



Reorganization of the Minerals Management Service in the Aftermath of the Deepwater Horizon Oil Spill

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Summary

On April 20, 2010, an explosion and fire occurred on the Deepwater Horizon drilling rig in the Gulf of Mexico, resulting in the largest oil spill in U.S. waters. This event drew additional attention to previously identified management challenges at the Minerals Management Service (MMS) in the Department of the Interior (DOI), the lead regulatory authority for leasing activity related to offshore oil and gas recovery. It also influenced administrative and congressional reform efforts that were already underway.

Prior to the oil spill, DOI and congressional investigations had identified a number of management shortcomings, ethical lapses among personnel, and conflicts of interest at MMS. Such concerns had been raised in oversight hearings and in reports by the DOI inspector general and the Government Accountability Office. The Obama Administration and the 111th Congress were taking action to make changes at MMS in response to these findings prior to the oil spill.

In the aftermath of the oil spill, some observers and governmental officials raised concerns about potential conflicts among the missions that were vested in MMS. The three potentially conflicting missions of the agency, as articulated by the department, were “Outer Continental Shelf (OCS) resource management, safety and environmental oversight and enforcement, and revenue collection.” Within a month of the Deepwater Horizon incident, the Administration had initiated an administrative reorganization to address these perceived mission conflicts. As part of this reorganization, MMS was renamed the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE).

During the 111th Congress, bills were introduced that would reorganize BOEMRE/MMS and its functions. H.R. 3534 was introduced on September 8, 2009. The bill, as amended, was passed by the House on July 30, 2010. It would, among other things, abolish MMS and establish three new units within DOI, each charged with one of the three missions identified above. S. 3516 was introduced on June 21, 2010, and it was reported by the Committee on Energy and Natural Resources on July 28, 2010. This bill, as reported, would direct the Secretary of the Interior to use administrative authority to establish three new entities within the department. Two of the new organizations would carry out OCS leasing, permitting, and safety and environmental regulatory functions. The Secretary would be directed to eliminate “to the maximum extent practicable ... any potential organizational conflicts of interest related to leasing, revenue creation, environmental protection, and safety.” The third entity would be responsible for revenue and royalty management functions. Bills introduced by the Senate minority leader (S. 3643) and the Senate majority leader (S. 3663), and subsequently placed on the Senate Legislative Calendar, also included these provisions. H.R. 3736 and H.R. 5572, each of which would also affect the organization of BOEMRE/MMS, were introduced and referred during the 111th Congress, but had not been acted upon as of November 8, 2010.

This report provides additional information on these legislative initiatives. It then provides background and context on the origins of MMS and its organization at the time of the oil spill. It discusses Secretary Kenneth L. Salazar’s use of his administrative reorganization authority to address perceived conflicts among the agency’s missions and his call for Congress to enact organic legislation. The report then identifies potential congressional options with regard to BOEMRE/MMS reorganization. The report also includes historical examples of reorganizations elsewhere in the federal government that may provide useful insights during consideration of the organizational arrangements for carrying out BOEMRE/MMS functions.

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On April 20, 2010, an explosion and fire occurred on the Deepwater Horizon drilling rig in the Gulf of Mexico, resulting in the largest oil spill in U.S. waters.¹ This event drew additional attention to previously identified management challenges at the Minerals Management Service (MMS) in the Department of the Interior (DOI), the lead regulatory authority for leasing activity related to offshore oil and gas recovery. It also influenced administrative and congressional reform efforts that were already underway.

Prior to the oil spill, investigators in DOI and in Congress had identified a number of management shortcomings, ethical lapses among personnel, and conflicts of interest at MMS. Such concerns were addressed in a number of oversight hearings² and in the reports and testimony of the DOI inspector general³ and the Government Accountability Office.⁴ Remarks by Secretary of the Interior Kenneth L. Salazar during a September 16, 2009, hearing recounted administrative actions that had been taken in response to the management challenges and forecast additional organizational changes ahead:

Within our department, how do we best organize and how do we work with our sister agencies ... with respect to what happens in the oceans? How do we bring MMS together to have a more synchronizing and less siloed approach to dealing with the issues of leasing and royalty collection?...

The people who are at this table with me ... are working on this full-time all the time, and I expect that we will have many more announcements with respect to organization....

The Royalty-In-Kind program has been a blemish, in my view, on this Department, and it really has been the source which both the Office of Inspector General and the GAO have pointed out have created problems and ethical lapses with the Department....

¹ For a broad discussion of this incident and its impact, see CRS Report R41262, *Deepwater Horizon Oil Spill: Selected Issues for Congress*, coordinated by Curry L. Hagerty and Jonathan L. Ramseur.

² See, for example, U.S. Congress, Senate Committee on Energy and Natural Resources, *Oil and Gas Royalty Management at DOI*, 110th Cong., 1st sess., January 18, 2007, S.Hrg. 110-7 (Washington: GPO, 2007); U.S. Congress, House Committee on Natural Resources, Subcommittee on Energy and Mineral Resources, *Getting Royalties Right: Recent Recommendations for Improving the Federal Oil and Gas Royalty System*, 110th Cong., 2nd sess., March 11, 2008, Serial No. 110-64 (Washington: GPO, 2008); U.S. Congress, House Committee on Appropriations, Subcommittee on Interior, Environment, and Related Agencies, *Minerals Management Service Oversight*, 111th Cong., 1st sess., April 2, 2009, transcript available at http://appropriations.house.gov/images/stories/pdf/ienv/Hearing_Volumes/Interior-FY10-Pt5.pdf#page=307; U.S. Congress, House Committee on Natural Resources, Subcommittee on Energy and Mineral Resources, *Leasing and Development of Oil and Gas Resources on the Outer Continental Shelf*, 111th Cong., 1st sess., March 17, 2009; and U.S. Congress, House Committee on Oversight and Government Reform, *Offshore Drilling: Will Interior's Reforms Change Its History of Failed Oversight*, 111th Cong., 2nd sess., July 22, 2010, webcast available at http://oversight.house.gov/index.php?option=com_content&task=view&id=5038&Itemid=2.

³ See, for example, U.S. Department of the Interior, Office of Inspector General, *Evaluation Report: Minerals Management Service Royalty-In-Kind Oil Sales Process*, Report No. C-EV-MMS-0001-2008, Washington, DC, May 2008, <http://www.doiig.gov/images/stories/reports/pdf//2008-G-00212.pdf>; U.S. Department of the Interior, Office of Inspector General, *Investigative Report: Island Operating Company et al.*, Case No. PI-GA-09-0102-I, Washington, DC, March 31, 2010, <http://www.doiig.gov/images/stories/reports/pdf//IslandOperatingCo.pdf>; and U.S. Department of the Interior, Office of Inspector General, *Investigative Report: MMS Oil Marketing Group - Lakewood*, Washington, DC, August 19, 2008, <http://www.doiig.gov/images/stories/reports/pdf//RIKinvestigation.pdf>.

⁴ GAO has summarized its recent work in this area in U.S. Government Accountability Office, *Oil and Gas Management: Past Work Offers Insights to Consider in Restructuring Interior's Oversight*, GAO-10-888T, July 22, 2010, <http://www.gao.gov/new.items/d10888t.pdf>.

[T]he occurrences that happened at MMS in the last several years where there were allegations of sex and drugs and a whole host of other inappropriate conduct regarding employees of MMS and the industry, are issues of concern.... We have set forth new ethics guidelines to all of the employees who work throughout the Department, including those who work at MMS. We have assigned a full-time ethics lawyer to basically provide guidance and advice to the employees who work at the MMS facilities. And in addition to that, my decision is it is time for us to end the Royalty-In-Kind program.⁵

Legislative proposals to make changes at MMS were also underway in 111th Congress prior to the oil spill. For example, H.R. 3534, the Consolidated Land, Energy, and Aquatic Resources Act of 2009 (CLEAR Act), which would make changes to the agency and its practices, was introduced in the House on September 8, 2009. Among other things, this legislation, as introduced, would have established an Office of Federal Energy and Minerals Leasing. Nearly all of the functions of MMS and the functions of the Oil and Gas Management program of the Bureau of Land Management (BLM) would have been transferred to this new office, thus consolidating the energy development work of the two agencies.⁶ Chairman of the House Committee on Natural Resources Nick J. Rahall II, who introduced the bill, discussed the rationale for this consolidation at the outset of a hearing on the matter:

Having one agency do the leasing, and one agency collect the money, is inefficient, unnecessarily complex, and potentially costs the American people millions in lost royalties.

The new office would help simplify matters for oil and gas companies and renewable energy developers, while allowing BLM to focus on its primary role as a multiple-use land management agency.⁷

In the aftermath of the Deepwater Horizon incident, Administration officials raised concerns about potential conflicts among the missions that were vested in MMS. Secretary Salazar described these conflicts:

MMS has managed the collection of over \$210 billion in revenues generated from programs including oil and gas, coal, metals and renewable energy resources.

But in addition to collecting revenues MMS is tasked with developing and implementing plans for leasing conventional and renewable energy resources on the outer continental shelf.

It is also responsible for overseeing offshore energy operations and ensuring compliance with relevant laws and regulations. These three missions, energy development, enforcement and revenue collection are conflicting missions.⁸

⁵ U.S. Congress, House Committee on Natural Resources, *H.R. 3534, "The Consolidated Land, Energy, and Aquatic Resources Act of 2009" (Parts 1 and 2)*, legislative hearing, 111th Cong., 1st sess., September 16, 2009, Serial No. 111-35 (Washington: GPO, 2009), pp. 11-12. For more on the Royalty-In-Kind program, see the section "Royalty-In-Kind Acquisition" in CRS Report RL33341, *The Strategic Petroleum Reserve: History, Perspectives, and Issues*, by Robert Bamberger.

⁶ The MMS reorganization provisions in the House-passed version of H.R. 3534 differed from those in the bill as introduced. This House-passed version of these provisions is discussed under "Agency Reorganization Legislation During the 111th Congress," below.

⁷ U.S. Congress, House Committee on Natural Resources, Statement of U.S. Rep. Nick J. Rahall, II, Chairman, Legislative Hearing on H.R. 3534, "Consolidated Land, Energy, and Aquatic Resources Act of 2009" September 16, 2009, available at http://resourcescommittee.house.gov/index.php?option=com_content&task=view&id=595&Itemid=1.

These perceived conflicts between the missions of energy development, safety and environmental regulation enforcement, and royalty collection and disbursement for the use of state and federal governments provided the rationale for post-oil-spill administrative and legislative initiatives to reorganize MMS. Within a month of the Deepwater Horizon incident, the Administration had initiated an administrative reorganization. As part of that reorganization, MMS was renamed the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE).⁹ Also, several additional statutory reorganizations of the agency have been under congressional consideration in the aftermath of the oil spill.

This report discusses the efforts to reorganize BOEMRE/MMS.¹⁰ The report begins with a description of legislation under consideration in Congress that would reorganize BOEMRE/MMS. It then provides background and context on the origins of MMS and its organization at the time of the oil spill. It discusses Secretary Salazar's use of his administrative reorganization authority to address conflicts among the agency's missions he and others perceived, and his call for Congress to enact organic legislation. The report then identifies potential congressional options with regard to BOEMRE/MMS reorganization, including some that would make changes to the organizational structure and lines of authority and others that would reshape operational and decision-making processes. Finally, the report includes three historical examples of reorganizations elsewhere in the federal government. In these cases, functions were either split up or consolidated in response to perceptions of competing or unbalanced agency missions. Such examples may provide useful insights during consideration of the future organizational arrangements for carrying out BOEMRE/MMS functions.

Agency Reorganization Legislation During the 111th Congress

During the 111th Congress, both before and after the Deepwater Horizon oil spill, bills were introduced that would reorganize BOEMRE/MMS and its functions. As noted above, on September 8, 2009, Representative Nick J. Rahall introduced H.R. 3534, the Consolidated Land, Energy, and Aquatic Resources Act of 2009. The bill was referred to the House Committee on Natural Resources. Hearings were held on the bill both before and after the oil spill, and a mark-up session was held on July 14 and 15, 2010. The bill, as amended, was ordered to be favorably reported. The House further amended and passed the bill on July 30, 2010. The bill, as passed,

(...continued)

⁸ U.S. Department of the Interior, "Secretary Salazar Divides MMS Missions," transcript of videotaped announcement, May 19, 2010, available at <http://www.doi.gov/news/video/Secretary-Salazar-Divides-MMS-Missions.cfm>.

⁹ In this report, the agency will be referred to under a combined acronym, BOEMRE/MMS, except for discussions of the agency in its historical context, where it will be referred to as MMS.

¹⁰ The alleged ethical lapses and conflicts of interest may be related to the potential conflicts of mission at BOEMRE/MMS, but the two sets of concerns are also distinguishable from each other. In public discourse about BOEMRE/MMS organization and management issues, the term *conflict of interest* has been used, at times, to denote both the individual-level ethical problem and what is referred to in this report as conflict of mission, the organizational-level phenomenon. For example, whereas the ethical lapses and conflicts of interest that were alleged to have occurred involved particular agency employees, offices, and processes, the potential conflicts of mission are organizational-level phenomena that might have an impact on the agency's direction, priorities, policies, culture, and practices. In addition, different remedies might be appropriate to address the two sets of concerns. This report does not discuss other ethics and training reforms designed to address individual-level ethical lapses and conflicts of interest.

would, among other things, abolish MMS and establish three new units within DOI. A Bureau of Energy and Resource Management (BERM) would “manage the leasing and permitting for renewable energy, non-renewable energy, and mineral resources on all onshore and offshore Federal lands in the United States,” except for Indian lands.¹¹ A Bureau of Safety and Environmental Enforcement (BSEE) would “carry out all the safety and environmental regulatory activities, including inspections, on all onshore and offshore federal lands in the United States.”¹² The third unit that would be established by the legislation, an Office of Natural Resources Revenue, would collect and disburse “all royalties and other revenues from energy and mineral related activities on onshore and offshore federal lands, [audit] such collections, and [promulgate] regulations relevant to revenue collection and management.”¹³ In its discussion of the need for such changes, the committee report accompanying the bill echoed the mission conflict concerns previously expressed by Secretary Salazar:

The bill reorganizes the Department of the Interior to provide for better management of energy resources on federal lands and waters, and to eliminate the conflicts that can arise between the missions of leasing, inspection and enforcement, and revenue collection.¹⁴

On June 21, 2010, Senator Jeff Bingaman introduced S. 3516, the Outer Continental Shelf Reform Act of 2010, and it was referred to the Senate Committee on Energy and Natural Resources. Hearings were held on the bill; the committee voted to report it, as amended, favorably, on June 30, 2010; and it was placed on the Senate Legislative Calendar on July 28, 2010. The bill, as reported, would direct the Secretary of the Interior to use administrative authority to establish three new entities within the department. Two of the new organizations would carry out Outer Continental Shelf (OCS) leasing, permitting, and safety and environmental regulatory functions. The Secretary would be directed to eliminate “to the maximum extent practicable ... any potential organizational conflicts of interest related to leasing, revenue creation, environmental protection, and safety.”¹⁵ The third entity would be responsible for revenue and royalty management functions.

On July 22, 2010, Senate Minority Leader Mitch McConnell introduced S. 3643, the Oil Spill Response Improvement Act, and the bill was subsequently placed on the Senate Legislative Calendar. The provisions of S. 3516 discussed above were also included in this bill. These provisions were also included in S. 3663, the Clean Energy Jobs and Oil Company Accountability Act of 2010, which was introduced by Senate Majority Leader Harry Reid on July 28, 2010, and subsequently placed on the Senate Legislative Calendar.

On October 7, 2009, Representative Darrell E. Issa introduced H.R. 3736, the Minerals Management Service Reform Act. This bill would establish MMS as an independent establishment in the executive branch, outside of the Department of the Interior. It would vest in the MMS director all powers and duties of the present MMS as well as all functions, powers, and

¹¹ U.S. Congress, House Committee on Natural Resources, *Consolidated Land, Energy, and Aquatic Resources Act of 2010*, report to accompany H.R. 3534, 111th Cong., 2nd sess., July 28, 2010, H.Rept. 111-575 Part 1 (Washington: GPO, 2010), p. 94.

¹² *Ibid.*, p. 95.

¹³ *Ibid.*, p. 96.

¹⁴ U.S. Congress, House Committee on Natural Resources, *Consolidated Land, Energy, and Aquatic Resources Act of 2010*, report to accompany H.R. 3534, 111th Cong., 2nd sess., July 28, 2010, H.Rept. 111-575 (Washington: GPO, 2010), p. 58.

¹⁵ 111th Congress, S. 3516, § 5(a).

duties that have been vested in DOI relating to bidding, leasing, and managing all offshore oil and gas, including with respect to the Gulf of Mexico and other areas of the outer continental shelf; and collection of revenue (other than taxes) generated by such oil and gas.

Each of the aforementioned bills would establish new department subunits, the leaders of which would be appointed by the President with the advice and consent of the Senate.

On June 22, 2010, Representative Vernon G. Buchanan introduced H.R. 5572, the Oil Spill Prevention Act of 2010. This bill would, among other things, establish a Minerals Management Service in the Department of the Interior that would carry out functions formerly performed by MMS. The agency would comprise an Office of Leasing and Permitting, which would carry out the named functions with regard to the OCS; an Office of Inspection, which would carry out vessel and facility inspection; and an Office of Revenue, which would collect OCS lease revenue. The bill does not specify how the leaders of MMS and each of its subunits would be appointed.

Establishment of the Minerals Management Service

MMS was established in 1982 after congressional committees held a number of hearings in 1981 documenting persistent, systemic problems with federal minerals management programs.¹⁶ These hearings built on the findings of the General Accounting Office (now called the Government Accountability Office, GAO)¹⁷ and the inspector general of DOI (hereafter OIG), among others. On July 8, 1981, Secretary of the Interior James Watt established a commission charged with looking into allegations of failures and advising him on potential remedies. In particular, the commission investigated underpayment and inadequate collection of royalties owed to the United States as well as inadequate protection against physical theft of resources in the field. The commission recommended, among other things, that leasing-related functions be consolidated into a new agency within the department.¹⁸ On January 19, 1982, two days prior to the public release of the commission's report, Secretary Watt issued a secretarial order establishing MMS.¹⁹ (See text box below regarding the Secretary's reorganization authority.) A series of other secretarial orders transferred certain functions to it from other organizational units within DOI.²⁰ Among the functions transferred to MMS were

All of the functions of the Conservation Division [of the U.S. Geological Survey], and all functions in direct support of the Outer Continental Shelf (OCS) program, including but not limited to the following: all functions of the Office of OCS Program Coordination; all functions related to the management of offshore energy and minerals administered by the Bureau of Land Management; all functions in direct support of the OCS program in the Geologic Division and the Office of the Assistant Director for Resource Programs, U.S. Geological Survey, including offshore oil and gas resources, energy-related hazards and

¹⁶ United States Commission on Fiscal Accountability of the Nation's Energy Resources, *Fiscal Accountability of the Nation's Energy Resources* (Washington: GPO, 1982).

¹⁷ Now the Government Accountability Office.

¹⁸ United States Commission on Fiscal Accountability of the Nation's Energy Resources, *Fiscal Accountability of the Nation's Energy Resources* (Washington: GPO, 1982).

¹⁹ Secretarial Order No. 3071, January 19, 1982. Amendment No. 1 to this order was issued on May 10, 1982. Copies of these documents are available from the author.

²⁰ The organization and functions of the Minerals Management Service are identified in Part 118 of the *Department of the Interior Departmental Manual*, available at http://elips.doi.gov/app_DM/index.cfm?fuseaction=home.

marine geology investigations; oil-spill trajectory analysis functions of the Office of Earth Sciences Applications; all functions of the Office of Policy Analysis relating to scheduling the sale of leases of OCS land; and all functions relating to the OCS program transferred from the Department of Energy as a result of the Interior and Related Agencies Appropriations Act, FY 82 (P.L. 97-100).²¹

Congress appropriated funds for this new entity for the following fiscal year (FY1983).²² The conference report did not specifically address the reorganization, but the House report, acknowledging the history of problems with the management of leasing programs, endorsed the consolidation:

This organization was established by Secretarial Order 3071 which transferred resources from the Geological Survey, the Bureau of Land Management, and the Office of the Secretary. The reorganization was the result of the underreporting of oil and gas production from Federal and Indian lands, theft of oil from those lands, and underpayment and inadequate collection of royalties owed to the United States.... The bulk of the appropriation ... is associated with the Outer Continental Shelf Leasing program, evaluation of resources, regulations, and activities associated with Federal and Indian lands. These are functions formerly divided between the Geological Survey and the Bureau of Land Management. That division of function often caused problems of neglect, duplication, and turf wars. The Committee agrees with the consolidation. This consolidation places the responsibility and accountability for the off-shore mineral leasing program in one spot, thus making oversight easier. The Committee will be looking carefully at the progress this organization makes to make sure that the people of the United States get the maximum protection of their resources, including a proper return on their ownership.²³

Reorganization Authority of the Secretary of the Interior

The 1982 administrative reorganization that created MMS was carried out under the authority of the Secretary of the Interior, without congressional or presidential action. Similarly, Secretary of the Interior Kenneth L. Salazar recently ordered another administrative reorganization of the agency and its functions, discussed below, and this action required no congressional or presidential action. These administrative reorganizations were ordered and carried out under the authority of Reorganization Plan No. 3 of 1950. This authority provided that functions that had previously been vested in the heads of the Interior Department's component entities were transferred to the Secretary of the Interior, thus centralizing authority over the department.²⁴ The secretary was also authorized, by the reorganization plan, to redelegate these functions to any department agency, employee, or officer, unless otherwise prevented by law from doing so. Administrative reorganizations are essentially redelegations of authority that has been vested in the Secretary.

²¹ Amendment No. 1 to Secretarial Order No. 3071, May 10, 1982.

²² P.L. 97-394, 96 Stat. 1973.

²³ U.S. Congress, House Committee on Appropriations, *Department of the Interior and Related Agencies Appropriation Bill, 1983*, report to accompany H.R. 7356, 97th Cong., 2nd sess. (Washington: GPO, 1982), p. 40.

²⁴ 43 U.S.C. § 1451, note. The provision makes an exception with regard to the functions vested by the Administrative Procedure Act in hearing examiners and the functions of the Virgin Islands Corporation or of its board of directors or officers.

Organizational Arrangements at MMS at the Time of the Oil Spill

At the time of the Deepwater Horizon oil spill, MMS was organizationally located under the Assistant Secretary for Land and Minerals Management in the Department of the Interior. The leaders of the Bureau of Land Management (BLM) and the Office of Surface Mining Reclamation and Enforcement also reported to this assistant secretary. Whereas these two leaders are appointed by the President, by and with the advice and consent of the Senate, MMS was led by a director who is appointed by the Secretary. The MMS directorship was a non-career (political) Senior Executive Service (SES) position.

The organizational chart for MMS at the time of the oil spill is shown in **Figure 1**. The agency included two operational subunits: Offshore Energy and Minerals Management (OEMM) and Minerals Revenue Management (MRM). As described in the agency's FY2011 budget justification, OEMM

regulates OCS activities, including administering OCS leases, monitoring the safety of offshore facilities, and protecting our coastal and marine environments. Through the work of OEMM, MMS manages the energy and mineral resources on the 1.7 billion acres of the Nation's OCS, which has potential remaining resources estimated at 101.2 billion barrels of oil and 480.1 trillion cubic feet of natural gas . . . and significant renewable resources. Under MMS management, energy resources on the OCS currently supply about 25 percent of the Nation's oil production and about 11 percent of its natural gas production. The MMS is also building a renewable energy program that will allow leasing on the OCS for the development of renewable energy resources such as wind, wave, and ocean current energy.²⁵

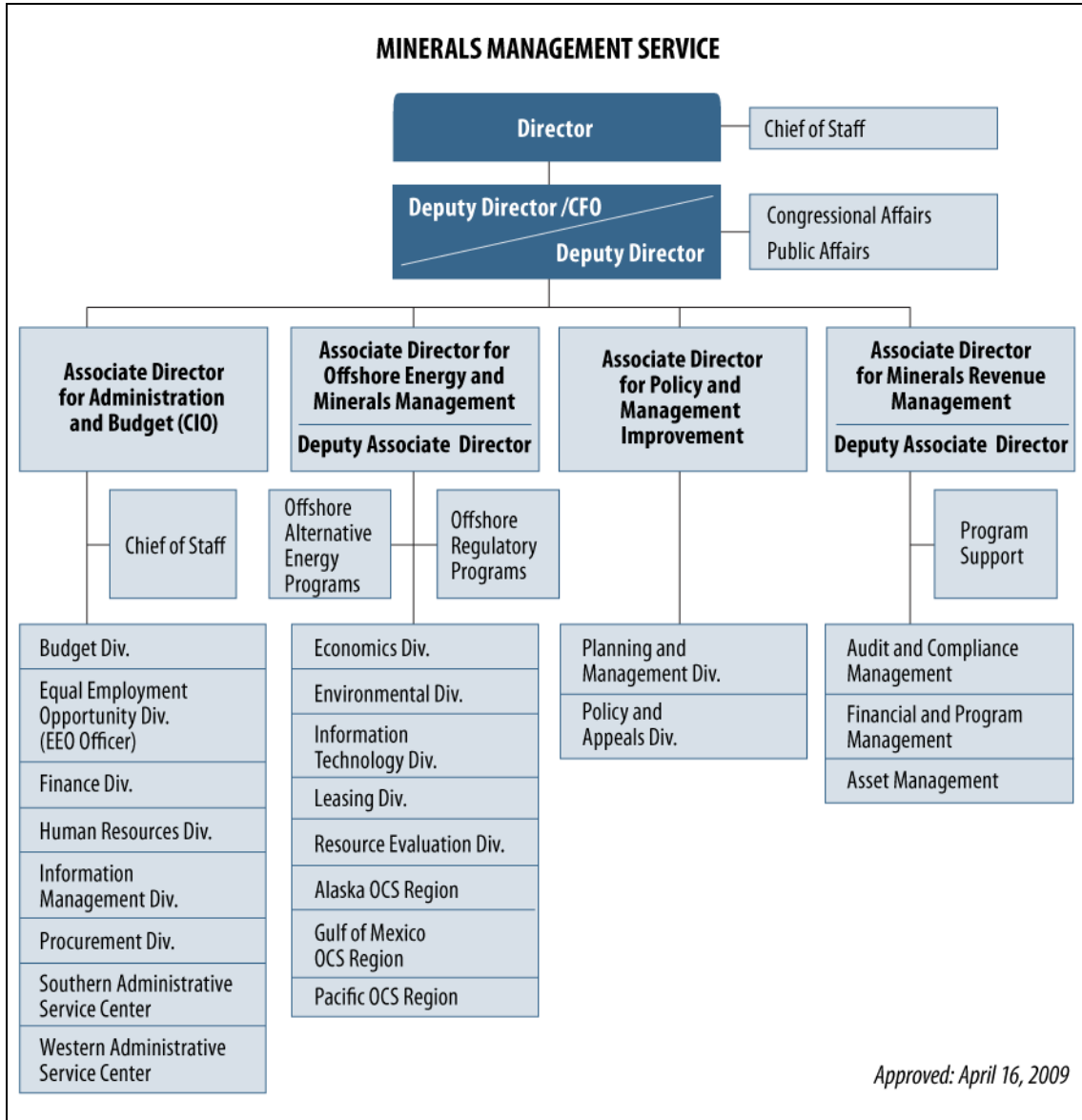
By the same account, MRM

collects, accounts for, and disburses revenues from energy and mineral leases on the OCS and onshore Federal and American Indian lands. The MRM has collected an average of more than \$13 billion annually over the past 5 years. The MMS works to ensure that revenues are reported and paid correctly and in a timely manner. Each month, approximately 2,100 companies report and pay royalties associated with over 29,000 producing Federal and Indian leases. The MMS' goal is to ensure that the Federal government is realizing fair-market value and that companies are in compliance with all applicable laws, regulations, and lease terms.²⁶

²⁵ U.S. Department of the Interior, *Budget Justifications and Performance Information, Fiscal Year 2011: Minerals Management Service*, pp. 3-4, at <http://www.boemre.gov/adm/PFD/2011BudgetJustification.pdf>.

²⁶ *Ibid.*, p. 4.

Figure I. MMS Organizational Chart at the Time of the Oil Spill



Source: U.S. Department of the Interior, *Budget Justifications and Performance Information, Fiscal Year 2011: Minerals Management Service*, p. 26, at <http://www.boemre.gov/adm/PFD/2011/BudgetJustification.pdf>.

MMS had an annual budget of approximately \$348.3 million²⁷ and a workforce of approximately 1,719.²⁸ It was headquartered in Washington, DC, with program components located in Lakewood, CO, and Herndon, VA. It had regional offices in California, Alaska, and Louisiana, and administrative service centers in Colorado and Louisiana.²⁹

²⁷ Ibid, p. 3.

²⁸ Employment figure drawn from FedScope, the Internet access point for human resources data from the U.S. Office of Personnel Management, at <http://www.fedscope.opm.gov/employment.asp>. The figure provided is as of March 2010. According to FedScope, as of June 2010, the BOEMRE/MMS employed 1,741.

²⁹ U.S. National Archives and Records Administration, Office of the Federal Register, *The United States Government* (continued...)

The functions of MMS, as specified in the DOI Departmental Manual, were as follows:

The MMS assesses the nature, extent, recoverability, and value of leasable minerals on and energy-related or other authorized marine-related purposes across the OCS. It ensures the orderly and timely inventory and development—as well as the efficient recovery—of mineral resources and energy-related or other authorized marine-related purposes; encourages use of the best available and safest technology; provides for fair, full, and accurate returns to the Federal Treasury for produced commodities; manages and administers the program for disbursement of coastal impact assistance to qualified recipients; and safeguards against fraud, waste, and abuse. The MMS ensures the protection of life, health, and the natural environment in the course of private sector activities on leased Federal OCS lands. It promotes cooperative relationships between the Federal Government, the States, and Indian feeholders, with respect to national, regional, or local issues related to the full scope of its responsibility.³⁰

Reorganization-Related Administrative Actions

In the aftermath of the Deepwater Horizon incident, the Obama Administration took a number of administrative actions in parallel. Each of these actions is discussed in detail below. Actions by Secretary Salazar included the establishment of an Outer Continental Shelf Oversight Board; the initiation of a structural reorganization of MMS; a call for organic legislation for the agency; a change in MMS's leadership; a change in MMS's name; and the establishment, within the agency, of a new Investigations and Review Unit. Two related reports were submitted to Secretary Salazar: an implementation plan for the MMS reorganization, and the findings and recommendations of the Outer Continental Shelf Oversight Board. In addition, the President submitted to Congress proposed Department of the Interior budget amendments for FY2011 that would, among other things, facilitate MMS reorganization.

Outer Continental Shelf Safety Oversight Board

On April 30, 2010, Secretary Salazar issued an order establishing an Outer Continental Shelf Safety Oversight Board. The board comprises the Assistant Secretary of the Interior for Land and Minerals Management, who chairs the panel, the Department of the Interior inspector general, and the Assistant Secretary of the Interior for Policy, Management and Budget. The Secretary charged the board with, among other duties, “[m]aking recommendations to the Secretary and the Deputy Secretary to improve and strengthen the Department’s overall management, regulation, and oversight of OCS operations including, but not limited to, undertaking further audits or reviews, and reviewing existing authorities and procedures.”³¹

(...continued)

Manual 2009/2010 (Washington: GPO, 2009), p. 246.

³⁰ U.S. Department of the Interior, *Departmental Manual*, pt. 118, chapt. 1, § 1.3(A), available at http://elips.doi.gov/app_dm/index.cfm?fuseaction=home. These functions were carried out under a variety of statutory authorities that are specified in the same chapter, under § 1.2

³¹ U.S. Department of the Interior, Secretarial Order 3298, “Establishment of the Outer Continental Shelf Safety Oversight Board,” issued April 30, 2010, available at http://elips.doi.gov/app_so/act_getfiles.cfm?order_number=3298.

Secretary Salazar's Reorganization Order

On May 13, 2010, the Department of the Interior announced that Secretary Salazar had initiated the process of reorganizing the Minerals Management Service administratively.³² The announcement indicated that the reorganization would be overseen by Assistant Secretary for Policy, Management, and Budget Rhea Suh and Senior Advisor Chris Henderson. It stated that the Secretary had sent a letter to congressional leaders seeking input on the reorganization. The prospective organizational changes were to “achieve the following principles: Independent safety enforcement function; Full enforcement authority; Priority attention to safety and environmental values; and Application of best technology and cutting edge science.”³³

On May 19, 2010, Secretary Salazar issued Order No. 3299, which divided MMS into three new offices.³⁴ At the time, he noted that the reorganization was intended to address what he asserted were conflicting missions at the agency:

The Minerals Management Service has three distinct and conflicting missions that—for the benefit of effective enforcement, energy development, and revenue collection—must be divided.... The reorganization I am ordering ... will enable us to carry out these three separate and equally-important missions with greater effectiveness and transparency. These reforms will strengthen oversight of offshore energy operations, improve the structure for revenue and royalty collections on behalf of the American people, and help our country build the clean energy future we need.³⁵

Under the provisions of the order, two of the new organizations, the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement, are to be organizationally housed under the Assistant Secretary for Land and Minerals Management, which has been the location of BOEMRE/MMS. The third unit, the Office of Natural Resources Revenue, was to be under the Assistant Secretary for Policy, Management, and Budget.

According to the order, the Bureau of Ocean Energy Management is to “exercise the conventional (e.g., oil and gas) and renewable energy-related management functions of [BOEMRE/MMS] not otherwise transferred [by the order] including ... activities involving resource evaluation, planning, and leasing.”

The Bureau of Safety and Environmental Enforcement is to carry out the functions of BOEMRE/MMS related to safety and environmental enforcement, including “the authority to

³² U.S. Department of the Interior, “Salazar Names Senior Interior Officials to Lead Minerals Management Service Restructuring,” press release, May 13, 2010, <http://www.doi.gov/news/pressreleases/Salazar-Names-Senior-Interior-Officials-to-Lead-Minerals-Management-Service-Restructuring.cfm#>. See text box, above, concerning the Secretary's reorganization authority.

³³ Ibid.

³⁴ U.S. Department of the Interior, Secretarial Order 3299, “Establishment of the Bureau of Ocean Energy Management, the Bureau of Safety and Environmental Enforcement, and the Office of Natural Resources Revenue,” issued May 19, 2010. This order was amended on June 18, 2010, to extend the deadline for development of a schedule for implementing the reorganization from “within thirty (30) days,” or by June 19, 2010, to “by July 9, 2010.” This amended order, numbered 3299A1, is available at http://elips.doi.gov/app_so/act_getfiles.cfm?order_number=3299A1.

³⁵ U.S. Department of the Interior, “Salazar Divides MMS's Three Conflicting Missions: Establishes Independent Agency to Police Offshore Energy Operations,” press release, May 19, 2010, <http://www.doi.gov/news/pressreleases/Salazar-Divides-MMSs-Three-Conflicting-Missions.cfm>.

inspect, investigate, summon witnesses and produce evidence, levy penalties, cancel or suspend activities, and oversee safety, response, and removal preparedness.”

The Office of Natural Resources Revenue is to be responsible for royalty and revenue management functions of BOEMRE/MMS, including “royalty and revenue collection, distribution, auditing and compliance, investigation and enforcement, and asset management for both onshore and offshore activities.”

The order also provides that the two Assistant Secretaries mentioned above are to “ensure that this reorganization will provide that agency decisions are made in compliance with all applicable safety, environmental, and conservation laws and regulations, and that all reviews and consultations are conducted in an independent, comprehensive, and scientifically-sound manner.”

The two Assistant Secretaries are charged with developing the implementation details and reporting those details to the Secretary. Initially, they were to “develop a schedule within [30] days for the implementation” of the order in consultation with the Office of Management and Budget and relevant congressional committees.³⁶

Call for Organic Legislation

On several occasions, Secretary Salazar has called for Congress to enact organic legislation for BOEMRE/MMS. Such legislation would establish the agency in statute, and could specify, for example, its location, missions, powers, duties, and functions; the parameters of its personnel systems; the appointment process for its executive officials; and its funding authorization. During his testimony before the Senate Committee on Energy and Natural Resources on the day before he issued the reorganization order, for example, Salazar stated:

[T]he Department of Interior has its responsibility. But I would say this Congress also has its responsibility. And I was proud to be a member of the Senate with, I think, everyone who is currently sitting in this committee today. From this Congress I would expect that we would move forward, and we would see thoughtfully crafted, organic legislation for the Minerals Management Service. Some of you, Senator Wyden, have pushed that effort for a while. I have supported that effort. It should be something that gets done. An agency the size of the Minerals Management Service that collects, on average, \$13 billion a year, that has these responsibilities for the Outer Continental Shelf in terms of the energy production and future of the United States of America, should not exist by fiat of a secretarial order that was signed almost 30 years ago. It is important that there be thoughtfully crafted, organic legislation for the new agency to be created. I will do—I will continue to do the efforts that I can do within the authority that I have as secretary to redo the Minerals Management Service. But at the end of the day, it’s going to be important that Congress take up that responsibility.³⁷

³⁶ The order was later amended to change the deadline to July 9, 2010. An implementation plan was submitted to Secretary Salazar on July 14, 2010. See “Reorganization Implementation Plan: Redistribution of Functions,” below.

³⁷ U.S. Congress, Senate Committee on Energy and Natural Resources, hearing on issues involving offshore oil and gas exploration including the *Deepwater Horizon* accident, 111th Cong., 2nd sess., May 18, 2010, archive webcast available at http://energy.senate.gov/public/index.cfm?Fuseaction=Hearings.LiveStream&Hearing_id=69f3a508-9c1a-a3d4-ffa5-fd397b02c93b. Excerpted comments at approximately 35:30.

Legislative initiatives introduced during the 111th Congress are discussed above, under “Agency Reorganization Legislation During the 111th Congress.” Some of these bills include specifications like those discussed above, and might therefore be considered organic legislation.

Leadership and Name Change

On May 27, 2010, the Department of the Interior announced that S. Elizabeth Birnbaum, who had led MMS since the beginning of the Obama Administration, was stepping down.³⁸ The following day, Secretary Salazar announced that BLM Director Bob Abbey would serve as acting director of MMS.³⁹ On June 18, the Secretary ordered the name of the Minerals Management Service (MMS) changed to the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE).⁴⁰ The name change was effective immediately. On June 21, Michael R. Bromwich was sworn in as the new director of the agency.⁴¹ Bromwich had been an inspector general of the Department of Justice.

Establishment of an Investigations and Review Unit

On June 29, 2010, the Secretary issued an order establishing, within BOEMRE/MMS, an Investigations and Review Unit (IRU). The mission of this unit was to “promptly and credibly respond to allegations or evidence of misconduct, unethical conduct, and unlawful activities by Bureau employees as well as by members of regulated industry,” consistent with BOEMRE/MMS authority; to “oversee and coordinate the Bureau’s internal auditing, regulatory oversight and enforcement systems and programs;” and to assure a swift bureau-wide response to emerging issues and crises.⁴² The unit was to coordinate with the DOI inspector general and to consult with the DOI ethics office. At the time the order was issued, the IRU reported to the director of BOEMRE/MMS, and was part of no other subunit of the bureau. According to the implementation plan for the BOEMRE/MMS reorganization, discussed below, “[a]s appropriate, the IRU’s functions and capabilities will continue in the new organizations.”⁴³ The figures accompanying the plan do not specify an organizational location for the unit as a whole.

³⁸ U.S. Department of the Interior, “Statements of Secretary of the Interior Ken Salazar and S. Elizabeth Birnbaum,” press release, May 27, 2010, <http://www.doi.gov/news/pressreleases/Statements-of-Secretary-of-the-Interior-Ken-Salazar-and-S-Elizabeth-Birnbaum.cfm>.

³⁹ U.S. Department of the Interior, “BLM Director Bob Abbey to Serve as Acting Director of the Minerals Management Service,” press release, May 28, 2010, <http://www.boemre.gov/ooc/press/2010/press0528.htm>.

⁴⁰ U.S. Department of the Interior, Secretarial Order 3302, “Change of the Name of the Minerals Management Service to the Bureau of Ocean Energy Management, Regulation, and Enforcement,” issued June 18, 2010. Available at http://elips.doi.gov/app_so/act_getfiles.cfm?order_number=3302.

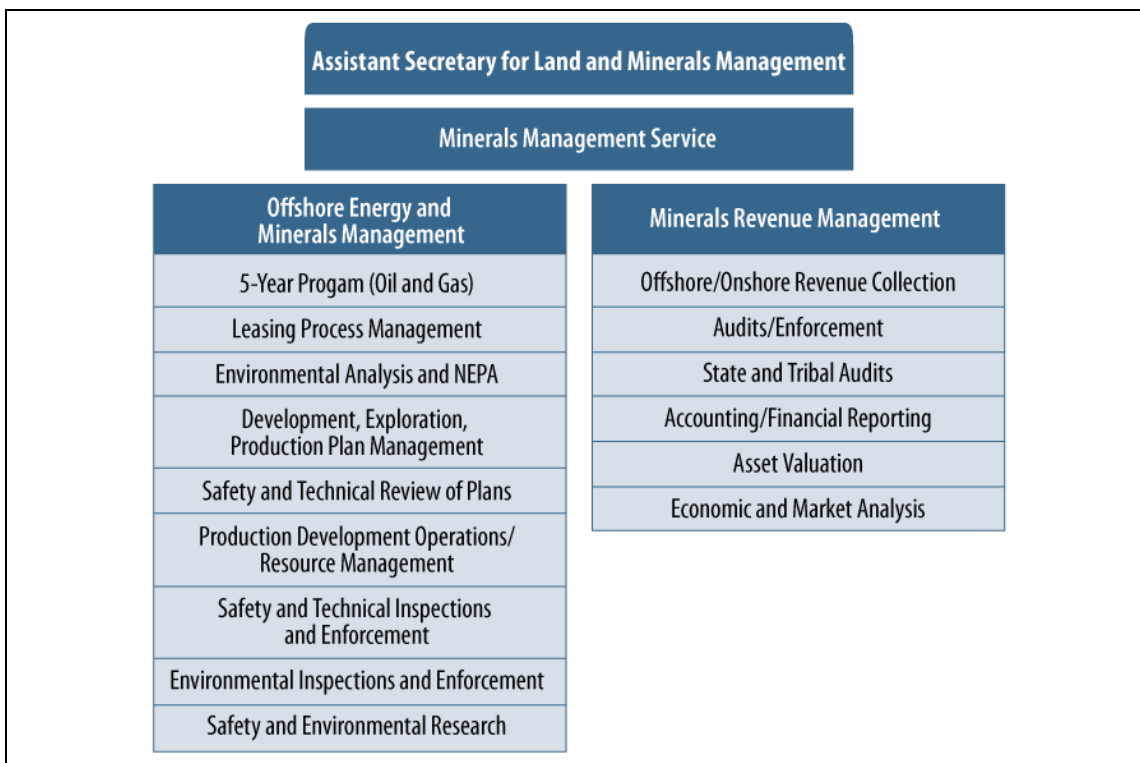
⁴¹ U.S. Department of the Interior, “Salazar Swears-In Michael R. Bromwich to Lead Bureau of Ocean Energy Management, Regulation and Enforcement,” press release, June 21, 2010, <http://www.boemre.gov/ooc/press/2010/press0621.htm>.

⁴² U.S. Department of the Interior, Secretarial Order No. 3304, “Establishment of the Investigations and Review Unit within the Bureau of Ocean Energy Management, Regulation, and Enforcement,” issued June 29, 2010, available at http://elips.doi.gov/app_so/act_getfiles.cfm?order_number=3304.

⁴³ U.S. Department of the Interior, “Implementation Report: Reorganization of the Minerals Management Service,” issued July 14, 2010, p. 5. Available at <http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=38543>. Hereafter cited as “Implementation Report.”

Figure 2. Pre-Reorganization Distribution of BOEMRE/MMS Functions

As characterized by the Department of the Interior



Source: U.S. Department of the Interior, “Implementation Report: Reorganization of the Minerals Management Service,” issued July 14, 2010, p. 5. Available at <http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=38543>.

Reorganization Implementation Plan: Redistribution of Functions

The implementation plan for the reorganization of BOEMRE/MMS was submitted to Secretary Salazar on July 14, 2010, and was also sent to congressional leaders.⁴⁴ Noting that the “reorganization of MMS is a substantial endeavor that will pose significant challenges,” the plan envisioned a phased implementation schedule.⁴⁵ The transfer of “the largely intact Minerals Revenue Management function” to the newly created Office of Natural Resources Revenue, under the Assistant Secretary for Policy, Management, and Budget, would be carried out first, with an effective date of October 1, 2010.⁴⁶ The report indicated that the other “two Bureaus will be created from a single bureau in which functions and process are tightly interconnected, making the separation complicated and demanding.”⁴⁷ Consequently, implementation of this part of reorganization was expected to take longer and require more resources. The plan called for “6 months of employee engagement and communication, detailed analysis, and planning ... with a

⁴⁴ U.S. Department of the Interior, “Salazar Receives Implementation Plan for Restructuring the Department’s Offshore Energy Missions,” press release, July 14, 2010, <http://www.doi.gov/news/pressreleases/Salazar-Receives-Implementation-Plan-for-Restructuring-the-Departments-Offshore-Energy-Missions.cfm#>.

⁴⁵ Implementation Report, p. 2.

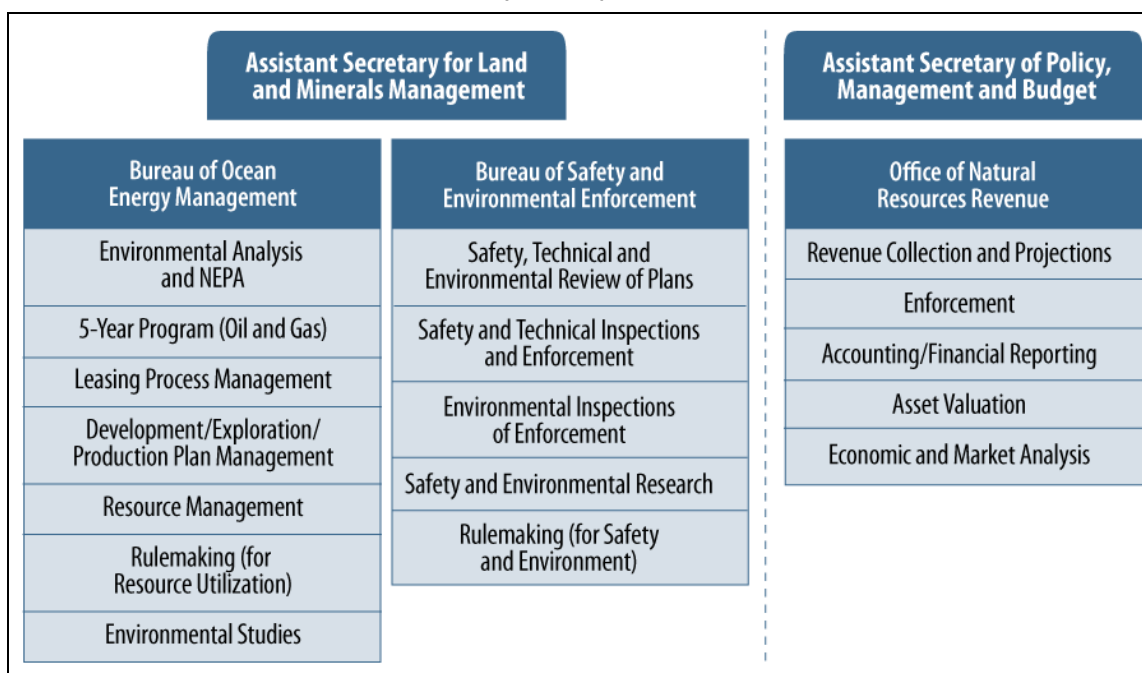
⁴⁶ Ibid., p. 4.

⁴⁷ Ibid., p. 6.

phased implementation beginning in January 2011 and continuing for at least the following 12 months.”⁴⁸ The changes in organizational arrangements envisioned in the plan are illustrated by diagrams that portray the distribution of functions among the major subunits of BOEMRE before and after the reorganization. **Figure 2** shows the pre-reorganization distribution, and **Figure 3** shows the post-reorganization distribution.

Figure 3. Post-Reorganization Distribution of BOEMRE/MMS Functions

As characterized by the Department of the Interior



Source: U.S. Department of the Interior, “Implementation Report: Reorganization of the Minerals Management Service,” issued July 14, 2010, p. 6. Available at <http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=38543>.

Report of the Outer Continental Shelf Safety Oversight Board

In line with its assignment, the Outer Continental Shelf Safety Oversight Board issued a report to the Secretary on September 1, 2010.⁴⁹ The report identified and analyzed a number of issues related to permitting, inspections, enforcement, post-accident investigations, and safety. It also provided 59 related recommendations, many of which pertained to BOEMRE/MMS organization and management.

On September 4, 2010, BOEMRE/MMS Director Bromwich, who had been consulted during the preparation of the board’s report, issued an implementation plan in response to its findings. Among other things, the plan noted that “[m]any of the Board’s recommendations will be addressed through initiatives and programs that are already in process,” including the

⁴⁸ Ibid., p. 6.

⁴⁹ The report is available at <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=43677>.

reorganization. The plan expressed the view that BOEMRE/MMS reform would require more than a rearrangement of organizational structures:

If the reorganization of the former MMS is to effect genuine improvements in the way in which the Department manages offshore energy resources and ensure that offshore energy development is conducted in a manner that ensures the safety of workers and adequately protects the environment, it must involve a great deal more than merely separating functions into the new organizations. Multiplying organizations does not by itself solve problems.⁵⁰

According to the plan, the envisioned implementation of the reorganization goes beyond changes to structural arrangements and includes

- building new systems for processing and analyzing data and performing risk assessments in permitting and environmental reviews;
- designing and implementing a robust, effective, and aggressive safety and environmental enforcement regime based on rigorous analysis of best practices and the challenges presented by industry;
- creating new policies and guidance for both federal personnel and industry;
- developing training programs and curricula;
- recruitment of scores of new professionals;
- establishing efficient, modern information systems; and
- developing management structures and systems appropriate to the scale and missions of the new organizations.⁵¹

Proposed Department of the Interior Budget Amendments

On September 13, 2010, the President submitted to Congress proposed amendments for the FY2011 budget for the Department of the Interior. Among other things the proposed amendments would increase budget authority to facilitate the reorganization that is underway, to “strengthen core programs within BOEMRE to address safety and environmental concerns highlighted by the” oil spill, to “address known deficiencies in Federal mineral revenue collection activities,” and to “establish an investigation and review unit within the agency.”⁵² The proposed amendments would also “allow the creation of new accounts and the transfer of funds among accounts during the reorganization” of BOEMRE/MMS and “provide the flexibility required by [DOI] to move funds among various accounts and programs including balances as the reorganization progresses.”⁵³

⁵⁰ U.S. Department of the Interior, “Implementation Plan in Response to the Outer Continental Shelf Oversight Board’s September 1, 2010 Report to the Secretary of the Interior,” issued September 4, 2010, p. 6. Available at <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=43879>.

⁵¹ *Ibid.*

⁵² U.S. White House Office, letter to the Speaker of the House of Representatives, Washington, DC, September 13, 2010, accompanied by U.S. Office of Management and Budget, “Estimate No. 11, 111th Congress, 2nd Session,” transmitted by Jeffrey D. Zients, Acting Director, Washington, DC, September 13, 2010, first enclosure.

⁵³ *Ibid.*, fifth enclosure.

Potential Approaches for Congressional Consideration

To the extent that BOEMRE/MMS is perceived as having organizational and management problems resulting from conflicting missions, Congress might elect to consider modifying organizational arrangements to address these perceived deficiencies. A number of possible approaches are available to Congress. Options discussed in this report include those that pertain to organizational structures and lines of authority and those that pertain to operational and decision-making processes. Structural and process-based options could also be combined.

Arranging Organizational Structures and Lines of Authority

Constitutionally, the establishment and organization of governmental entities is the province of Congress. Congress, through law, determines the need for, creates, and locates offices; establishes their missions, powers, duties, and functions; defines the parameters of personnel systems; confirms certain executive officials; provides funding; and ultimately evaluates whether a government unit shall continue in existence. Congress has also elected, at times, to provide Secretaries and other agency heads with limited discretionary authority to construct organizational structures and determine lines of authority within their respective departments and agencies. To the degree that perceived BOEMRE/MMS deficiencies are thought to result from structural problems, a number of options are available to Congress. Four general approaches are discussed here: (1) absence of congressional action and continued reliance on secretarial reorganizational solutions; (2) establishment, in statute, of BOEMRE/MMS in its pre-oil spill configuration; (3) division of the functions of BOEMRE/MMS between two or more entities; and (4) assignment of BOEMRE/MMS functions to a newly created commission within DOI.

Structural Option 1: Congressional Oversight But No Legislative Action; Secretary of the Interior Establishes Organization

Under this option, Congress would take no action with regard to the organizational structure(s) that carry out the functions that were, until recently, vested in BOEMRE/MMS. It could be argued that, inasmuch as the Secretary has already acted to address perceived organizational deficiencies, no congressional action is necessary. This option would also continue to provide the Secretary of the Interior with administrative flexibility, and would preserve the ability for future Administrations to reorganize these functions in accordance with their policy preferences and priorities. On the other hand, it could be argued that functions as important as those performed by MMS should be organized in statute in accordance with congressional determinations. In a variety of contexts, greater levels of organizational flexibility have sometimes resulted in administrative actions that appear to be contrary to congressional intent.

If Congress elected not to take action regarding organizational structure, it might still make changes to the organizational processes. For example, it could establish monitoring or reporting requirements, or it could specify goals or priorities for BOEMRE/MMS. (For more on this, see below, under “Shaping Operational and Decision-Making Processes Within BOEMRE/MMS or Successor Organizations.”)

Given heightened congressional concern about BOEMRE/MMS and its functions, Congress might demonstrate its prolonged interest in the outcome of the Secretary's reorganization by enacting legislation that would require two or more annual reports in the aftermath of the transition. Such legislation could require that these reports directly convey estimates of the costs and benefits of the reorganization.

When an agency head has reorganized a portion of an agency administratively, Congress has, on occasion, endorsed the action without giving it statutory underpinnings. For example, Congress has sometimes validated an agency reorganization through the appropriations process, by adjusting the agency's appropriation to match the new configuration or by addressing the action in the conference report.⁵⁴ As noted above, this was the case with the initial establishment of MMS. Congress appropriated funds for the new agency for the fiscal year after it was created by secretarial order (FY1983),⁵⁵ and the associated House report addressed the change:

The Committee agrees with the consolidation. This consolidation places the responsibility and accountability for the off-shore mineral leasing program in one spot, thus making oversight easier. The Committee will be looking carefully at the progress this organization makes to make sure that the people of the United States get the maximum protection of their resources, including a proper return on their ownership.⁵⁶

Congress also has recognized some newly created entities by delegating to them specific authorities, or otherwise making reference to them in statute. Of course, Congress can also register its disapproval of a reorganization by appropriating little or no funding for a new entity, by condemning the action in conference report language, or by redelegating authority to other entities.

Structural Option 2: Establish BOEMRE/MMS, by Statute, in its Pre-Oil Spill Configuration

To the degree that Secretary Salazar's May 19, 2010, reorganization has not yet been fully implemented, this option would serve to maintain the organizational configuration that has evolved since 1982. Establishing BOEMRE/MMS in statute without additional change arguably could help to stabilize an organization that has undergone considerable strain due to the oil spill crisis. It could also be argued that maintaining these organizational arrangements would preserve relationships and processes that have allowed BOEMRE/MMS to integrate interrelated functions involved with the leasing process.

Critics of the agency as it existed prior to the oil spill might emphasize the enduring nature of the organization's problems and argue that the importance of addressing these problems outweighs

⁵⁴ U.S. Government Accountability Office, *Principles of Federal Appropriations Law, Third Edition Volume I*, GAO report GAO-04-261SP (Washington: January 2004), pp. 2-61 through 2-65. This report summarizes the principles to be applied in this situation by quoting a Comptroller General's opinion as follows: "To conclude that Congress through the appropriations process has ratified agency action, three factors generally must be present. First, the agency takes the action pursuant to at least arguable authority; second, the Congress has specific knowledge of the facts; and third, the appropriation of funds clearly bestows the claimed authority" (p. 2-65).

⁵⁵ P.L. 97-394, 96 Stat. 1973.

⁵⁶ U.S. Congress, House Committee on Appropriations, *Department of the Interior and Related Agencies Appropriation Bill, 1983*, report to accompany H.R. 7356, 97th Cong., 2nd sess. (Washington: GPO, 1982), p. 40. A longer excerpt from the House report may be found above, under "Establishment of the Minerals Management Service."

any short-term impact on the stability of the agency and long-term benefits that might have resulted from integrated functions. Such an argument might also note that the stimulus for congressional action is often greater at the time of a crisis than it is at other times.

The impact of establishing BOEMRE/MMS in statute in its earlier configuration changes over time. If Congress had enacted legislation codifying these arrangements before implementation of the administrative reorganization had begun, then the impact of the new statute would have been to preserve the status quo. As discussed above, however, the implementation of the administrative reorganization is underway. If Congress established BOEMRE/MMS in statute in its earlier configuration now, the agency would revert to its previous organizational form. Some of the changes that have been implemented under the administrative reorganization would have to be undone to restore the previous arrangements. Such a restoration, after implementation of all of, or a substantial portion of, the administrative reorganization, could itself be disruptive to relationships, processes, and operations.

If Congress elected to establish BOEMRE/MMS in statute with its pre-oil spill structure, it might address perceived agency weaknesses from that period in other ways. To the degree that conflicts between missions are thought to have existed in those arrangements, authorizing legislation might include provisions, short of structural changes, that could address these conflicts. These might include provisions that specify decision-making processes that the agency must use in order to ensure a proper balance of the agency's missions. Some possible processes that might be used are discussed below under "Shaping Operational and Decision-Making Processes Within BOEMRE/MMS or Successor Organizations."

Another way to address perceived conflicts between missions would be to specify "mission preservation requirements" as part of the agency's authorization. These might be comparable to those included in the Homeland Security Act of 2002 to preserve non-homeland security missions of the U.S. Coast Guard when it was transferred into the Department of Homeland Security. The applicable provision defined "non-homeland security missions" as marine safety, search and rescue, aids to navigation, living marine resources (fisheries law enforcement), marine environmental protection, and ice operations. Concerning these functions, the provision specified, for example, that

No mission, function, or asset ... of the Coast Guard may be diverted to the principal and continuing use of any other organization, unit, or entity of the Department, except for details or assignments that do not reduce the Coast Guard's capability to perform its missions,

and that

[t]he Secretary may not substantially or significantly reduce the missions of the Coast Guard or Coast Guard's capability to perform those missions, except as specified in subsequent Acts.⁵⁷

Such a provision or provisions could be used to make clearer, in statute, the relative priority of the agency's various missions.

⁵⁷ P.L. 107-296, § 888; 116 Stat. 2249.

The Potential for Further Secretarial Reorganization

Even if Congress establishes in statute organizational arrangements for carrying out BOEMRE/MMS functions, a Secretary of the Interior could modify those arrangements to the degree that such modifications were not contrary to existing law.⁵⁸ If this possibility were of concern, selective statutory limits on this authority, as discussed below, might be considered.

Congress has, in the past, reorganized other portions of the Interior Department through statute. In at least one case, the statutory reorganization was followed by a further administrative reorganization by the Secretary of the Interior. In 1994, Congress passed the American Indian Trust Fund Management Reform Act (Trust Fund Reform Act)⁵⁹ to address what were perceived as persistent problems at the Interior Department with the management of Indian lands and funds. Among other things, the act established a Special Trustee for American Indians. This office was charged with the development of a comprehensive strategic plan for all phases of the management business cycle for American Indian trust funds and assets. The Special Trustee was also directed to oversee trust-related reform efforts generally, with more specific oversight responsibilities in the Bureau of Indian Affairs (BIA), BLM, and MMS. In addition, the Special Trustee was tasked with coordinating the development of policies, procedures, systems, and practices among Interior Department components, particularly those just mentioned.⁶⁰

The Trust Fund Reform Act established a new organization, a statutory position subject to Senate confirmation, and certain functions for the entity. The act did not, however, limit the Secretary from using the authority to make further organizational changes within that statutory structure. Interior Secretaries in the William J. Clinton and George W. Bush Administrations subsequently made such changes by secretarial order. In 1996, for example, the Secretary of the Interior expanded the functions of the Special Trustee by transferring to it the Office of Trust Funds Management and other financial trust service functions from the BIA.⁶¹ Whereas the statutory authority establishing the Special Trustee gave it planning, oversight, and coordination functions, the Special Trustee acquired operational functions under this Secretary's order, and it could be argued that this step changed the character of the office. The Secretary took what was perhaps a more contentious step in 1999 when he inserted, between the Special Trustee and most of the

⁵⁸ In general, agency heads have implied authority to organize and manage the agencies and departments they head. (See Basil J. Mezines, Jacob A. Stein, and Jules Gruff, *Administrative Law*, vol. 1 (New York: Matthew Bender, 2006), pp. 4-18 to 4-27.) In addition, since the 1950s, the powers, duties, and functions of the component offices of most agencies have been vested in the agency head, who is, in turn, empowered to delegate these powers, duties, and authorities. Furthermore, Section 301 of Title 5 of the *U.S. Code* provides that the "head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business." The agency head's authority does not, however, supersede congressional authority to provide for specific organizational arrangements or to vest powers, duties, or authorities in particular offices established in this way. In *Myers v. United States*, 272 U.S. 52, 129 (1926), the Supreme Court declared: "[t]o Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction...." Subsequent to the decision in *Myers*, the Court has consistently recognized the authority of Congress to create and abolish offices within the executive branch, to the extent that it is generally considered settled that the transfer or abolition of statutorily vested functions may only be accomplished pursuant to congressional authorization. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *INS v. Chadha*, 462 U.S. 919, 954 (1983).

⁵⁹ P.L. 103-412; 108 Stat. 4239.

⁶⁰ 25 U.S.C. § 4043.

⁶¹ U.S. Dept. of the Interior, Secretary Bruce Babbitt, "Establishment of the Office of Special Trustee for American Indians and Transfer of Trust Funds Management Functions from the Bureau of Indian Affairs," Secretary's Order No. 3197, February 9, 1996, available at http://elips.doi.gov/app_so/act_getfiles.cfm?order_number=3197.

Office of the Special Trustee (OST), an administratively created office of Principal Deputy Special Trustee, who is appointed by the Secretary.⁶² As specified by the order, “[a]ll office and organizations in OST [with one exception] report through the Principal Deputy Special Trustee to the Special Trustee.” The incumbent Special Trustee, Paul M. Homan, resigned several days later, reportedly because “the order effectively ‘designated two other officials to become the special trustee,’ thereby taking away the independence guaranteed by the 1994 law that created his office.”⁶³

Selective Limits on Secretarial Reorganization Authority

It could be argued that, in the event that Congress reorganizes a portion of a department, selective restriction of a Secretary’s authority to further reorganize that portion would increase the likelihood that the organizational ends envisioned by congressional sponsors would be achieved. Such a step would limit the Secretary’s ability to directly or indirectly undo part, or all, of the organizational changes instituted by Congress. A counter argument could be advanced that such restrictions could work against the interests of Congress, because they would also limit the flexibility of the Secretary to respond to changing conditions and needs, even if a secretarial reorganization were to be preferred by Members of Congress at some future point. In such a case, additional legislative action would be necessary to alter the organization to respond to those future conditions and needs.

Congress has taken the step of selectively limiting secretarial reorganization authority by statute in some cases. For example, the Secretary of Energy is “authorized to establish, alter, consolidate or discontinue such organizational units or components within the Department as he may deem to be necessary or appropriate.”⁶⁴ This authority does not, however, extend to the National Nuclear Security Administration (NNSA), which is located within the Department of Energy.⁶⁵ Instead, Congress elected to delegate the authority to reorganize NNSA to the administrator of that organization.⁶⁶ Likewise, although the Secretary of Homeland Security has the statutory authority, under Section 872 of the Homeland Security Act, to reorganize most parts of DHS,⁶⁷ the Post-Katrina Emergency Management Reform Act of 2006 exempts the Federal Emergency Management Agency (FEMA) from that authority.⁶⁸

An appropriations limitation with regard to the reorganization authority of the Secretary of Homeland Security illustrates another tool Congress has used to proscribe such activity. Since May 2007, Congress has limited the use of appropriated funds for carrying out Section 872 reorganizations. Section 3501 of the U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, enacted on May 25, 2007, instituted such limitations for the balance of FY2007, stating,

⁶² U.S. Dept. of the Interior, Secretary Bruce Babbitt, “Reorganization of the Office of the Special Trustee for American Indians,” Secretary’s Order No. 3208A2, January 5, 1999, available at http://elips.doi.gov/app_so/act_getfiles.cfm?order_number=3208A2.

⁶³ William Claiborne, “Indians’ Special Trustee Quits, Criticizing Babbitt; Problems with Trust Fund Accounts Noted,” *Washington Post*, January 8, 1999, p. A19.

⁶⁴ 42 U.S.C. § 7253(a).

⁶⁵ 42 U.S.C. § 7253(b).

⁶⁶ 50 U.S.C. § 2402(e).

⁶⁷ P.L. 107-296; 6 U.S.C. § 452.

⁶⁸ P.L. 109-295, § 611(13), new Homeland Security Act Sec. 506(b).

None of the funds provided in this Act, or P.L. 109-295 [Department of Homeland Security Appropriations Act, 2007], shall be available to carry out section 872 of P.L. 107-296 [Homeland Security Act of 2002].⁶⁹

Succeeding DHS appropriations acts have included similar provisions.⁷⁰

A provision to limit the ability of the Secretary of the Interior to reorganize the Department of the Interior would be tailored to that Secretary's specific authority.

Structural Option 3: Dividing the Functions of BOEMRE/MMS Among Two or More Entities

Under this option, Congress would enact legislation that would either distribute all of the functions of BOEMRE/MMS among other entities or else establish BOEMRE/MMS in statute and divide the functions between it and one or more entities.⁷¹ Congress could elect, for example, to enact into law the organizational arrangements in Secretary Salazar's May 19, 2010, order. Alternatively, the functions of BOEMRE/MMS might be divided in some other fashion within the department, between DOI and some other federal department or agency, or outside of DOI altogether.

Dividing the functions of BOEMRE/MMS among two or more entities could be expected to have the effect of increasing the number of officials involved in decisions that involve functions that have been divided. Depending on the organizational distance between the entities, the officials involved might be at a more senior level than is currently the case. Decisions that were resolved at the director level before, for example, might now need to be resolved at the Assistant Secretary level. This could have the effect of increasing the visibility and transparency of such decision-making processes, and it might also lead to the airing of a greater diversity of viewpoints on such decisions. Because a greater number of officials and more sign-offs might result from such a structural reorganization, the new arrangement might be less efficient than is currently the case. Given the time-sensitive nature of the leasing processes, such inefficiencies might have an adverse impact on the predictability of BOEMRE/MMS functions. It should be noted that new decision-making structures, such as interoffice coordinative working groups, might evolve in an effort to regularize and expedite decision-making, particularly for routine decisions. Such developments could potentially mitigate any loss of efficiency and also might decrease visibility and transparency.

Dividing units by function is likely to lead the new offices to give greater attention to specific missions than would otherwise be the case. These units could develop a greater focus on the particular aspects of the leasing process for which they are responsible. At the same time, each of the units, lacking as much day-to-day contact with the other aspects of the process, may have

⁶⁹ P.L. 110-28; 121 Stat. 112 at 143.

⁷⁰ See, for example, a provision of the Consolidated Appropriations Act, 2008: "None of the funds provided in this Act shall be available to carry out section 872 of Public Law 107-296" (P.L. 110-161, § 546; 121 Stat. 2080). Similar provisions were included in the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 (P.L. 110-329, § 529; 122 Stat. 3686); and the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83, § 525; 123 Stat. 2173).

⁷¹ See case studies at the end of this report—particularly the Atomic Energy Commission and Civil Service Commission—for instances in which Congress has taken actions similar to those described in this section.

diminished understanding of, and appreciation for, these aspects. Over time, the units may develop organizational cultures that increase morale and internal cohesion. Such developments could also result in increased friction among units at decision-making points.

Structural Option 4: Assign BOEMRE/MMS Functions to a New Independent Commission within DOI

Under this option, Congress would establish a new commission within DOI, or elsewhere in the federal government, and assign some or all of the MMS functions, particularly regulatory functions, to this new entity. Such an organization might be comparable to the Federal Energy Regulatory Commission (FERC), which is an independent agency located in the Department of Energy. Independent commissions often carry out regulatory or adjudicatory functions, and they are usually established with structural features that give them greater levels of independence from presidential direction than would otherwise be the case. Most such commissions have three or five members with fixed terms and statutory protection from arbitrary removal. Membership is often balanced between the political parties, and sometimes appointees are required to meet specified qualifications, such as a particular educational background or industry affiliation. Such structural elements can build into the commission a diversity of viewpoints that might, collectively, be able to successfully balance conflicting missions.

It should be noted, however, that in two of the three cases discussed later in this report—the Atomic Energy Commission and the Civil Service Commission—Congress elected to divide an existing commission’s work and assign seemingly conflicting missions to separate organizations. In view of these experiences, the use of this model might be restricted to the regulatory functions of MMS, with the other functions vested elsewhere.

Independent commissions are designed to be more protected from political influence—particularly presidential influence—than are other federal agencies. Arguably, this increases the probability that these commissions will be able to apply politically neutral expertise to their regulatory or adjudicatory activities. This design might be most beneficial with regard to areas that are highly complex or susceptible to politicization. Critics of the commission model often criticize what they characterize as the diffuse responsibility and accountability of a collectively run body. In addition, some argue that functions such as those performed by BOEMRE/MMS should not be removed from the direction and influence of the President.⁷²

Shaping Operational and Decision-Making Processes Within BOEMRE/MMS or Successor Organizations⁷³

Another perspective on government organization relates to processes for getting work done and making decisions. As a complement to any structural options that Congress might consider, Congress might also consider options to retain the current operational and decision-making processes or modify them. These processes may influence the way in which an agency uses

⁷² For a more in depth discussion of the history, strengths, and shortcomings of this model, see Marshall J. Breger and Gary Edles, “Established by Practice: The Theory and Operation of Independent Federal Agencies,” *Administrative Law Review*, vol. 52 (2000), p. 1111.

⁷³ This section was prepared by Clinton T. Brass, Analyst in Government Organization and Management, 7-4536.

discretion (e.g., increased transparency may deter certain behaviors) and therefore can be used to address perceptions of improperly balanced missions and priorities.

Discretion and Agency Missions

On one hand, a congressional grant of discretion to an agency may provide it with flexibility to tailor the implementation of laws to specific circumstances as the agency perceives them. On the other hand, discretion can allow an agency to make decisions or engage in operations that might not have garnered support in Congress, had the subject been considered explicitly during the legislative process, or to emphasize one priority while subordinating others. For example, Congress faced a tension between flexibility and accountability in 2002 and 2003, when considering whether to grant the Departments of Homeland Security (DHS) and Defense (DOD) discretion to determine some of the contents of their human resources management (HRM) systems through regulation. Separate authorities for DHS and DOD to establish new HRM systems were enacted into law.⁷⁴ However, in both cases, DHS and DOD were required to do so in regulations prescribed jointly with the Office of Personnel Management (OPM).

Options for Channeling the Use of Discretion Through Processes

In considering situations when Congress weighs whether to give discretion to an agency, and if so, to what extent, scholars have noted four general options that can be used alone or in combination by Congress to address delegation situations and help balance competing missions and priorities.⁷⁵

- **Contract design:**⁷⁶ Congress can set the conditions for a delegation of authority to better ensure that its intentions will be carried out by the executive branch, as well as reduce risk of harm. For example, Congress could establish goals, sanctions, probation periods, or sunsets; require the use of pilot projects; or establish “profit-sharing relationships” (i.e., establish incentives for agencies to behave in ways that benefit both the agency and the government as a whole—for example, an agency might be allowed to retain 50% of unspent funds after the end of a fiscal year, thereby providing an incentive against end-of-the-year “use it or lose it” spending behaviors).
- **Screening and selection mechanisms:** To avoid delegating authority to an agency in a way that could risk poor “on-the-job” performance with a given task, program, or management initiative, Congress can try to look beforehand for

⁷⁴ See discussion of Title 5, U.S.C., Chapter 97 and Chapter 99, in CRS Report RL30795, *General Management Laws: A Compendium*, by Clinton T. Brass et al.

⁷⁵ This four-option framework and some of the examples are drawn from D. Roderick Kiewiet and Mathew D. McCubbins, *The Logic of Delegation: Congressional Parties and the Appropriations Process* (Chicago: University of Chicago Press, 1991), pp. 27-38. Kiewiet and McCubbins note that these four options can sometimes impose financial and other costs on agencies.

⁷⁶ Here, the term *contract* is figurative, and means “the terms and conditions under which authority or power is delegated from the legislative body to an agency.” In a delegation situation, theorists see one actor, the legislature, as a *principal*, and the other actor, an agency, as an *agent* for the principal. Because the agent can take action that is optimal in light of his or her own goals, instead of the principal’s intended goals, theorists call this situation an *agency problem*. In response, theorists often advocate establishing a contract that aligns the terms and conditions of the delegation (sometimes including incentives for the agent) with the principal’s goals, in order to accomplish the principal’s goals.

signals or other information that indicate whether the executive branch agency and its officials will likely do the work effectively. For example, for presidential appointments that require the advice and consent of the Senate, hearing questions often relate to a nominee's skills and reputation. Congress also could require a third party (e.g., an independent review panel) to determine whether the agency rigorously analyzed a problem and its potential solutions or look for evidence that the agency has organizational capacity and management skill to do its work and balance competing priorities.

- **Monitoring and reporting requirements:** To increase accountability and transparency for a given activity or program, Congress can require agencies to report their "actions taken," milestones they have reached, and any information the agencies have obtained during their activities. The rationales might be (1) to monitor agency actions that are difficult to oversee and (2) to make available information that is difficult for Congress and outside stakeholders to access. Web-based reporting may enable such reporting to be close to real-time and more frequently updated. However, some commentators argue that a proliferation of reporting requirements can be burdensome, and that reports to Congress are not always used.
- **Institutional checks:** When authority is delegated to an agency, Congress can ensure that one or more additional agencies or entities can veto or block the delegate agency's actions. For example, Congress could involve another agency in the promulgation of regulations (such as the DHS personnel system established by the Homeland Security Act of 2002, which required that regulations be prescribed jointly by DHS and the Office of Personnel Management (OPM)); require public notice and comment before an agency is allowed to proceed with certain actions; provide sequential funding within an appropriation that is contingent upon certain conditions at each of several milestones; require the agency or additional agencies to conduct an independent study examining an issue; or use "committee vetoes"⁷⁷ to prevent certain actions absent congressional committee approval.

Past Reorganizations that Split or Consolidated Functions

Finally, this section provides three historical examples of reorganizations elsewhere in the federal government. In each of these cases, the reorganization was a response to perceptions of competing agency missions. The three cases provide instances in which the functions of a federal agency were divided among two or more agencies as well as instances in which functions vested in two or more agencies were consolidated under a single roof. Such examples may provide useful insights during consideration of the future organizational arrangements for carrying out

⁷⁷ Committee vetoes continue to be used after the Supreme Court's ruling in *INS v. Chadha* (1983), which struck down the legislative veto. For more on committee vetoes, see Louis Fisher, "Congress As Co-Manager of the Executive Branch," in *The Managerial Presidency*, 2nd ed., ed. James P. Pfiffner (College Station, TX: Texas A&M University Press, 1999), pp. 306-308; and Louis Fisher, "The Legislative Veto: Invalidated, It Survives," *Law and Contemporary Problems*, vol. 56, no. 4 (autumn 1993), pp. 273-292.

BOEMRE/MMS functions. The first two of these cases—the Atomic Energy Commission and the Civil Service Commission—are instances in which Congress took actions similar to those described above under “Structural Option 3: Dividing the Functions of BOEMRE/MMS Among Two or More Entities.”

The third case—the Federal Emergency Management Agency (FEMA)—involved a complex series of reorganizations. The agency’s organizational arrangements were changed frequently in a relatively short span of time, as they might be under “Structural Option 2: Establish BOEMRE/MMS, by Statute, in its Pre-Oil Spill Configuration.” In the space of four years, FEMA was reorganized both by statute and by secretarial action. In the most recent statutory reorganization of FEMA, Congress gave it increased autonomy within the department. In this way, it bears similarity to “Structural Option 4: Assign BOEMRE/MMS Functions to a New Independent Commission within DOI.” In contrast to this option, however, Congress did not give FEMA full independence or re-establish it as a commission.

Atomic Energy Commission

The history of organizational challenges and reorganizations of the Atomic Energy Commission (AEC) has some parallels with BOEMRE/MMS, although it also is dissimilar in a number of ways. Both organizations were charged with facilitating the development of energy resources and, at the same time, with regulating the associated industries in the interest of protecting the environment and public safety. In both cases, some in Congress and in the public perceived a conflict between these functions, with the regulatory function thought to be subordinated to the facilitation or promotion function. Unlike BOEMRE/MMS, however, the AEC was an independent agency, was established and later reorganized by statute, and had no royalty collection function.

AEC was established by the Atomic Energy Act of 1946.⁷⁸ Created in the aftermath of World War II and the use of atomic weapons in Hiroshima and Nagasaki, the commission was charged with peacetime research and development of military and civilian applications of nuclear energy. By one account, at that time, atomic energy “was 95 percent for military purpose, with possibly 5 percent for peacetime uses.”⁷⁹ The development and utilization of nuclear energy were largely government activities during the first eight years of the agency. In 1954, amendments to the Atomic Energy Act facilitated commercial participation.⁸⁰ The commission, in turn, was given both the roles of promoting this participation and of regulating it in the interests of public health, safety, and national security.

As the AEC pursued these dual roles in the late 1950s and early 1960s, the difficulty of excelling in both roles simultaneously became apparent. As one study by the staff of the Joint Committee on Atomic Energy reported,

Unlike the deliberations of most other agencies, the staff judgment which results from a weighing of scientific and policy factors in reactor licensing should not be reviewed, in the

⁷⁸ P.L. 79-585; 60 Stat. 755.

⁷⁹ U.S. Congress, Joint Committee on Atomic Energy, *Amending the Atomic Energy Act, as Amended, and for Other Purposes*, report to accompany S. 3690, 83rd Cong., 2nd sess., June 30, 1954, S.Rept. 1699 (Washington: GPO, 1954), p. 3.

⁸⁰ P.L. 83-703; 68 Stat. 919.

appellate sense, only to determine the fairness of the staff decision and the substantiality of the evidence supporting it. The Commissioners are faced with the task of deciding whether the staff's safety judgment is correct and much rides on the accuracy of their determination—an error could have disastrous consequences. The very difficult job facing the Commissioners is compounded by the fact that the AEC, in handling these complex and serious problems, is subject to a strain on its objectivity for, in many instances, it is both the promoter and the regulator of the atomic energy project in question.⁸¹

By 1961, the possibility that the promotion and regulatory functions might be housed in different agencies, together with the drawbacks of such a plan, had been acknowledged by committee staff:

[I]t has been suggested that there be created a regulatory agency separate from the AEC. This suggestion would free the Commission from regulatory responsibilities and tend to increase public confidence in the new agency's determinations.

However, this plan has several serious disadvantages, principally centering around problems of communication and staffing. Informal consultation concerning scientific and engineering questions relating to safety between the new agency's staff and the AEC's staff would be made more difficult. It might also be difficult to attract qualified technical personnel to the new agency because of their shortage and reluctance to serve an agency with no developmental functions. Having only safety responsibilities, the agency might come to disregard other considerations. Finally, it does not appear that AEC's regulatory workload has developed to the point where creation of a separate agency can be justified.⁸²

By 1963, the regulatory functions of the AEC had been internally separated from operational and development functions.⁸³

The Energy Reorganization Act of 1974 abolished the AEC and established the Nuclear Regulatory Commission (NRC) and the Energy Research and Development Administration (ERDA). According to one account, public perception of a tension between the functions of promotion and regulation of nuclear energy in the 1970s was an important factor in this reorganization:

Many citizens linked their doubts [about nuclear power] with a growing disillusionment about government objectivity in general. This feeling easily targeted nuclear regulation, housed in a federal agency historically tied to nuclear development, as a prime example of a regulatory body being compromised by the industry it regulated. The twenty-year-old idea of completely separating the regulatory and promotional roles of the commission again surfaced and was debated.⁸⁴

Even as the 1974 act split these two nuclear power-related functions, it was intended to “consolidate the Federal Government's fragmented and uncoordinated energy research and

⁸¹ U.S. Congress, Joint Committee on Atomic Energy, *Improving the AEC Regulatory Process*, committee print, prepared by committee staff, 87th Cong., 1st sess., March 1961, pp. 2-3.

⁸² *Ibid.*, p. 5. The study also discussed two other options: continuance of the status quo with minor changes and improved procedures, and creation of an internal safety and licensing board.

⁸³ George T. Mazuzan, “Nuclear Regulatory Commission,” in *Government Agencies*, ed. Donald R. Whitnah (Westport, CT: Greenwood Press, 1983), p. 397.

⁸⁴ *Ibid.*, pp. 398-399.

development functions.”⁸⁵ Three years later, ERDA was folded together with other energy-related organizations into a newly established Department of Energy.⁸⁶

Since its establishment as a dedicated safety regulatory agency in 1974, the NRC has been faced with several serious accidents and near-accidents, notably a fire at the Browns Ferry (AL) plant in 1975 and the partial melting of the Three Mile Island (PA) unit two reactor core in 1979. The Three Mile Island accident led to substantial legislative and administrative changes in the nuclear regulatory system, including strengthening the authority of the NRC chairman, requiring emergency evacuation plans at nuclear plants, and increasing safety requirements.⁸⁷ NRC currently has an annual budget of slightly more than \$1 billion and a staff of nearly 4,000.

Civil Service Commission

The history of organizational challenges and reorganizations of the U.S. Civil Service Commission also has some parallels with BOEMRE/MMS. The commission, like BOEMRE/MMS, was vested with a number of interrelated, but potentially conflicting functions. In the case of the commission, it was eventually divided into three, and ultimately four, separate independent agencies. Unlike BOEMRE/MMS, however, the Civil Service Commission was never part of a department, was established and reorganized by statute, and had no royalty collection function.

The United States Civil Service Commission was established by the Pendleton Act of 1883. The newly created organization was part of an effort to move from a spoils-based government personnel system that had been pervasive during the 19th century to one based on merit and continuous service across administrations. The functions and reach of the commission were initially limited, but they grew over the following decades.

By the 1970s, the Civil Service Commission had been given responsibility for, and authority over, most functions related to the federal government’s personnel system. Among these functions were to serve as the President’s main agent with regard to personnel matters, to be the principal facilitator of labor-management relations, and to be the protector of the merit-based personnel systems. An assessment of the commission conducted under a Jimmy Carter Administration government reorganization initiative suggested that the tensions among these varied roles had inhibited the commission’s effectiveness:

Major organizational deficiencies in the Federal personnel management system have long been recognized and have been the subject of numerous studies by reputable organizations and individuals over the past 40 years. While these studies reveal no absolute agreement concerning either the precise nature of the major deficiencies or the most effective ways of correcting them, the most significant problems cited are: Role conflicts inherent in the responsibilities and authority assigned to the Civil Service Commission, which must simultaneously serve (a) as a management agent for a President elected through a partisan political process and also as the protector of the merit system from partisan abuse; and (b)

⁸⁵ U.S. Congress, Senate Committee on Government Operations, *Energy Reorganization Act of 1974*, report to accompany S. 2744, 93rd Cong., 2nd sess., June 27, 1974, S.Rept. 93-980 (Washington: GPO, 1974), p. 1.

⁸⁶ See Department of Energy Organization Act, P.L. 95-91; 91 Stat. 565.

⁸⁷ United States, President’s Commission on the Accident at Three Mile Island, *Report of the President’s Commission on the Accident at Three Mile Island*, (Washington: GPO, October 1979), at <http://www.threemileisland.org/downloads/188.pdf>.

the provider of services to agency management in implementing personnel programs, while maintaining sufficient neutrality to adjudicate disputes between agency managers and their employees.⁸⁸

Following this assessment, the Civil Service Reform Act of 1978 was enacted.⁸⁹ The act split the commission into three agencies. The first of these was the Office of Personnel Management (OPM), which was charged with the administration of the federal personnel system, that is, responsibility for personnel policy-making and the central management of federal personnel. The OPM director also became the principal advisor to the President on personnel matters. In addition, this new agency headed the development and coordination of the management side of labor-management relations.

The second agency created was the Merit Systems Protection Board (MSPB). This organization was charged with the adjudication of appeals related to alleged abuses of the merit system and with investigation of federal employee allegations of illegal and improper personnel actions, including retaliatory actions against whistleblowers. The Office of Special Counsel (OSC), which carried out these latter functions, later was split off from MSPB and established as an independent federal agency by the Whistleblower Protection Act of 1989.⁹⁰

The third of the new entities established by the 1978 act was the Federal Labor Relations Authority (FLRA), which administers the federal labor-management relations program and adjudicates related disputes as they arise.

Federal Emergency Management Agency

The history of organizational challenges and reorganizations of the Federal Emergency Management Agency (FEMA) also has some parallels with BOEMRE/MMS. The agency, like BOEMRE/MMS, was created in an effort to consolidate a number of interrelated functions that were, until then, vested in a variety of other agencies. Although FEMA was, for more than two decades, an independent agency, it eventually became, like BOEMRE/MMS, part of a larger department. As the account below discusses, some of the functions and offices of FEMA were reassigned to other parts of the department, as some perceived that these modifications were necessary to respond to a changing homeland security and emergency management environment. Congress later elected to reestablish FEMA within the department as a distinct entity with the functions it had previously been vested with. Although the functions of BOEMRE/MMS, like those of FEMA a few years ago, are being reassigned elsewhere in the department, the underlying reasons for this reorganization appear to differ from those of the FEMA case. The FEMA case also differs from the BOEMRE/MMS case in that FEMA was established by statute, was initially an independent agency, and has no royalty collection function.

The current organizational configuration for emergency management functions, largely centered in FEMA, is an outgrowth of decades of emergency preparedness and civil defense arrangements. Since the end of World War II, public expectations regarding governmental intervention in preparation for, and in response to, natural and man-made emergencies and disasters have grown.

⁸⁸ The President's Reorganization Project, *Personnel Management Project Volume 1: Final Staff Report*, Washington, DC, December 1977, p. 231.

⁸⁹ P.L. 95-454; 92 Stat. 1111.

⁹⁰ P.L. 101-12; 103 Stat. 16.

In response to these expectations, as well as national security considerations, Congress and Presidents debated, formulated, and revised administrative responsibilities for emergency management during that time.

The earliest incarnation of FEMA arose in the late 1970s, after several decades during which federal emergency management functions were alternately centralized and decentralized in various configurations. In 1978, using existing statutory presidential reorganization authority, President Carter proposed, and Congress consented to, the merger of certain emergency management programs and functions from across the federal government into a new independent agency.⁹¹ FEMA gradually took form in 1979 as President Carter transferred to it these programs and functions, including fire prevention and control and certain Emergency Broadcast System functions (from the Department of Commerce); flood insurance and federal disaster assistance programs (from the Department of Housing and Urban Development); other Emergency Broadcast System functions (from the President); civil defense (from the Department of Defense); federal preparedness (from GSA); and earthquake hazards reduction (from the Office of Science and Technology Policy). The President also authorized FEMA to coordinate “all civil defense and civil emergency planning, management, mitigation, and assistance functions,” in addition to dam safety, “natural and nuclear disaster warning systems,” and “the coordination of preparedness and planning to reduce the consequences of major terrorist incidents.”⁹²

Although successive directors reorganized the agency internally in accordance with the priorities of each Administration, FEMA retained largely the same set of functions during its more than two-decade existence as an independent agency.

On February 15, 2001, the U.S. Commission on National Security/21st Century (USCNS/21), also known as the Hart-Rudman Commission,⁹³ issued the last of three reports. The report, which was based on the commission’s three-year comprehensive reexamination of U.S. national security policies and processes in view of the changed international environment and technological, social, and intellectual changes of the late 20th century, included 50 recommendations for governmental changes.⁹⁴ Second among the commission’s recommendations was a proposal to create a Cabinet-level National Homeland Security Agency (NHSA) with FEMA as “a key building block in this effort.”⁹⁵ Under the proposal, FEMA would have been the core of an Emergency Preparedness and Response Directorate.

Following the Hart-Rudman Commission report and the terrorist attacks of September 11, 2001, the Homeland Security Act of 2002 was enacted.⁹⁶ Title V of the act transferred the functions, personnel, resources, and authorities of six existing entities, the largest of which was FEMA, into

⁹¹ U.S. Congress, House, *Message from the President of the United States Transmitting A Reorganization Plan to Improve Federal Emergency Management and Assistance, Pursuant to 5 U.S.C. 903 (91 Stat. 30)*, H. Doc. No. 95-356, 95th Cong., 2nd sess. (Washington: GPO, 1978).

⁹² President Carter accomplished these transfers through two executive orders: Executive Order 12127, *Federal Register*, vol. 44, April 3, 1979, p. 19367; and Executive Order 12148, *Federal Register*, vol. 44, July 24, 1979, p. 43239.

⁹³ The commission was co-chaired by former Senators Gary Hart and Warren Rudman.

⁹⁴ U.S. Commission on National Security/21st Century, *Road Map for National Security: Imperative for Change* (Washington: 2001).

⁹⁵ *Ibid.*, p. 15.

⁹⁶ P.L. 107-296, 116 Stat. 2135. For more on the development of the Homeland Security Act, see CRS Report RL31493, *Homeland Security: Department Organization And Management—Legislative Phase*, by Harold C. Relyea.

the Emergency Preparedness and Response (EPR) Directorate of the newly established DHS. Section 507 of the act specifically charged FEMA with “carrying out its mission to reduce the loss of life and property and protect the Nation from all hazards by leading and supporting the Nation in a comprehensive, risk-based emergency management program.”

Although all of FEMA’s components were transferred into the new department, they were not defined as an autonomous or distinct entity within its parent organization. The name FEMA, well known to the public, was retained by DHS. The department, as well as elected officials, the press, the public, and this report continue to use the name FEMA. However, the entity described by that name had organizational status and components that were different from those it had prior to being folded into DHS.

Within a year after DHS was established, a component of FEMA was, for the first time, relocated to another part of the department.⁹⁷ In January 2004, Secretary Tom Ridge used his administrative reorganization authority to consolidate “select grant award functions [then] exercised by the Under Secretary for Emergency Preparedness and Response,” under Sections 502 and 503 of the Homeland Security Act within the Office of State and Local Government Coordination and Preparedness, an office that would report directly to the Secretary.⁹⁸

In 2005, more components of FEMA were relocated to other parts of the department. As part of a reorganization instituted by Secretary Michael Chertoff, most preparedness functions housed in FEMA were transferred to a newly created Preparedness Directorate. The remaining components of FEMA were to focus on response and recovery, not on preparation.⁹⁹

By virtue of the Homeland Security Act of 2002 and the DHS reorganizations of 2004 and 2005, FEMA had transformed from an independent agency with responsibility for all phases of emergency management to a departmental unit responsibility for response and recovery programs. Meanwhile, certain components that were formerly located in FEMA had become integral parts of DHS.

In the aftermath of Hurricane Katrina of 2005, the relationship and respective functions of FEMA and DHS were reconfigured once again. While reviewing the governmental response to Hurricane Katrina, Congress considered the dynamic history of functional and organizational changes. Some contended that, as a result of these mission and organizational shifts, FEMA’s capabilities deteriorated as functions, resources, and responsibilities moved to other DHS units. Others argued that an emphasis on terrorist-caused incidents within DHS dominated planning and allocation decisions and contributed to a diminishment of FEMA’s capabilities for all hazards. These findings led to congressional enactment of significant revisions to FEMA’s structure and mission.

⁹⁷ The Homeland Security Act explicitly gave the Secretary significant discretion in reorganizing the department. See CRS Report RS21450, *Homeland Security: Scope of the Secretary's Reorganization Authority*, by Stephen R. Vina.

⁹⁸ Letter from Secretary of Homeland Security Tom Ridge to Sen. Joseph I. Lieberman, January 26, 2004.

⁹⁹ The 109th Congress addressed the Administration’s reorganization plan during the FY2006 appropriations process, which was underway at the time Chertoff’s initiative was announced. The Administration submitted to congressional appropriators a budget amendment requesting a modification of the appropriations structure to align appropriations with the newly organized department. In response, “[f]or the most part, the conferees ... complied with these requests.” U.S. Congress, Committee on Conference, *Making Appropriations for the Department of Homeland Security for the Fiscal Year Ending September 30, 2006, and for Other Purposes*, report to accompany H.R. 2360, 109th Cong., 1st sess., H.Rept. 109-241 (Washington: GPO, 2005), p. 30. For more on the reorganization plan, see CRS Report RL33064, *Organization and Mission of the Emergency Preparedness and Response Directorate: Issues and Options for the 109th Congress*, by Keith Bea.

Most of those changes were included in Title VI of the DHS appropriations legislation for FY2007.¹⁰⁰ Among other provisions, Title VI, the Post-Katrina Emergency Management Reform Act of 2006, reconfigured FEMA with consolidated emergency management functions, elevated status within the department,¹⁰¹ and enhanced organizational autonomy.¹⁰² As part of this reconfiguration, the act transferred to the new FEMA most functions administered by FEMA during its period as an independent agency.

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¹⁰⁰ P.L. 109-295.

¹⁰¹ The new law elevated FEMA within DHS by raising the status of the FEMA Administrator to the Deputy Secretary level, increasing the scope of his or her responsibilities, mandating that he or she report directly to the Secretary, and giving him or her a statutory advisory relationship to the President, the Homeland Security Council, and the Secretary, particularly during disasters.

¹⁰² Like the U.S. Coast Guard and the U.S. Secret Service, the new FEMA was classified as a distinct entity within DHS. In addition, the new FEMA is not subject to the Secretary's broad reorganization authority under HSA. The act also explicitly prohibits, as of the date of enactment, substantial or significant reductions, by the Secretary, of the authorities, responsibilities, or functions of the new FEMA, or FEMA's capability to perform them. Furthermore, the Post-Katrina Act prohibits most transfers of the new FEMA assets, functions, or missions to other parts of DHS. With regard to reprogramming or transfer of funds, the act requires that the Secretary comply with any applicable appropriations act provisions. Furthermore, the act authorizes the FEMA Administrator, as of March 31, 2007, to provide emergency-management-related recommendations directly to Congress after informing the Secretary.