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Federal Judge Blocks Moratorium on Deepwater Drilling

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In the wake of the Deepwater Horizon explosion, the federal government ordered an evaluation of the safety of deepwater drilling operations in the Gulf of Mexico. In order to improve the safety of such operations and provide more substantial environmental protection, the Department of the Interior (DOI) and the Minerals Management Service (MMS) issued a six-month moratorium on deepwater drilling in the Gulf. A federal district court in Louisiana has since set aside the moratorium, noting that the suspension of deepwater drilling demonstrated the federal government's arbitrary exercise of authority. The U.S. Court of Appeals for the Fifth Circuit later rejected the federal government's request to stay the lower court's ruling pending the full appeal of the decision.

Background

To evaluate safety measures for offshore drilling rigs, a one-month drilling moratorium was established on May 6, 2010; however, on May 27, President Obama extended the moratorium by six months, concurring with Secretary of the Interior Kenneth Salazar's determination that a longer moratorium was necessary to ensure safe drilling procedures in the Gulf of Mexico. In extending the moratorium, DOI characterized offshore deepwater drilling as "an unacceptable threat of serious and irreparable harm to wildlife and the marine, coastal, and human environment."¹ MMS's order imposing the moratorium defined deepwater drilling as any operation occurring at depths greater than 500 feet. This moratorium ordered 33 existing drilling rigs to cease operation and prohibited MMS from granting additional deepwater drilling permits.²

Hornbeck Offshore Services filed suit to challenge the moratorium, alleging that the federal suspension of deepwater drilling threatened its continued ability to provide vessel support to the offshore exploration and deepwater drilling industries. In June, a federal district court agreed with Hornbeck's argument and blocked the moratorium, holding that the suspension of all deepwater drilling in the Gulf was arbitrary and capricious and, moreover, had a negative impact on both the plaintiffs and the local economies dependant on the oil and gas industry.³

District Court Ruling

Though the federal government may have the authority to impose a drilling moratorium in the Gulf, the court noted that such an order may not be arbitrarily handed down without valid explanations as to its breadth. The Outer Continental Shelf Lands Act (OCSLA) grants DOI the authority to temporarily suspend any activity that poses "a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment."⁴ In finding for Hornbeck, the court noted that, under the Administrative Procedure Act, DOI's decision to impose the moratorium under the OCSLA could not be set aside unless this decision was "arbitrary, capricious, [or] an abuse of discretion."⁵ Because DOI failed to clearly explain the reasoning behind issuing such an expansive drilling suspension, the court found that no clear relationship existed between the proposed threats of injury and the "immense scope of the moratorium."⁶

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The court noted that DOI's report regarding increased safety measures in the Gulf offered valuable recommendations for offshore drilling; however, because DOI failed to address the actual danger posed by the 33 operating rigs affected by the moratorium, the court found that the moratorium arbitrarily suspended a vast amount of drilling. Moreover, the court took issue with the lack of coordination between DOI and MMS in actually defining the breadth of the moratorium. DOI's report never explicitly defined "deepwater" drilling, noting only that drilling at depths greater than 1,000 feet presents dangers not experienced in shallow waters; however, MMS's Notice to Lessees specifically suspended drilling at any depth greater than 500 feet, with no explanation as to why drilling at this depth presents greater risks to the coastal environment than in deeper waters. In an attempt to explain its rationale for recommending the moratorium, DOI described various studies which noted faulty equipment used on the offshore rigs; however, the court dismissed this argument as irrational, characterizing the government's decision to impose a moratorium based on the failure of a single rig as "heavy-handed, and rather overbearing."⁷

The court also noted that Hornbeck and similar companies stand to lose contracts and business opportunities if drilling is restricted in the Gulf. Though DOI claims the moratorium will have only a minor impact on these businesses, the court maintained that the moratorium will cause oil companies to move their rigs outside of the Gulf, ultimately leading to lost jobs and business failures which will negatively impact the entire coastal region.⁸ Though DOI's report substantially supports implementing new regulations to govern offshore drilling, the court held that a blanket moratorium, based on the failure of a single deepwater rig, is not warranted and unnecessarily punishes the other drilling companies operating in the Gulf without regard for their safety records.⁹

DOI's Response

In response to the lower court's decision to end the moratorium, DOI appealed to the Fifth Circuit, requesting that the court enforce the deepwater drilling suspension. Because the court will not hear DOI's full appeal of the lower court's decision until August 30th, DOI requested that the Fifth Circuit stay the lower court's injunction lifting the moratorium pending the resolution of the appeal. In making this request, DOI noted that the suspension did not arbitrarily target certain rigs and emphasized that the affected rigs posed similar threats as the Deepwater Horizon. DOI claimed that, because each of the 33 rigs affected by the suspension used similar technology and techniques as the Deepwater Horizon, suspending their operations was key to preventing further damage to the Gulf in the event of another explosion.¹⁰ Though the possibility of another blowout is unlikely, DOI contended that the potential for further damage necessitated the temporary suspension to provide time to implement new safety measures.

While acknowledging that economic impacts to the drilling industry are a valid short-term concern, DOI further asserted that its priority is ensuring the long-term security of the nation's coastal economy and marine environment. During the moratorium, DOI intended to assess the safety protocols for drilling in the Gulf and implement new safety regulations if necessary. Accordingly, DOI maintained that enforcing the moratorium was essential to promote the "Gulf's economic, social, and ecological health" by ensuring that no further spills occur.¹¹

On July 8th, the Fifth Circuit Court of Appeals, in a 2-1 decision, denied the federal government's request to temporarily stay the lower court's decision while the appeal is pending. To qualify for a stay, DOI needed to establish that irreparable injury would occur if the stay were not granted. Noting that DOI failed to show irreparable injury was likely, the court refused to restore the ban on deepwater drilling in the Gulf. Specifically, the court found that DOI failed to show that drilling activities would resume while the appeal was pending; however, DOI may seek emergency relief from the court should drilling commence.¹²

Conclusion

Although the Fifth Circuit denied DOI's motion for a stay, the appeal remains on an expedited track; the Fifth Circuit is scheduled to hear the matter the week of August 30th. On July 12, DOI issued a second moratorium on deepwater drilling based on growing evidence that the oil industry cannot properly respond to and contain a deepwater blowout.¹³ Unlike the drilling suspension lifted by the district court in Louisiana, the new moratorium is not based strictly on depth; rather, DOI's new decision suspends drilling operations based on the type of blowout prevention technology being used. DOI has indicated that the moratorium will last until November 30 in order to allow for new safety regulations to be implemented for deepwater operations.

Endnotes

1. Press Release, DOI, Interior Issues Directive to Guide Safe, Six-Month Moratorium on Deepwater Drilling (May 28, 2010) (on file with author).
2. *Id.*
3. Order at 22, Hornbeck Offshore Services v. Salazar, No. 10-633 (E.D. La. June 22, 2010).

4. 43 U.S.C. § 1334(a)(1).
5. 5 U.S.C. § 706(2)(A).
6. Order, *supra* note 3 at 17.
7. *Id.* at 19.
8. *Id.* at 21.
9. *Id.*
10. Motion for a Stay at 14, *Hornbeck Offshore Services v. Salazar*, No. 10-30585 (5th Cir. June 25, 2010).
11. *Id.* at 21.
12. Order at 2, *Hornbeck Offshore Services v. Salazar*, No. 10-30585 (5th Cir. July 8, 2010).
13. Press Release, DOI, Secretary Salazar Issues New Suspensions to Guide Safe Pause on Deepwater Drilling (July 12, 2010) (on file with author).

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