

To: National Commission on the BP Deepwater Horizon Oil Spill and Offshore Oil Drilling
From: Professor Jody Freeman, Harvard Law School*
Date: October 13, 2010
Re: Structural Options for Improving MMS/BOEM Decision Making on Offshore Drilling

This memorandum describes structural options for better integrating scientific, engineering and other technical expertise into Minerals Management Service/Bureau of Ocean Energy Management (MMS/BOEM) decisions related to offshore drilling through more robust interagency consultation and independent review by outside experts. Some of these options require new legislation; others might be adopted independently by the executive branch through executive order, agency rulemaking or inter-agency agreement.

I. INTERAGENCY CONSULTATION

A. The Current System

Currently, federal agencies with relevant expertise on the environmental effects of offshore drilling and its associated risks have limited access to and influence over MMS/BOEM decision making throughout the planning, leasing and permitting process under the Outer Continental Shelf Lands Act (OCSLA). A number of statutes require consultation with outside agencies for particular purposes, but the consultation provisions generally are either weak or narrowly limited. The National Environmental Policy Act (NEPA) serves in theory as the umbrella process for soliciting interagency input on the potentially significant environmental effects of offshore drilling, but for a number of reasons this too is limited.

OCSLA itself requires the Secretary of the Interior to invite and consider suggestions from “any interested federal agency” during the development of the five-year plan, but does not require the Department of the Interior (DOI) to respond to these comments, or accord them any particular weight.¹ By contrast, during development of the five-year plan, OCSLA requires the agency to respond and explain itself when deviating from comments by either the states or the Attorney General regarding antitrust conformance.² Under applicable regulations, at the individual lease sale stage, MMS/BOEM must, in consultation with “appropriate federal agencies,” develop measures to mitigate adverse environmental impacts.³ Yet there is no legal mandate requiring MMS/BOEM to adopt in lease stipulations any recommendations made by other agencies, or to explain why they have not. Finally, during the development and production plan stage, “any federal agency” may submit comments and recommendations to the Regional Supervisor within 60 days, but there is no requirement that MMS/BOEM respond to such comments.⁴ The statute requires the

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¹ OCSLA § 18, 43 U.S.C. § 1344(c)(1) (2000). Section 18 of OCSLA identifies a number of factors that the Secretary must consider when proposing a five-year plan, but his decision regarding how to balance those factors is discretionary.

² See OCSLA § 18, 43 U.S.C. § 1344 (c)(2) and (d)(2) (2000).

³ 30 C.F.R. § 256.29(a).

⁴ 30 C.F.R. § 250.267(b).

Secretary of the Interior to “cooperate with the relevant departments and agencies of the Federal Government and of the affected States” in the enforcement of safety, environmental and conservation laws.⁵

In addition, a number of environmental statutes require MMS/BOEM to consult with outside agencies such as the Environmental Protection Agency (EPA), the National Oceanic and Atmospheric Administration (NOAA), and the Fish and Wildlife Service (FWS) at different points in the leasing process prior to drilling.⁶ Yet such consultations typically are for narrow purposes such as ensuring compliance with the Clean Air Act (CAA) permit requirements for offshore rigs⁷ or Clean Water Act (CWA) requirements for discharges of solid or liquid wastes generated by drilling,⁸ or to secure authorization to “take” limited numbers of protected marine mammals.⁹ The strongest of the consultation requirements, Section 7 of the Endangered Species Act (ESA), requires MMS/BOEM to consult with the FWS (in DOI) and National Marine Fisheries Service (NMFS, in the Department of Commerce) to ensure drilling does not “jeopardize” protected species.¹⁰ The jeopardy prohibition gives the two Services significant leverage to require MMS/BOEM to adopt alternatives and conditions that will avoid harm to listed species. Yet even this fairly robust consultation requirement is limited to that specific purpose.

NEPA provides an umbrella process for soliciting interagency input on the potential environmental effects of DOI’s offshore drilling program. Ideally the NEPA process would serve as a forum for pooling federal government expertise not only on the best strategies for mitigating negative impacts on the marine environment, but also for improving safety, reducing operational risk related to drilling, and assessing industry oil spill response plans. It is important to remember, however, that NEPA is a “procedural” statute with no substantive obligations—it requires action agencies to fully disclose environmental impacts, but does not require them to alter their plans in light of that disclosure. NEPA does not require mitigation even when environmental impacts are expected to be severe,¹¹ nor does it require action agencies to provide a “worst case” analysis.¹²

⁵ OCSLA § 5, 43 U.S.C. § 1333(a) (2000).

⁶ Consultations or permits are required under statutes including the Clean Air Act § 328, 42 U.S.C. § 7627 (1990), Clean Water Act § 402, 33 U.S.C. § 1342 (1987), Marine Mammals Protection Act § 104, 16 U.S.C. 1374 (2007), Endangered Species Act § 7, 16 U.S.C. § 1536 (2006), Magnuson Stevens Fishery Conservation and Management Act § 305(b), 16 U.S.C. § 1855 (1976), and Coastal Zone Management Act § 307, 16 U.S.C. § 1456 (1988).

⁷ CAA § 328, 42 U.S.C. § 7627 (1990); 40 C.F.R. § 55.6.

⁸ CWA § 402, 33 U.S.C. § 1342 (1987); 40 C.F.R. § 122.21.

⁹ Marine Mammals Protection Act § 104, 16 U.S.C. 1374 (2007); 50 C.F.R. § 216.104.

¹⁰ ESA § 7, 16 U.S.C. § 1536(a)(2) (1973).

¹¹ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) (holding that NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or to include in each EIS a fully developed mitigation plan). It is well settled that NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed—rather than unwise—agency action.

¹² Under applicable caselaw and regulations, when identifying potentially adverse impacts that could result from a proposed action, an agency must include low probability, high consequence impacts, but only those that are reasonably foreseeable. CEQ addressed this issue in its August 16, 2010 report on MMS’s NEPA practices: “[MMS] did not deem a catastrophic spill, comparable to the BP Oil spill, to be a reasonably foreseeable impact, based on historical information on spills in U.S. OCS waters. Since April 20, 2010, that assumption

NEPA does require MMS/BOEM to analyze the environmental effects of offshore drilling at various stages of the planning, leasing, and exploration and development process, and to prepare environmental impact statements (EISs) where those effects are expected to be significant. Yet the onus is on *other* federal agencies to comment on the EISs and it is their responsibility to press their concerns with MMS/BOEM. MMS/BOEM, however, has no legal obligation to respond directly to federal agency comments. These other federal agencies may be resource constrained, making it challenging for them to participate in the evaluation of environmental impacts to the extent envisioned by NEPA. And while the agencies most likely to file comments under NEPA may possess significant expertise on some matters (e.g., scientific knowledge about the marine environment), they may not possess all of the expertise necessary to evaluate MMS/BOEM's technical prescriptions and risk assessments. Moreover, the timing of interagency input in practice often comes too late to be of maximum benefit—for example in the form of after-the-fact comments on analyses that have already been substantially designed or completed.

There are a number of steps that can be taken to improve the NEPA consultation process. To that end it may be appropriate to recommend reforms along the lines suggested by the Chair of the Council on Environmental Quality and others who have testified before this Commission.¹³ Yet NEPA is inherently limited because it is a procedural statute that requires only disclosure, and because it is not designed primarily to focus on operational integrity of oil and gas drilling.

Beyond the NEPA process, there are limited opportunities for other federal agencies to coordinate with MMS/BOEM on its technical research on drilling operations and its risk assessment methodology related to oil spill and oil spill response, among other things. DOI's new OCS Safety Oversight Board, created on April 30, 2010 by Secretary Salazar, concluded among other things that U.S. Coast Guard officials rarely review Oil Spill Response Plans (OSRP) and are not notified of new submissions, and that EPA currently

will be revised, and BOEM will take steps to incorporate catastrophic risk analysis going forward.” Council on Environmental Quality, Report Regarding the Minerals’ Management Service’s National Environmental Policy Act Policies, Practices, and Procedures as they relate to Outer Continental Shelf Oil and Gas Exploration and Development 27 (2010), *available at* <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100816-ceq-mms-ocs-nepa.pdf> [hereinafter CEQ Report].

¹³ CEQ Report, *id.* recommends a number of reforms including more site-specific analysis, tracking mitigation commitments, ensuring greater transparency, and reconsidering the use of categorical exclusions. In her testimony to the Commission on August 25, 2010, Meg Caldwell, Executive Director of Stanford University’s Center for Oceans Solutions, recommended the following: 1) Amend OCSLA to make safeguarding and restoration of ecosystems a priority; 2) Designate EPA, NOAA, NMFS, NFWS and the Coast Guard as cooperating agencies under NEPA; 3) Amend OCSLA to strengthen interagency consultation requirements, including requirements to consult with sister agencies early and to respond in writing to comments BOEM disagrees with; 4) Amend OCSLA to require more comprehensive environmental review; 5) Amend OCSLA to eliminate or extend the 30-day review deadline for exploration plans; 6) Cease using categorical exclusions; and 7) Give the scientific arm of BOEM autonomy.

has no role in the OSRP process.¹⁴ Currently, MMS/BOEM's Technology Assessment and Research Program (TAR)¹⁵ supports research on operational safety and pollution prevention as well as oil spill response and cleanup capabilities, largely by contracting out studies.¹⁶ There appears to be a lack of institutionalized mechanisms for coordinating this research program with the Department of Energy (DOE) and its national labs, the USGS (even though it is also housed in DOI), and other agencies with potentially relevant expertise, such as the U.S. Coast Guard. Plus, as discussed below in the section on bolstering independent *outside* oversight, there appears to be no independent outside review of this technology program, or how its findings factor into MMS/BOEM regulatory requirements and lease stipulations. The Outer Continental Shelf (OCS) Science Committee, which reviews research sponsored by MMS/BOEM's Environmental Studies Program, does not review the TAR program, and no other outside body with relevant engineering expertise appears to do so.

Greater inter-agency input may help to improve MMS/BOEM decision making and reduce risk by introducing needed expertise and by providing alternative viewpoints from other agencies of the federal government. Options for improving interagency input into MMS/BOEM decision making include: (1) integrating and institutionalizing the current collection of legally required consultation requirements, (2) adding more robust consultation requirements to increase the leverage of outside agencies with relevant expertise, and (3) exerting more centralized White House review of MMS/BOEM OCS decisions. These options are discussed in detail below.

B. Options for Improvement

1. Integrate and Institutionalize Existing Consultation Requirements. The MMS/BOEM offshore leasing process stands to benefit from integrating existing interagency consultation requirements in a more coherent fashion, and institutionalizing them through inter-agency agreements such as Memoranda of Understanding. Ideally, this would help to improve the quality and consistency of the input by documenting how it occurs, clarifying mutual obligations and enhancing accountability. This might also help to identify gaps in expertise, which might be filled by agencies not currently part of the process, or by closer and perhaps earlier cooperation with agencies that are. If nothing else, it would improve transparency if MMS/BOEM were to describe in a single comprehensive document all of the interagency interactions currently required by law and regulation or conducted pursuant to informal practice; identify the stage of leasing at which they occur; and specify their purpose, scope and impact. Without this comprehensive understanding, it is hard to conclude that the combination of these requirements adequately allows interagency input into the full range of

¹⁴ Outer Continental Shelf Safety Oversight Board, Report to the Secretary of the Interior Ken Salazar (Sept. 1, 2010), *available at*

<http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=43677>.

¹⁵ <http://www.boemre.gov/tarhome/>

¹⁶ Established in the 1970's, the program's aim is to ensure that industry operations on the OCS incorporated the use of the Best Available and Safest Technologies (BAST), which were subsequently required through the 1978 OCSLA amendments. TAR operates through two branches: Operational Safety and Engineering Research (OSER) and Oil Spill Response Research (OSRR). Like the agency's Environmental Studies Program discussed later, TAR contracts out research projects to universities and private companies.

environmental, safety and engineering issues raised by offshore drilling, especially in deep water, where risks are greater and technology is still evolving. Notably, institutionalizing current agency practice through MOUs or the equivalent does not require new legislation.

2. *Impose More Robust Consultation Requirements.* Congress sometimes burdens agencies with more than one statutory mission, or with multiple obligations that can conflict.¹⁷ This is true of OCSLA.¹⁸ This is frequently the case with resource management agencies, which find they must adapt their primary pro-production mission to accommodate new environmental protection requirements imposed later by Congress in subsequent amendments or new separate legislation.¹⁹ Historically, agencies faced with multiple and conflicting mandates have tended to prioritize one (usually the pro-production mission) and minimize the other (usually the environmental protection or conservation mission) in the absence of a clear declaration from Congress that they are equally important. For example, the Federal Energy Regulatory Commission (FERC) long ignored its more recent legal obligations to consider environmental impacts when licensing dams, instead prioritizing its original pro-power mission under the Federal Power Act. This changed only when Congress gave the agencies charged with environmental protection and species conservation the right to participate directly in FERC licensing decisions; obligated FERC to provide an explanation when it chose to ignore their recommendations; and required FERC to establish a dispute resolution process to mediate disagreements with other agencies.²⁰ Thus, one way to encourage an action agency to pay greater attention to secondary mandates like environmental protection is to increase the leverage of outside agencies with relevant expertise (for which these mandates are a priority) to play a more robust role in the action agency's decisions.²¹ This may be especially important when an agency is faced with additional legislative mandates and other incentives to favor its pro-production mission over

¹⁷ J.R. DeShazo and Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217 (2005).

¹⁸ The Deputy Director of MMS/BOEM has testified that: "The OCS Lands Act mandates that the 5-Year Program must balance the priorities of meeting national energy needs, ensuring environmentally sound and safe operations, and assuring receipt of fair market value to the taxpayer." Environmental Stewardship Policies Related to Offshore Energy: Hearing before the S. Committee on Energy and Natural Resources, 111th Cong. 2 (2009) (testimony of Walter Cruickshank, Deputy Director, Minerals Management Service).

¹⁹ See DeShazo and Freeman, *supra* note 17; Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1 (2009).

²⁰ DeShazo and Freeman, *id.* at 2226 (citing relevant provisions of the Energy Conservation Policy Act of 1986). See ECPA § 3(c) (codified as amended at [16 U.S.C. § 803\(j\)\(2\)](#)) (requiring FERC to give "due weight to the recommendations, expertise, and statutory responsibilities" of other agencies). Compare FPA, ch. 285, § 10(a), 41 Stat. 1063, 1068 (1920) (codified as amended at [16 U.S.C. § 803\(a\)\(1\)](#)) (exhibiting lack of consultation requirement), with ECPA § 3(b) (codified, in relevant part, as amended at [16 U.S.C. § 803\(a\)\(2\)\(B\), \(a\)\(3\)](#)) (adding consultation requirement).

²¹ Under OCSLA, it is declared to be the policy of the United States that, "the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." OCSLA § 3(3); 43 U.S.C. § 1331. The Secretary of Interior must prepare a five-year OCS leasing program that "will best meet national energy needs." OCSLA § 18(a); 43 U.S.C. 1331. The timing and location of leasing must be based on a consideration of "relative environmental sensitivity" as one among eight considerations with no specification as to the appropriate balance. OCSLA § 18(a)(2)(G); 43 U.S.C. 1331. The Secretary is obligated to select timing and location of leasing, "to the maximum extent practicable, so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone." OCSLA § 18(a)(3); 43 U.S.C. 1331.

other non-production values. This appears to be the case with DOI, which in addition to OCSLA must comply with the Deepwater Royalty Relief Act of 1995 and the Energy Policy Act of 2005 (both of which provide incentives for deepwater drilling).²²

The list of options below represents a continuum of requirements that provide escalating leverage to the outside or “interested” agency. (Statutory examples of each type of provision are noted parenthetically and described in more detail in the appendix.)

Types of Consultation Requirements

- a. Action agency may consult with interested agency (Federal Insecticide, Fungicide and Rodenticide Act (FIFRA))
- b. Action agency must consult with interested agency (Outer Continental Shelf Lands Act; Surface Mining Control Act)
- c. Action agency must consult and coordinate with interested agency to maximum extent practicable (Coastal Zone Management Act (CZMA))
- d. Action agency must consult with and respond to interested agency (FIFRA)
- e. Action agency must consult with and provide reasons for deviating from recommendations of interested agency (Federal Power Act (FPA))
- f. Adoption of recommendations of interested agency is the structural default, unless action agency gives reasons why doing so is inconsistent with its legal duties (FPA)
- g. Interested agency has authority to set standards on a specific topic (Nuclear Waste Policy Act)
- h. Interested agency must concur before action agency can proceed with proposed or pending action (Endangered Species Act; Solid Waste Disposal Act; Natural Gas Act)
- i. Action agency and interested agency are instructed to work jointly to carry out statutory mission (with concurrent and equal say) (CZMA; Federal Public Lands Act)
- j. Same options as above but exercised through a panel of federal agencies

The more robust provisions above provide additional leverage for outside agencies not only during the policy process but later, upon judicial review. If action agencies ignore recommendations with no explanation—in violation of a requirement that they provide one—courts may strike down the decision as arbitrary or capricious. In this sense, a strong consultation provision makes the treatment of outside agencies a relevant consideration for judicial review, and judicial review can in turn strengthen the leverage of the outside

²² The full variety of incentives that favor production over environmental protection are beyond the scope of this memorandum but may include legislation, executive orders (*see, e.g.*, Exec. Order No. 13,211, 3 C.F.R. 767 (2002), *reprinted in* 42 U.S.C. 13,201 (2006)), announced national policies (*see, e.g.*, National Energy Policy Development Group, National Energy Policy (2001)), government accounting rules, private sector financing regimes, and other formal and informal drivers.

agencies. (See the example of the Clean Air Science Advisory Committee and its role in judicial review of CAA standards in the Appendix).

Ideally, such provisions would be adopted through legislation rather than through agency rulemaking. Statutory requirements provide greater stability over time, limit the action agency's discretion and allow for congressional oversight. Nevertheless, DOI has the authority to voluntarily adopt enhanced consultation or leverage-creating requirements through rulemaking.

3. Centralize Oversight through White House Review

OCSLA requires the Secretary of the Interior to submit a proposed final five-year plan for offshore drilling to the President (as well as Congress) sixty days before it is finalized.²³ Before this point, the statute requires no formal review by the White House. Currently, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) does not appear to review five-year plans, lease sales or individual permitting decisions under Executive Order 12,866.²⁴ This may be because none of these actions are considered by OIRA to be "regulatory actions."²⁵ Under Executive Order 12,866, all economically significant regulatory actions (defined as potentially having an impact on the economy of \$100 million) and other "significant" regulatory actions by executive branch agencies must be submitted for OIRA review before becoming final.²⁶ This review mechanism affords the White House a measure of centralized oversight of regulatory actions that could have a significant impact on the economy, or otherwise present issues of special legal or policy significance. The most rigorous review is reserved for *economically* significant regulatory actions for which agencies must submit a detailed cost-benefit analysis, including the underlying analyses (i.e., assumptions and data), and an assessment of reasonable alternatives.²⁷

Most relevant for the Commission's purposes, the OIRA-led review process under Executive Order 12,866 affords White House policy offices and councils as well as interested agencies an opportunity to comment on, and propose revisions to, other agencies' rules.²⁸ Thus, the OIRA review process can be a high-level executive branch forum for

²³ OCSLA § 18(d)(2); 43 U.S.C. 1331.

²⁴ A review of OMB's website (www.reginfo.gov) finds no indication that OMB reviews five-year plans or leasing and permitting decisions.

²⁵ Exec. Order No. 12,866 § 3, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2006) defines regulatory actions as "expected to lead to the promulgation of a final regulation" The Order defines a Regulation as "an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy." A "significant" regulatory action is defined as "likely to result in a regulation that may: (1) Have an annual effect on the economy of \$100 million or... (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set out in this Executive Order..." The D.C. Circuit treats five-year plans as a separate category of action from traditional rulemaking or adjudication, and reviews them under a special hybrid standard of review. *See, e.g., Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 484 (D.C. Cir. 2009).

²⁶ Exec. Order No. 12,866, *id.* at § 6(a)(3)(A)-(C).

²⁷ *Id.* at § 6(a)(3)(C).

²⁸ OIRA's duty under the Executive Order is to "provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities...and do not conflict with the policies or actions of another agency." *Id.* at § 6(b).

federal agencies to raise concerns about actions being contemplated by their sister agencies. This may be a useful model on which to draw.

Arguably, OIRA already possesses the authority under Executive Order 12,866 to review DOI five-year plans. Five-year plans conceivably fall within the Order's broad definition of "regulatory actions" that are expected to lead to "regulation." By way of precedent, the General Accountability Office has classified similar agency actions—such as National Forest Land and Resource Management Plans—as regulations subject to the Congressional Review Act (which adopts virtually the same definition of "regulation" as Executive Order 12,866).²⁹ And if five-year plans are regulatory actions under the terms of the Executive Order, they are surely economically significant and thus subject to full cost-benefit analysis. Pursuant to Executive Order 12,866 and under subsequent OMB Circulars, Bulletins and Memos, OIRA has asserted expansive discretion to review a broad category of agency actions. Even if reviewing five-year plans were considered beyond the scope of OIRA's current regulatory review authority, a new Executive Order could grant such authority.

There are pros and cons to extending the well-established OIRA regulatory review process to DOI planning regarding the OCS. Ideally, such review could serve as a useful vehicle for (a) better coordinating interagency consultation on the impacts of offshore drilling, and (b) improving the underlying analytic basis of MMS/BOEM decisions. Yet because OIRA has historically focused primarily on cost-benefit analysis, its expertise is targeted to that task. As a result, the current regulatory review process may not be optimally suited to reviewing risk assessment, operational design, spill response and other technical elements of drilling plans, or to fostering inter-agency collaboration in particular. Presumably, however, a review process could be designed specifically for such purposes and conceivably overseen by a different White House office such as CEQ. Still, while centralized review by OIRA or any another White House office might have significant benefits, it is also likely to be resource intensive and politically contentious. These are important considerations for the Commission.

II. INDEPENDENT OUTSIDE EXPERTISE

A. The Current System

At the same time, MMS/BOEM could benefit from greater input and oversight from non-governmental bodies with relevant expertise on technical and engineering aspects of offshore drilling. MMS/BOEM currently consults with three advisory committees chartered under the Federal Advisory Committee Act (FACA)³⁰—the Outer Continental Shelf Science Committee (Scientific Committee),³¹ the Outer Continental Shelf Policy Committee (Policy Committee),³² and the Royalty Policy Committee.³³ Yet only one of these—the

²⁹ See Morton Rosenberg, Cong. Research Serv., Report No. RL30116, Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act after a Decade 26-27 (2008), <http://www.fas.org/sgp/crs/misc/RL30116.pdf> (discussing agency actions referred to the Comptroller General for determinations as to whether they were "regulations" subject to congressional review under the CRA).

³⁰ Federal Advisory Committee Act §§ 1-16 FACA, 5 U.S.C. app. 2 §§ 1-16 (2008).

³¹ <http://www.boemre.gov/mmab/ScientificCommittee/ocssc.htm>.

³² The Policy Committee, <http://www.boemre.gov/mmab/PolicyCommittee/pcnew.htm>, "provides advice to the Secretary of Interior through the Director of the [MMS] related to the discretionary functions of the Bureau under the [OCSLA]." OCSPC: Annual Committee Report, FACA Database, *available at* <http://www.fido.gov/facadatabase/search.asp> (Committee name must be input manually). It is comprised of

Scientific Committee—consists of members with scientific expertise drawn primarily from academia,³⁴ and its duties are narrowly limited to evaluating the quality of research proposals eligible for funding by the agency’s Environmental Studies Program (ESP).³⁵

three federal members from DOI, and one each from DOC, DOD, DOE, State, EPA and USCG. Non-federal members include representatives of each state with offshore oil and gas interests, and up to seven members representing a variety of stakeholder constituencies, six of which are from the oil and gas industry. OCS Policy Committee Members (as of March 1, 2010), *available at* <http://www.boemre.gov/mmab/PDF/OCSPCMembershipList.pdf>; *see also* OCSPC: Annual Committee Report, *supra*.

³³ There are other advisory committees providing advice on offshore drilling to both the Coast Guard and DOE, but their role is constrained due to the narrow scope of their charge, their composition, or both. For example, the National Offshore Safety Advisory Committee (NOSAC) “makes recommendations, performs studies, and produces reports... [that] influence the development of [DHS] and Coast Guard regulations and policies affecting the offshore industry.” NOSAC: Annual Committee Report, FACA Database, *available at* <http://www.fido.gov/facadatabase/search.asp> (Committee name must be input manually); *see also* NOSAC website, <http://www.uscg.mil/hq/cg5/cg522/cg5222/nosac.asp>. This year NOSAC submitted seven recommendations to the USCG on topics related to the safety of offshore vessels, including final reports on Evacuation and Medical Treatment of Injured Workers from OCS Facilities. NOSAC is comprised of up to 15 members with “expertise, knowledge and experience regarding the technology, equipment and techniques that are used, or are being developed for use in the exploration for and the recovery of offshore mineral resources.” NOSAC: Annual Committee Report, *supra*. Fourteen of its fifteen members are appointed as “representatives”—meaning they are not subject to conflict of interest reviews. Nearly all members represent industry (Transocean, Caterpillar, and Global Industries are among the represented). *See* NOSAC website, *supra*; NOSAC: Annual Committee Report, *supra*. The Ultra-Deepwater Advisory Committee (UDAC) advises the Secretary of Energy on “development and implementation of programs related to ultra-deepwater” oil and gas drilling (deeper than 500 meters). <http://fossil.energy.gov/programs/oilgas/advisorycommittees/UltraDeepwater.html>. Its mission is focused on promoting off-shore drilling. Section 999 of the Energy and Policy Act of 2005, under which UDAC was created, explicitly charges DOE with “maximiz[ing] the value of natural gas and other petroleum resources of the United States, by increasing the supply of such resources...” 42 U.S.C. § 16372. While DOE is to do so “while improving safety and minimizing environmental impacts,” *id.*, the starting point of the committee is to facilitate, not impede, drilling. Membership on UDAC is comprised largely of industry representatives (e.g., Shell, ExxonMobil, and Transocean) with no discernible representation of environmental interests. UDAC website, *supra*; *see also* UDAC: Annual Committee Report, FACA Database, *available at* <http://www.fido.gov/facadatabase/search.asp> (Committee name must be input manually).

³⁴ Twelve of sixteen committee members are from academia, including five experts in socio-economics and seven in oceanography and related sciences. The remaining four members are the Director of MMS (ex officio), the Director of Conservation Advocacy at the American Bird Conservancy, a representative of the State of Alaska’s Department of Fish and Game, and a research associate at ExxonMobil. Outer Continental Shelf Scientific Committee: Members, Revised October 6, 2009, *available at* <http://www.boemre.gov/mmab/PDF/OCSScientificCommitteeMembership100609Rev2.pdf>.

³⁵ The Environmental Studies Program “was initiated in 1973 to support [DOI’s] offshore oil and gas leasing program.” <http://www.boemre.gov/eppd/sciences/esp/OurStory.htm>. The ESP engages in a wide variety of ocean research projects, some of which are conducted in conjunction with NOAA. *See generally* the ESP Information System, available at <https://www.gomr.mms.gov/homepg/espis/espisfront.asp>, for summaries of research projects and full research reports. The Science Committee reviews and advises MMS on the “feasibility, appropriateness, and scientific value” of proposed research topics. *See* OCSSC website, *supra* note 31. Almost all ESP projects are then contracted out to other entities. *See* ESP Information System, *supra*. A 1990 review of the program by the National Research Council (notably prior to the dramatic expansion of deepwater drilling between 1995 and the present) concluded that ESP research would benefit from improved modeling, verification in light of field studies, and peer review. National Research Council, Assessment of the U.S. Outer Continental Shelf Environmental Studies Program, Volumes I-III (1990, 1992), *available at* http://www.nap.edu/catalog.php?record_id=1609 (Volume I),

Notably, the Scientific Committee does not review research produced by MMS's TAR program. Thus, there appears to be no wholly independent expert check on a number of important and highly consequential decisions made by the agency as it prescribes performance standards; specifies prescriptive standards; determines what qualifies as "best and safest technology;" engages in risk assessment; and evaluates industry proposals to ensure compliance with relevant rules, among other things. DOI's newly established Outer Continental Shelf Safety Oversight Board recently concluded, among other things, that MMS/BOEM's regulations lag behind available technology, and that oil spill response plans are not adequately assessed by the agency.³⁶

B. Options for Improvement

1. Establish an Expert Advisory Board

The Commission may wish to recommend the creation of a new independent advisory board consisting of experts on engineering, safety and risk assessment, with the authority to review and make recommendations regarding MMS/BOEM planning, leasing and permitting decisions on the OCS, including the agency's standards for operational safety. The Board might be designed in a variety of ways, but ideally would be structured to ensure maximum independence and integrity. There are useful models for such an Advisory Board, including the Nuclear Waste Technical Review Board, the Clean Air Science Advisory Committee, and the independent National Transportation Safety Board, which are described in detail in the Appendix. Below are salient design features that emerge from a review of these and similar boards.

Key design features for effective technical/scientific advisory boards:

- Members chosen based solely on relevant subject matter expertise
- Independence from agency and other political control
- Independent staff and budget³⁷
- Tailored charter³⁸
- Authority to take up matters of own initiative
- Authority to review draft work product
- Reports to agency head and Congress
- Conflict of interest requirements, waivable in rare circumstances

http://www.nap.edu/catalog.php?record_id=1963 (Volume II), and
http://www.nap.edu/catalog.php?record_id=2062 (Volume III).

³⁶ OCS Safety Oversight Board report, *supra* note 14 at 25.

³⁷ It may be advisable to insulate the board's budget from political vulnerability e.g., allocate budget as a percentage share of appropriations for a popular program or as share of overall departmental budget.

³⁸ For example, the charge might specify that the committee's purpose is "to ensure that the agency's regulations remains consistent with technological developments, that oil spill response plans are adequately assessed and that risk assessment methodologies are sound."

- Agency required to respond
- Exempt from some FACA requirements

The design features above are characteristic of advisory boards that, according to available information, have significant independence and technical expertise and are widely regarded as relatively effective.

One key consideration in designing review boards is whether to exempt them from the FACA. FACA applies to all committees formed by statute, the president or by federal agencies to advise the executive branch, with some exceptions.³⁹ Committees must have a defined purpose; have a “fairly balanced” membership; exercise independent judgment; and have specified durations, reporting dates, appropriations, and publication details.⁴⁰ Unless Congress provides otherwise or a FOIA exemption applies, all committees must be open to the public; keep minutes; make minutes, drafts, and other committee materials available to the public; and be chaired, attended, and approved by a member of the federal government.⁴¹

In 1997, Congress amended FACA to clarify that National Academy of Sciences (NAS) committees are exempt from FACA’s requirements. Instead, the FACA amendments specified a handful of separate and more permissive guidelines that now govern NAS committees in lieu of the traditional FACA provisions. Pursuant to FACA section 15, NAS committees are not under government control.⁴² In addition, NAS must make its best effort to avoid member conflicts of interest; committee membership must be fairly balanced; and the committee must exercise independent judgment.⁴³ NAS committees are not subject to the full set of transparency requirements imposed on other advisory committees. Meetings to gather data from outside of the Academy are generally open to the public (unless exempt under FOIA) as are the materials presented at such meetings. For meetings that are not “data gathering” meetings, the Academy provides only a summary of the meeting to the public.

FACA has been praised for, among other things, improving public access to government advisory bodies; exposing regulatory agencies to a broad set of viewpoints; producing consensus decisions; and bolstering credibility.⁴⁴ Yet FACA requirements also have been subject to a number of criticisms. For example, the mandatory balancing of interests in committee composition can undermine committee expertise by prioritizing the search for institutional/group affiliation over the search for the best qualifications.⁴⁵ Agencies have been criticized for doing an inadequate job of avoiding bias in appointments, which can jeopardize committee credibility.⁴⁶ Under GSA regulations, committee members may be appointed as

³⁹ *Id.* at §§ 3(2), 4.

⁴⁰ *Id.* at §§ 5(b)(1-5), 5(c).

⁴¹ *Id.* at § 10.

⁴² *Id.* at § 15.

⁴³ *Id.*

⁴⁴ See Kevin D. Karty, *Membership Balance, Open Meetings, and Effectiveness in Federal Advisory Committees*, 35 AM. REV. PUB. ADMIN. 414 (2005); Sidney A. Shapiro, *Public Accountability of Advisory Committees*, 1 RISK: ISSUES HEALTH & SAFETY 189 (1990).

⁴⁵ See Karty, *id.* at 418; Shapiro, *id.* at 194.

⁴⁶ U.S. Government Accountability Office (formerly the General Accounting Office), *Federal Advisory Committee Act: Issues Related to the Independence and Balance of Advisory Committees* 7 (2008), available at <http://www.gao.gov/new.items/d08611t.pdf> [hereinafter U.S. GAO 2008].

“special government employees” (SGEs) or as “representatives.” Representatives are aligned with particular stakeholder groups and are expected to present a biased account and they are not screened for conflicts of interest. By contrast, SGEs are experts expected to provide their best judgment and must pass a conflict review. Studies suggest that stakeholder representatives have been “inappropriately appoint[ed]” to scientific and technical advisory committees.⁴⁷ Agencies have also been criticized for failing to adequately screen members for conflicts of interest.⁴⁸

While open meetings have certain benefits, they also have been faulted for creating an atmosphere that stifles debate—indeed this was a central contention of NAS when seeking exemption from FACA.⁴⁹ Open meeting requirements may negatively impact NAS’s ability to recruit committee participants. Interviews with NAS committee members confirmed that they would be less likely to serve if NAS meetings were required to be open.⁵⁰ Assigning appointment power exclusively to the agency seeking advice, or the President, may increase the likelihood that the committee will be influenced unduly by the authorizing entity (this was a central objection of NAS when seeking exemption from FACA—NAS thought sole authority to appoint members was necessary for independent work product).⁵¹ NAS has also expressed concern about the FACA mandate that each committee be chaired by a government employee who must be present at and approve every meeting, and can adjourn meetings at will.⁵²

The Nuclear Waste Technical Review Board (NWTRB) is a useful example of an independent expert committee, comprised of members screened by NAS, selected solely for their technical expertise, and not subject to all of FACA’s requirements (see detailed description in Appendix).

2. Enlist the National Academy of Engineering

The Commission may wish to recommend an ongoing review and advisory role for the National Academy of Engineering (NAE) in particular. Any such role would need to be carefully structured to ensure consistency with the congressional charter for the National Academies.⁵³

⁴⁷ *Id.* at 7, 9.

⁴⁸ U.S. General Accounting Office, *Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance* (2004), available at <http://www.gao.gov/new.items/d04328.pdf> [hereinafter U.S. GAO 2004].

⁴⁹ U.S. General Accounting Office, *Federal Research: The National Academy of Sciences and the Federal Advisory Committee Act* 2, 6 (1998), available at <http://www.gao.gov/archive/1999/rc99017.pdf> [hereinafter U.S. GAO 1998].

⁵⁰ *Id.* at 6.

⁵¹ *Id.* at 2, 6.

⁵² U.S. GAO 2008, *supra* note 46 at 4; U.S. GAO 1998, *supra* note 49 at 6-7; U.S. General Accounting Office, *Federal Advisory Committee Act: Overview of Advisory Committees Since 1993* (Testimony before the Subcommittee on Government Management, Information, and Technology Committee on Government Reform and Oversight House of Representatives) 6 (1997), available at <http://www.gao.gov/archive/1998/gg98024t.pdf>.

⁵³ An Act to Incorporate the National Academy of Sciences, 12 Stat. 806 (1863), text available at http://www.nasonline.org/site/PageServer?pagename=ABOUT_incorporation.

The NAE is a private, independent non-profit organization comprised of 2000 peer elected members. Among the purposes listed in its Articles of Organization is to “advise the Congress and the executive branch of the government, whenever called upon by any department or agency thereof, on matters of national import pertinent to engineering.”⁵⁴ In addition, the NAE conducts independent studies on important topics in engineering and technology (including several section areas related to energy and the environment).⁵⁵

The NAE advises the government through committees of its members (who are uncompensated). These committees are subject to § 15 of FACA, which includes requirements that the committee composition be subject to notice and comment; that the committee be fairly balanced and designed to avoid conflicts of interest; that “data gathering” meetings be open to the public; and that for all other meetings a summary of activities be made public, as noted above.

On May 11th, Secretary Salazar announced the formation of an NAE committee to study the Deepwater Horizon oil spill.⁵⁶ This committee is tasked with “conduct[ing] an independent, technical investigation to determine the root causes of the Deepwater Horizon disaster so that corrective steps can be taken to address the mechanical failures underlying the accident.”⁵⁷ Its first report is due to DOI by October 31, 2010. The second and final report is due June 1, 2011.

It is possible to imagine the NAE providing ongoing independent review of MMS/BOEM’s technical and engineering analyses relevant to offshore drilling. NAE might be asked to compose a committee that would periodically identify and recommend available technology, industry best practices, best available standards, and other measures both in the U.S. and worldwide that would help reduce operational risk and mitigate the likelihood of future oil spills. The committee’s charter might be framed more narrowly or more broadly. Either the Director of MMS/BOEM or the Secretary of the Interior might be required to consider the recommendations, respond to them, and/or justify deviations from them. Requiring such an

⁵⁴ Articles of Organization of the National Academy of Engineering, Article II(3), *available at* <http://www.nae.edu/cms/7874.aspx>.

⁵⁵ The National Academy of Sciences (NAS) established the National Academy of Engineering (NAE) as an independent organization on December 5, 1964. *See* NAS Const. art. II, § 9; Cochrane, Rexmond C., *The National Academy of Sciences: the first hundred years, 1863-1963* 571 (1978). Both academies now operate under the original 1863 Congressional charter signed by President Lincoln, *see supra* note 53. All current committees functioning under the auspices of the National Academies are listed and described at www8.nationalacademies.org/cp/.

⁵⁶ *See* Press Release, U.S. Department of the Interior, Salazar Launches Safety and Environmental Protection Reforms to Toughen Oversight of Offshore Oil and Gas Operations (May 11, 2010), *available at* <http://www.doi.gov/news/pressreleases/Salazar-Launches-Safety-and-Environmental-Protection-Reforms-to-Toughen-Oversight-of-Offshore-Oil-and-Gas-Operations.cfm>.

⁵⁷ Specifically, the committee will begin by examining the technologies and practices “involved in the probable causes of the explosion.” After that inquiry, the committee is tasked with identifying and recommending “available technology, industry best practices, best available standards, and other measures” both in the US and worldwide that will help avoid future spills. This project is being implemented through the National Research Council and is intended to supplement the USCG and MMS investigations. *See* Project Information: Analysis of Causes of the Deepwater Horizon Explosion, Fire, and Oil Spill to Identify Measures to Prevent Similar Accidents in the Future, *available at* <http://www8.nationalacademies.org/cp/projectview.aspx?key=49246>.

advisory committee to report to both the Secretary of the Interior and Congress would raise the visibility of the committee's recommendations.

Most National Academies committees currently in effect do not serve as perfect models for such a role. Most have durations between 6 and 24 months, with very few extending beyond that; none appear to be of indefinite duration.⁵⁸ Most committees focus on discrete subjects or provide site-specific analyses.⁵⁹ One potential model is the Research and Technology Coordinating Committee, which advises the Federal Highway Administration. Rather than focusing on a discrete problem, issue or location, the committee is tasked with providing “guidance on highway research and technology programs and activities and mak[ing] broad-based research priority recommendations” to the FHWA.⁶⁰ Other models, based on existing committees that review technical standard setting, may exist as well. There are a variety of options for framing the scope of the work—presumably an appropriate charge could be developed in consultation with the NAE.

3. Bolster Internal Engineering Capacity of MMS/BOEM

There may be more direct mechanisms for bolstering internal MMS/BOEM expertise on operational safety, which do not rely on input from other agencies or outside experts. For example, higher pay, more senior level government appointments, stronger professional criteria and ongoing training would help to increase the engineering competence within the agency to bring it closer to par with industry. In addition, MMS/BOEM functions might be restructured or reallocated to enable the engineering staff to focus on operational integrity to the exclusion of other tasks, and free of political interference. Some have suggested removing some or all of MMS/BOEM's current responsibilities from DOI and housing them in a new independent agency. There are pluses and minuses to creating independent agencies. These agencies are typically structured as multi-member boards or commissions that make decisions by majority vote with members removable by the president only for cause, rather than at his discretion. As a result, they are not subject to executive control. It is also possible to insulate an expert body *within* an executive agency to enhance its internal independence. The relative strengths and weaknesses of different bureaucratic structures now being proposed for the several MMS/BOEM functions is beyond the scope of this memorandum, but regardless of the structure chosen, improving engineering competence and bolstering the independence of safety managers are crucial issues.

⁵⁸ Non-academy advisory committees appear, on average, to be renewed indefinitely. *See generally* GSA's FACA Database, *available at* www.fido.gov/facadatabase/search.asp.

⁵⁹ *See, e.g.*, Project Information: Evaluation of a Site-Specific Risk Assessment for the Department of Homeland Security's Planned National Bio- and Agro-Defense Facility in Manhattan, Kansas, *available at* <http://www8.nationalacademies.org/cp/projectview.aspx?key=49194>.

⁶⁰ The committee's broad scope also includes technology transfer, ways to increase state/local/private participation in highway research, and “economic, social, energy, and environmental issues as they influence highway research policy and programs.” The committee meets three times a year. It typically produces “letter reports” to the FHWA, though on occasion it produces more extensive reports. *See* Project Information: Research and Technology Coordinating Committee, *available at* <http://www8.nationalacademies.org/cp/projectview.aspx?key=154>.

APPENDIX

Examples of Provisions Affording Outside Agencies Leverage

a. Action agency may consult with interested agency

Federal Insecticide Fungicide and Rodenticide Act (FIFRA): Administrator of the EPA is authorized, but not required, to consult with other federal agencies in determining whether to register pesticides for use and distribution. 7 U.S.C. 136a(f) (“In connection with consideration of any registration or application under this section [“Registration of pesticides”], the Administrator *may* consult with any other Federal agency”) (emphasis added).

b. Action agency must consult with interested agency

Outer Continental Shelf Lands Act (OCSLA): “During the preparation of any proposed leasing program under this section,” The Secretary of the Interior “shall invite and consider suggestions from any interested Federal agency.” 43 U.S.C. 1344(c)(1).

Surface Mining Control and Reclamation Act: Along with other duties of the Secretary of the Interior acting through the Office of Surface Mining Reclamation and Enforcement, the Secretary of the Interior “shall...consult with other agencies of the Federal Government having expertise in the control and reclamation of surface mining operations, and assist States, local governments, and other eligible agencies in the coordination of such programs.” 30 U.S.C. 1211(c)(6).

c. Action agency must consult and coordinate with interested agency to the maximum extent practicable

Coastal Zone Management Act (CZMA): In carrying out “functions and responsibilities under this chapter,” which include reviewing and approving state coastal zone management plans, the Secretary of Commerce “shall consult with, cooperate with, and to the maximum extent practicable, coordinate his activities with other interested Federal agencies.” 16 U.S.C. 1456(a). The statute is silent as to what constitutes an “interested” agency.

d. Action agency must consult with and respond to interested agency

FIFRA: In addition to soliciting the views of the Secretary of Agriculture and the Secretary of Health and Human Services before publishing regulations under FIFRA, 7 U.S.C. 136s(a), “if the Secretary [of Agriculture] comments in writing to the Administrator regarding [the proposed or final regulation]” within 30 days of receiving a copy of the proposed regulation or 15 days of receiving the final form of the regulation, “the Administrator shall publish in the Federal Register ...the comments of the Secretary and the response of the Administrator.” 7 U.S.C. 136w(a)(2)(A), (B). This requirement may be seen as ensuring that the action agency (here the EPA) actually give some weight and consideration to the views submitted by consulting agencies.

- e. Action agency must consult with and provide reasons for deviating from recommendations of interested agency

OCSLA: Within 60 days after notice of a proposed lease sale or receipt of a development and production plan, “any Governor of any affected State or the executive of any affected local government in such State may submit recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan....” 43 U.S.C. § 1344(a) and (b). “The Secretary shall communicate to the Governor, in writing, the reasons for his determination to accept or reject such Governor’s recommendations....” 43 U.S.C. § 1344(c).

Federal Power Act (FPA): In granting an exemption pursuant to 16 U.S.C. 823a (a), governing exemptions from water power regulation policies, FERC “shall consult with the United States Fish and Wildlife Service and National Marine Fisheries Service” and “shall include in any such exemption...such terms and conditions as the Fish and Wildlife Service and National Marine Fisheries Service...determine are appropriate to prevent loss of, or damage to, such resources.” 16 U.S.C. 823a(c).

- f. Adoption of recommendations of interested agency is the structural default, unless action agency gives reasons why doing so is inconsistent with its legal duties

FPA: “Upon receipt of an application for a license,” FERC “shall solicit recommendations” from federal agencies that have authority to prepare waterway development and conservation plans or that “exercis[e] administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located.” 16 U.S.C. 803(a)(2-3). Licenses must also include conditions “for protection, mitigation, and enhancement” of fish and wildlife, based on recommendations from FWS and NMFS. 16.U.S.C. 803(j)(1). If FERC believes the recommendation conflicts with its purposes under the act, it “shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies.” 16 U.S.C. 803(j)(2). If FERC declines to adopt a recommendation, it “shall” publish its findings that the recommendations conflict with its duty, along with a “statement of the basis for each of the findings.” *Id.*

- g. Interested agency has authority to set standards on a specific topic and action agency must ensure their criteria are “not inconsistent.”

Nuclear Waste Policy Act: EPA “shall, by rule, promulgate generally applicable standards for protection of the general environment from offsite releases from radioactive materials in repositories.” 42 U.S.C. 10141(a). The standards and criteria set by the Nuclear Regulatory Commission for approving repository applications “shall not be inconsistent with any applicable standards promulgated by [the EPA].” 42 U.S.C. 10141(b)(1)(C).

- h. Interested agency must concur before action agency can proceed with proposed or pending action.

Endangered Species Act (ESA): “Each federal agency shall, in consultation with the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of the endangered species or threatened species, or result in the destruction or adverse modification of [habitat listed as critical to the species by the Secretary].” 16 U.S.C. 1536(a)(2). Following the consultation, the Secretary “shall provide to the Federal agency...a written statement setting forth the Secretary’s opinion [as to whether the action agency’s action is likely to jeopardize the species or adversely modify habitat and thus violate the statute]” and “if jeopardy or adverse modification is found...shall suggest those reasonable and prudent alternatives” through which the agency can lawfully proceed with the action. 16 U.S.C. 1536(b)(3)(A).

Solid Waste Disposal Act (SWDA): While the Secretary of the Interior has “exclusive responsibility for carrying out any requirement” of the statute’s hazardous waste management provisions “with respect to coalmining wastes or overburden for which a surface coal reclamation permit is issued or approved under the Surface Mining Control Act,” the Secretary shall nonetheless obtain “concurrence of the Administrator [of the EPA]” in order to “promulgate such regulations as may be necessary to carry out” the general provisions of the Act and integrate such regulations with those promulgated under the Surface Mining Control Act. 42 U.S.C. 6905(c)(2).

Natural Gas Act: The Federal Power Commission “shall obtain the concurrence of the Secretary of Defense before authorizing the siting, construction, expansion, or operation of liquefied natural gas facilities affecting the training or activities of an active military installation.” 15 U.S.C. 717b(f).

- i. Action agency and interested agency are instructed to work jointly to carry out statutory mission (with concurrent and equal say)

CZMA: Under 16 U.S.C. 1455b(c)(1), the Secretary of Commerce and Administrator of the EPA “shall jointly review” a state’s submitted coastal protection program. A state plan will be approved if “the Secretary determines that the portions of the program under the authority of the Secretary meet the requirements of this section and the Administrator concurs with that determination” *and* “the Administrator determines that the portions of the program under the Authority meet the requirements of this section and the Secretary concurs with that determination.” *Id.*

Federal Public Lands Act: 43 U.S.C. 1748b(a) states that “the Secretary of the Interior and the Secretary of Agriculture, acting jointly shall submit to Congress a report that contains a cohesive wildfire management strategy.”

j. Same options as above but exercised through a panel of federal agencies

SWDA: SWDA establishes an Interagency Coordinating Committee on Federal Resource Conservation and Recovery Activities, “which shall have the responsibility for coordinating all activities dealing with resource conservation and recovery from solid waste carried out by the Environmental Protection Agency, the Department of Energy, the Department of Commerce, and all other Federal agencies which conduct such activities pursuant to this chapter or any other Act.” 42 U.S.C. 6911(b)(1). The Committee is chaired by the Administrator of the EPA, which is the principal action agency for the statute, and includes representatives from DOE, DOC, and the Treasury, along with “each other Federal agency which the Administrator determines to have programs or responsibilities affecting resource conservation or recovery.” *Id.* The Committee is given specific authority to oversee implementation of interagency MOUs pertaining to Federal resource conservation and recovery activities. 42 U.S.C. 6911(b)(2).

Toxic Substances Control Act (TSCA): The interagency committee established by TSCA is explicitly assigned an advisory role: “to make recommendations to the Administrator [of EPA] respecting the chemical substances and mixtures to which the Administrator should give priority consideration for promulgation of a rule...” 15 U.S.C. 2603(e)(1). The committee consists of one member of the EPA, and members of seven other federal bodies. 15 U.S.C. 2603(e)(2)(A).

ESA: The Endangered Species Committee (ESC) established by 16 U.S.C. 1536(e) provides greater influence than the TSCA or SWDA committees because it allows a multi-agency committee to grant a wholesale exemption from the protections of the statute as administered by the action agency (here, the DOI): “The Committee shall review any application submitted to it...and determine in accordance with...this section whether or not to grant an exemption.” 16 U.S.C. 1536(e)(2). However, the ESC does not remove the action agency from the decision-making process entirely, because the Committee itself includes the Secretary of the Interior. Further, decisions to grant an exemption are made based on a report prepared by DOI. 16 U.S.C. 1536(g)(5).

Examples of Advisory/Independent Boards

Nuclear Waste Technical Review Board

Mission: The NWTRB was created by the Nuclear Waste Policy Amendments Act of 1987 (NWPAA) and charged with “evaluating the technical and scientific validity” of DOE’s plans for disposing of civilian spent nuclear fuel and defense high-level radioactive waste.⁶¹

Salient Design Features:

- Independent
- Members appointed by the president from list supplied by the NAS
- Not subject to FACA’s open meetings requirement⁶²
- Members must be “eminent” in science or engineering, and selected “solely” on basis of established records of distinguished service⁶³
- Must represent broad range of relevant scientific and engineering disciplines (rather than balance of stakeholders typical of FACA committees)
- Members may not be employees of DOE, a national lab under contract with DOE, or an entity performing nuclear waste disposal under contract with DOE
- Reports to the Secretary of DOE and Congress
- Independent staff and budget⁶⁴
- Requirement that Secretary provide the Board with records as may be necessary, including draft work product

Evaluation: Anecdotal evidence suggests that the NWTRB is generally well-regarded. The NWTRB itself acknowledges that it cannot compel DOE to act. Its annual report evaluates its performance by asking whether it undertook the work necessary to evaluate the technical and scientific validity of relevant DOE activity, and whether the results of the NWTRB’s evaluation were communicated in a “timely, understandable, and appropriate way” to Congress, the Secretary of Energy, and others. The year-end report tracked all instances

⁶¹ The NWPAA directed DOE to focus on Yucca Mountain so the NWTRB has until recently been concerned almost exclusively with reviewing and making recommendations for that site. In practice, the Board’s activities include meeting with DOE, DOE contractors, and Board panels; small group fact-finding focused on in-depth technical topics; review of “critical technical documents” from DOE and contractors, including “pre-closure safety analyses,” contractor reports, and design drawings; and visits to Yucca Mountain to observe progress at the site. See NWTRB Fiscal Year 2008 Performance and Accountability Report (PAR) 1-2 (Nov. 17, 2008), available at <http://www.nwtrb.gov/plans/fy2008par.pdf>; see generally www.nwtrb.gov.

⁶² The Board is an independent agency—not subject to FACA—and has no statutory requirements with regard to open meetings or public documents. 42 U.S.C. §§ 10261-10270. However, information on the NWTRB suggests that its meetings are open to the public and its reports, correspondence, meeting transcripts and other materials are publicly available on its website, see www.nwtrb.gov.

⁶³ 42 U.S.C. § 10262(C)(i).

⁶⁴ The Act allows the Chairmen to appoint clerical staff as necessary and up to 10 professional staff. 42 U.S.C. § 10266.

where both criteria were met; the review was largely favorable.⁶⁵ A 2001 law review article noted that the DOE prepared its report, “Principles and Guidelines for Formal Use of Expert Judgment by the Yucca Mountain Site Characterization Project,” at the recommendation of the NWTRB.⁶⁶ Stanford professor, and former Board member, D. Warner North noted in comments on OMB’s proposed guidelines for peer review that NWTRB (along with the EPA’s Science Advisory Board and the National Research Council) do an “exemplary job of meeting the need for federal agency peer review.”⁶⁷ Finally, media and non-governmental organizations appear to take the Board seriously: Public Citizen called the NWTRB “a rare source of unbiased technical review of the controversial Yucca Mountain proposal, which in other respects has been highly politicized and inappropriately influenced by the powerful nuclear industry lobby.”⁶⁸ The Las Vegas Review-Journal referred to the Board as “highly regarded as an independent voice in nuclear waste science debates.”⁶⁹

Clean Air Scientific Advisory Committee (CASAC)

Mission: The Clean Air Act (CAA) requires that every five years, the CASAC complete a review of the national ambient air quality standards for the six criteria air pollutants regulated by EPA under the Act, and provide its advice and recommendations to the EPA Administrator.⁷⁰

Salient Design Features:

- Although one of ten standing committees administered by the EPA Science Advisory Board,⁷¹ CASAC is independently chartered and so reports directly to the EPA Administrator

⁶⁵ See *supra* note 61.

⁶⁶ Patricia Fleming, *Examining Recent Expert Elicitation Judgment Guidelines: Value Assumptions and the Prospects for Rationality*, 12 RISK: ISSUES HEALTH & SAFETY 107, 109 (2001).

⁶⁷ D. Warner North, Comments on OMB Proposed Guidelines for Peer Review (submitted to OMB Oct. 28, 2003), available at <http://www.whitehouse.gov/sites/default/files/omb/inforeg/2003iq/11.pdf>.

⁶⁸ This arose in the context of a controversial Chair appointment whose expressed support for the Yucca Mountain plan was perceived to undermine the impartiality of the Commission; he eventually resigned. Lisa Gue, “New Chair of Key Nuclear Review Board Prompts Concerns About Objectivity on Yucca,” Public Citizen, available at http://www.citizen.org/cmep/article_redirect.cfm?ID=8903.

⁶⁹ Steve Tetreault, “Reid targets nuke board chief,” Las Vegas Review-Journal, Jan. 29, 2003, available at http://www.reviewjournal.com/lvrj_home/2003/Jan-29-Wed-2003/news/20576601.html.

⁷⁰ CAA § 109(d)(2), 42 U.S.C. § 7409(d)(2) (2008).

⁷¹ EPA’s Science Advisory Board (SAB), established in 1978 under the Environmental Research, Development, and Demonstration Authorization Act, provides independent peer review and advice to EPA on a wide range of scientific and technical aspects of environmental problems, and research needs. See SAB website, <http://www.epa.gov/sab/>. The Board gives advice five ways: reports (peer reviews of agency documents), advisories (review of agency “works-in-progress”), commentaries (“extensive original reports on topics . . . important to environmental protection”), consultations (meeting with agency members in the “earliest stages of development of a project”), and workshops (in which the Board sponsors meetings between the Agency and non-SAB experts on a given topic). U.S. EPA Science Advisory Board, Overview of the Panel Formation Process at the Environmental Protection Agency Science Advisory Board 4 (2002), available at [http://yosemite.epa.gov/sab/sabproduct.nsf/WebFiles/OverviewPanelForm/\\$File/ec02010.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/WebFiles/OverviewPanelForm/$File/ec02010.pdf). Members are appointed by the EPA Administrator after federal register notice to solicit nominations. See SAB Website,

- Subject to FACA
- Members chosen by EPA Administrator with input “invited” from the White House
- Membership drawn largely from universities and independent research laboratories, though the statute requires that one be a member of NAS, one be a physician, and one represent state air control agencies
- Meets on average six times per year, with work regularly orchestrated through its subcommittees (which hire paid consultants from universities and labs to supplement membership)⁷²

Evaluation: GAO has noted that in structuring its committees, EPA does not select individuals with known biases or positions⁷³ and does a better job than most agencies of collecting information on potential committee members to inform the selection and conflict review processes.⁷⁴ Among EPA committees, CASAC is particularly well-regarded.⁷⁵ CASAC’s influence has been bolstered by judicial review—when evaluating the rationality of agency rules, courts look to see whether EPA has adhered to CASAC’s recommendations.⁷⁶ This is a result of the prominent position given to CASAC in the CAA,⁷⁷ which requires EPA, when proposing new air quality standards, to summarize recommendations by CASAC and the National Academy of Sciences and provide reasons when deviating from their recommendations in any important respect. Some features of CASAC may diminish its independence, however: it depends entirely on EPA officials for its budget and staffing, and it functions under at least nominal control of the designated government official.

supra. A 2004 GAO report commended the SAB for adopting procedures designed to monitor conflicts of interest, ensure balance, and maintain integrity and independence. U.S. GAO 2004, *supra* note 48 at 44-46.

⁷² While the CAA dictates that CASAC review the new NAAQS and make recommendations for revisions, “[i]n practice, EPA staff, not CASAC, have prepared these reviews, drafting Criteria Documents, which review the science and health effects of criteria air pollutants, and Staff Papers, which make policy recommendations. CASAC’s role has been to review and approve these EPA documents before they [go] to the agency’s political appointees and the Administrator for final decisions.” Congressional Research Service, CRS Report for Congress: Air Quality Standards and Sound Science: What Role for CASAC? 19 (2007), available at <http://www.ncseonline.org/nle/crsreports/07Oct/RL33807.pdf> [hereinafter CRS-CASAC report].

⁷³ U.S. GAO 2004, *supra* note 48 at 5, 29, 32-33.

⁷⁴ U.S. GAO 2008, *supra* note 46 at 8.

⁷⁵ CASAC has been singled out as a model of “knowledge assessment,” one of a handful of advisory groups considered to be “credibility specialists,” which display intense concern for their actual and perceived independence from particular vested interest and can point to procedural guarantees of that independence. Lawrence McCray, *Doing Believable Knowledge Assessment for Policymaking: How Six Prominent Organizations Go About It* (2004) (draft publication), available at <http://web.mit.edu/cis/pdf/McCray-DoingBelievableKnowledgeAssessment.pdf>; see also CRS-CASAC report, *supra* note 72 at 7-8, 19.

⁷⁶ In 2006, EPA for the first time promulgated National Ambient Air Quality Standards (NAAQS) that were not consistent with CASAC’s recommendations. In 2009, the D.C. Circuit held that the Administrator’s proposed NAAQS were impermissible, in large part because they diverged from CASAC’s recommendations and “[t]he EPA failed adequately to explain its reason for not accepting the CASAC’s recommendations.” *Am. Farm Bureau Fed’n v. EPA*, 559 F.3d 512, 521 (D.C. Cir. 2009).

⁷⁷ CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3) (2010).

National Transportation Safety Board (NTSB)

Mission: The NTSB was established in 1967 within the Department of Transportation and was made independent by the Independent Safety Board Act of 1974.⁷⁸ It is charged with “determining the probable cause of transportation accidents and promoting transportation safety, and assisting victims of transportation accidents.”⁷⁹ In 2000, the agency embarked on an initiative to increase employee technical skills by establishing the NTSB Academy, now called the NTSB Training Center.

Salient Design Features:

- Independent agency
- Not subject to FACA
- Members appointed by the president with advice and consent of the Senate
- No more than three members to be appointed from a single political party
- At least three to be appointed on the basis of technical qualifications and expertise in accidents, safety and transportation
- Independent staff and significant annual budget⁸⁰

Evaluation:

The NTSB reports that it has investigated “more than 132,000 aviation accidents and thousands of surface transportation accidents.” The Board also operates a “Most Wanted List of Transportation Safety Improvements” that “highlights safety-critical actions” that should be taken by the Department of Transportation, the Coast Guard, and other agencies. Since its inception the NTSB has issued some 13,000 safety recommendations to 2,500 different agencies, industries, and organizations.⁸¹ In 2008, the NTSB reported that 67 of its recommendations were implemented, largely in the aviation industry; the average “acceptance rate” for recommendations in 2008 was estimated at around 82%.⁸² NTSB is

⁷⁸ Independent Safety Board Act of 1974, 49 U.S.C. § 1111 (2010).

⁷⁹ The Board “investigates accidents, conducts safety studies, evaluates the effectiveness of other government agencies’ programs for preventing transportation accidents, and reviews the appeals of enforcement actions involving aviation and mariner certificates issued by the Federal Aviation Administration (FAA) and the U.S. Coast Guard (USCG), as well as the appeals of civil penalty actions taken by the FAA.” Based on its studies and the results of its investigations, the NTSB makes recommendations about transportation safety to government agencies (at all levels) and to industries and organizations, though it works primarily with the FAA and USCG. Its investigations and recommendations cover aviation, highways, marine activities, pipelines, and railroads, as well as the transport of hazardous material. NTSB, Background, Mission, and Mandate, *available at* http://www.nts.gov/Abt_NTSB/history.htm.

⁸⁰ The Board has about 400 staff and a yearly budget of almost \$100 million. U.S. Government Accountability Office, National Transportation Safety Board: Issues Related to the 2010 Reauthorization 1 (2010), *available at* <http://www.gao.gov/new.items/d10366t.pdf> [hereinafter U.S. GAO 2010].

⁸¹ NTSB, Background, Mission, and Mandate, *supra* note 79.

⁸² NTSB, Background, Mission, and Mandate, *supra* note 79. One scholarly article confirms this estimate, at least with respect to the aviation industry. Mark C. Niles, *On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, “Agency Capture,” and Airline Security*, 10 AM. U. J. GENDER SOC. POL’Y & L. 381, 417 (2002).

well regarded for its independence and, in particular, its probing investigations. The GAO has called the NTSB “a relatively small agency that has gained a worldwide reputation as a preeminent investigator of transportation accidents.”⁸³ The GAO also noted that the NTSB continues to make progress on GAO recommendations to improve its Board’s training and management.

⁸³ U.S. GAO 2010, *supra* note 80 at 1.