerman and O'Dwyer (2007) argue the business case for the regulation of corporate social and environmental reporting, as a way to enhance both stakeholder and shareholder value by ensuring credible and transparent reporting. To support their case Unerman and O'Dwyer (2007 p. 347) provide the example of the BP Texas City refinery explosion in 2005, even though BP had proclaimed safety and responsible operating supported by advanced audits in the prior years' sustainability reports.

Unerman and O'Dwyer (2007) cite the scathing report by the Panel (2007). The report stated that while BP had 'aspirational goals' of no accidents and no harm, the company had not provided an effective leadership nor a process of safety as a core value across its five refineries in the US. Further BP had not effectively shown that it held senior executives, line managers and supervisors accountable for safety performance across its five US refineries. The report pointed out several other weaknesses with BP's safety performance, in contrast to the portrayal in its sustainability reports of a company genuinely committed to the safety of its workforce.

> "Where events such as the BP Texas City Refinery explosion occur which shed light on an underlying reality which seems to be at variance with the image portrayed by the glossy SEAR, this calls into question the credibility of the SEAR" (Unerman and O'Dwyer 2007 p. 347).

BP's oil spill and other major accidents in recent years (see Table 1) indicates the failure of corporate sustainability reporting; and that BP's sustainability reporting is no more than greenwash to mimic genuine environmental and social commitment by a company mired in scandals and the dirty business of oil exploration and extraction. BP's bad record on environmental issues resonates with Gray's (1992) argument that "the roots of modern (especially Western) society are essentially incommensurable both with continued survival and with any set of values other than those of (very) short-term (human and economic) self-interest (p.399). Further, a search of BP's 2009 sustainability review revealed 'sustainability' was mentioned over a thousand times; hence sustainability loses its imprimatur and becomes a 'catch' word that suggests more BP's un-sustainability. BP's liberal but devalued use of the word sustainability is symptomatic of the contestability of sustainability and what it really means. Gray's (2010) concern about the un-sustainability of "western, expansive and financial capital" starts a discourse of a more nuanced understanding of sustainability and its troubled relationship with modernity, particularly modern science. Ironically modern science aided in the development of the technologies that allowed BP to drill for oil in very deep water that resulted in the largest and most catastrophic oil spill in US history.

The greenwash in BP's commitment to sustainability is portrayed as highly responsible in regards to health, safety and the environment.

> "BP operates globally according to a system of internal control that extends from corporate governance policies at board level to detailed processes that are applied in our operations. … The board is responsible for the direction and oversight of BP p.l.c. on behalf of shareholders; it is accountable to them, as owners, for all aspects of BP's business. The board sets the tone from the top, and has established a set of board governance principles, which delegate management authority to the group chief executive (GCE) within defined limits. These include a requirement that the GCE will not engage in any activity without regard to health, safety and environmental consequence. On 1 January 2010, the board was composed of the chairman, eight non executive directors and five executive directors.

> The board maintains five permanent committees that are composed entirely of non-executives. They include the audit committee, the remuneration committee and the safety, ethics and environment assurance committee (SEEAC). Monitoring the GCE's identification and management of the group's risks – both financial and non-financial – is conducted through the board and its committees. SEEAC monitors non-financial risk, which includes regular reviews of information and reports from the safety and operations function. It also acts for the board in working with the Independent Expert to review the progress made in implementing the recommendations of the BP US Refineries Independent Safety Review Panel[4]." (2009 BP sustainability review, p. 5)

The problem with BP's system of internal controls to monitor safety, health and the environment is just that, internally self regulated by a few directors with little transparency or critical review about the processes (see Table 2). The alarm bells however, have been ringing for a long time. Green groups and ethical investment funds have endeavoured to question the company for more details on the environmental and social risks it was taking (see Monbiot 2010) for many years. Due to concerns about the company, in 2002 Henderson Global Investors withdrew BP from its socially responsible investment funds after one of its analysts conducted his own research into the safety risks that BP were taking in Alaska. Generation Investment Management, co-founded by David Blood and Al Gore, deemed BP to no longer be a suitable investment when Lord Browne stepped down as BP's chief in 2007, to be replaced by Tony Hayward who did not embrace its transition from a petroleum company to an energy company (Van Dyck 2010). Similarly, Walden Asset Management also made an early call on BP's risky behaviour liquidating its investment after the Texas City refinery accident.

## 4. Conclusion

This paper has examined the compromised and sometime corrupt regulatory system put in place by public governance that predisposed BP's disastrous accident that resulted in millions

[4] This Panel is the result of BP's 2005 Texas refinery explosion that killed and maimed workers.

of gallons of oil spilt into the Gulf of Mexico, a prime habitat for sea life. We provide evidence that public governance failed in its duty to protect the social and environmental aspects, and sacrificed these for the exploration and extraction of oil. Evidence also indicates that private governance failed, that is BP's board and its various sub-committees charged with monitoring the safety, health and environment under their responsibility failed in these responsibilities, with 11 workers killed in the Deepwater Horizon oil rig explosion and millions of gallons of oil gushing into the ocean for 86 days. The picture described in the BP annual reports and sustainability reviews of an upstanding corporate citizen caring for its people and the environment is in tatters. BP's Greenwash is forever stained by the dirty and un-sustainable business of oil exploration and extraction.

**Table 1: Reported accidents, deaths and oil spills by BP**

| **2009** | Work-related major accidents | Deaths | Oil spills of one barrel or more | Litres |
|---|---|---|---|---|
| | 8<br>Discussed by group operations risk committee (GORC) | 16<br>Third-party operated helicopter crashed at BP's Miller platform in North Sea | 234 | 1.191 million litres<br>A reduction of 65% compared with 2008 |
| **2008** | 21<br>2 related to hurricanes<br>8 driving accidents | 5<br>1 from Texas City refinery<br>1 fall from height Tangguh, Indonesia<br>1 land farm near Texas City<br>2 driving fatalities Mozambique and South Africa | 335 | 3.5 million litres<br>An increase of 2.5 million litres compared with 2007<br><br>One spill at Texas City and one at the Whiting refinery, accounted for two-thirds of the reported volume |
| **2007** | Injury frequency rate 0.48 per 200,000 hours worked | 7<br>2 shootings in South Africa<br>2 at US refineries<br>1 aboard a BP marine vessel<br>1 road related and 1 accident in Indonesia | 340 | 1 million litres |
| **2006** | Injury frequency rate<br>0.48 per 200,000 hours worked | 7<br>2 driving fatalities | 417 | Alaska: March 4,800 barrels<br>August 199 barrels |
| **2005** | Not reported | 27<br>15 Texas City Refinery<br>10 transport related | 541 | Not reported |
| **2004** | Not reported | 11 | 578 | Not reported |

**Table 2: Greenwash policies in BP Annual Reports**

| | | | |
|---|---|---|---|
| **Annual Report 31 Dec 2009:** Issued 26 Feb 2010 | Continued to implement 2007 recommendations made by the Panel, following incident at Texas City in 2005, which reviewed process safety management at US refineries and safety management culture (p46). | Independent Expert's 2nd annual report acknowledged BP's sustained focus on safety and operations agenda (p46). | Efforts included taking action on six-point plan for process safety, launched in 2006 (p46). |
| **Annual Report 31 Dec 2008:** Issued 24 Feb 2009 | Board's independent expert L. Duane Wilson continues to report on progress in implementing the improvements recommended by the Panel (p5). | Site visits by Group Chief Executive and members of the executive team. Safety performance scrutinized by the GORC, chaired by Group Chief Executive (p41). Team of 45 auditors in place, completed 36 audits in 2008 (p42). | Continue to implement OMS that embraces recommendations made by Panel in Jan 2007. Eight sites completed transition to OMS in 2008 (p41). On track to implement across group by the end of 2010 (p42). |
| | Except at two locations, operations are covered by certification to the ISO 14001 international environmental management system standard. Texas City refinery to seek recertification in 2009. Angola business working to expand its existing ISO 14001. See BP sustainability report at: www.bp.com/sustainability (p44). | Environmental Requirements for new projects (ERNP) practice updated in line with OMS. This practice now called the Environmental Group Defined Practice (GDP) is a full life cycle environmental assessment process (p44). | Board appointed Safety, Environment and Ethics Assurance Committee reviewed the progress of ERNP during summer 2008. Included 12 projects classified as requiring management at the highest level of sensitivity (p44). |
| **Annual Report 31 Dec 2007:** Issued 22 Feb 2008 | In January 2007 the Panel, chaired by former US Secretary of State, James A Baker III, issued its report on March 2005 incident at Texas City (p28) | At the Panel's recommendation, in May 2007 the Board appointed an independent expert, L. Duane Wilson, who was a member of the Panel, to monitor progress (p28). | The Panel reports directly to the BP board's Safety, Ethics and Environment Assurance Committee (p28). |

| | | | |
|---|---|---|---|
| | A number of additional actions undertaken relating to safety and operations, atmospheric relief valves, operating procedures and training, control of work systems, and process safety culture and leadership (p28). | Implementation of OMS began at first group of sites that included all five US refineries (p40). | Material progress made throughout the group across all of the Panel's 10 recommendations (p40).<br>Lord Browne stood down and Tony Haywood now GCE (p4) |
| **Annual Report 31 Dec 2006** Issued: 23 Feb 2007 | The BP US Refineries Independent Safety Review Panel (Panel) established by BP on the recommendation of the US Chemical Safety and Hazard Investigation Board in wake of Texas tragedy (p7). | Also established the Group Operations Risk Committee (GORC). Its main focus is management systems, particularly safety across the Group (p.39). | Will form part of the new operating management system OMS. (p39)<br>Safety, Ethics and Environment Assurance Committee, a subcommittee of the Board chaired by Sir Walter Massey |
| **Annual Report 31 Dec 2005** | Ethics and Environment Committee a subcommittee of the Board under Sir Walter Massey | Met 7 times during 2005.<br>All members are independent non-executive directors.<br><br>External auditor's lead partner and BP Head of internal audit attend at request of committee. | CEO Lord Browne states that BP Alternative Energy is focused on the power generation sector through investments in solar power, wind, gas and hydrogen power, where the latter employs the new technology of sequestration. |
| **Annual Report 31 Dec 2004** | 100% of major operations independently certified to the ISO 14001 standard on environmental management. | Lord Browne GCE states that BP can be a sustainably successful company in the long term, | making a meaningful contribution to a sustainable world, responding to the critical issue of climate change. |

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