UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

HORNBECK OFFSHORE SERVICES, L.L.C.,	*	**CIVIL ACTION NO. 10-1663(F)(2)**
Plaintiff	*	
VERSUS	*	**SECTION F**
	*	
KENNETH LEE "KEN" SALAZAR, IN HIS OFFICIAL CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES DEPARTMENT OF INTERIOR; ROBERT "BOB" ABBEY, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR, MINERALS MANAGEMENT SERVICE; AND MINERALS MANAGEMENT SERVICE,	*	**JUDGE FELDMAN**
	*	**MAGISTRATE 2**
	*	**MAGISTRATE WILKINSON**
	*	
Defendants		
* * * * * * * *		

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT OR, IN THE ALTERNATIVE, FOR A STAY OF PROCEEDINGS PENDING CIRCUIT COURT'S DECISION ON DEFENDANTS' MOTION TO VACATE THE PRELIMINARY INJUNCTION

NOW INTO COURT, through undersigned counsel, come Plaintiffs Hornbeck Offshore Services, L.L.C., the Chouest Entities and the Bollinger Entities (collectively, "Plaintiffs"), which respectfully submit their Response in Opposition to Defendants' Motion to Dismiss Complaint or, In the Alternative, for a Stay of Proceedings Pending Circuit Court's Decision on

Defendants' Motion to Vacate the Preliminary Injunction.

Contrary to Defendants' arguments, this Court continues to have subject matter jurisdiction over this lawsuit because: (a) the circumstances upon which Defendants base their mootness argument are a classic example of a case falling within the "capable of repetition, yet evading review" exception to the mootness doctrine; and (b) the mootness doctrine cannot apply when, as here, a defendant purports voluntarily to cease the challenged action, but there is a reasonable probability (indeed, in this case, it is already a certainty) that the challenged conduct will resume and that Plaintiffs will thereby be injured. *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 414 n. 17 (5th Cir. 1999) (discussing the exceptions to the mootness doctrine).

The very afternoon that this Court issued its preliminary injunction, Defendant Secretary Salazar publicly announced that he would reissue the drilling moratorium to prevent drilling in the deepwater of the Gulf of Mexico. In other words, the policy decision to reissue the moratorium came within mere hours of the preliminary injunction. On July 12, 2010, Defendant Secretary Salazar issued a Decision Memorandum, which, in all critical respects, is a mirror image of the moratorium the Secretary issued on May 28th and that the Court preliminarily enjoined. *See* Rec. Doc. 125-4 at Exhibit "A." In reality, the new document repackages the prior moratorium, coupled with post hoc rationalizations created in an attempt to justify an action identical to the one the Court already has enjoined. These circumstances, in particular the brief period that elapsed between the entry of the injunction and the Secretary's public announcement of his decision to reissue the moratorium and then his issuance of that decision, show that the putative "new" moratorium does not establish a new regulatory regime. Rather, it is simply an administrative pretext designed to support a mootness challenge to the Court's subject matter

jurisdiction, in an effort to evade judicial review. Defendants' effort to avoid compliance with the Court's injunction and the orderly process for seeking judicial review of that Order present additional grounds for doubting the probity and regularity of the Department of the Interior's decisionmaking process.

Further, this Court should deny Defendants' alternative motion for a stay pending resolution of Defendants' motion submitted to the Fifth Circuit Court of Appeals because their Motion to Vacate the Preliminary Injunction is without merit. Under well-settled equitable principles, a district court may not be ordered to vacate its injunction decision when the party against whom the injunction was issued requests vacatur based on its own deliberate action to discontinue the challenged conduct while its appeal is pending. Put differently, a party cannot use its own discontinuance of challenged conduct, while an appeal is pending, as a basis for arguing that an injunction should be vacated. *See, e.g., U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25-27 (1994) (concluding that, if mootness results from the losing party's voluntary actions, the loser "has voluntarily forfeited his legal remedy by the ordinary processes of appeal . . . thereby surrendering his claim to the equitable remedy of vacatur" and that, to allow the losing party, who voluntarily forfeited review, "to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would – quite apart from any consideration of fairness to the parties – disturb the orderly operation of the federal judicial system."); *Rio Grand Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1129 (10th Cir. 2010) ("if the party seeking vacatur has caused mootness, generally we do not order vacatur.") (citations omitted); *Houston Chronicle Publ'g Co. v. League City, Texas*, 488 F.3d 613, 619-620 (5th Cir. 2007) (rejecting a city's request to vacate a district court's injunction against a city ordinance under circumstances in which the city repealed most of its challenged ordinance only

after losing at the district court level, and finding that vacatur was inappropriate on the grounds that the "mootness-causing action did not result from typical progression of events," because there was no showing by the city that its repeal was not in response to the district court judgment and plaintiffs had obtained full relief against the city before the repeal); *Center for Sci. in Pub. Interest v. Regan*, 727 F.2d 1161, 1166 (D.C. Cir. 1984).

Accordingly, the Court should deny both Defendants' motion to dismiss based on lack of subject matter jurisdiction and their alternative motion for a stay.

Background and Procedural History

On May 27, 2010, Defendant Secretary Salazar issued a report entitled "Increased Safety Measures for Energy Development on the Outer Continental Shelf" (the "Safety Report"), which contained, in its Executive Summary (but nowhere in the body of its text), a recommendation for imposition of "a six month suspension of all pending, current, or approved offshore drilling operations of new deepwater wells in the Gulf of Mexico and the Pacific Regions."[1] On May 28, 2010, Defendant Secretary Salazar issued a one-page Memorandum, entitled "Suspension of Outer Continental Shelf (OCS) Drilling of New Deepwater Wells," in which he directed the Minerals Management Service ("MMS," which is now known as the Bureau of Ocean Energy Management, Regulation and Enforcement "BOEM") to issue "a six month suspension of all pending, current, or approved offshore drilling operations of new deepwater wells in the Gulf of Mexico and the Pacific regions." He also ordered that: "MMS shall not process any new applications for permits to drill consistent with this directive."

[1] Because the Executive Summary concluded with a statement that "The recommendations in this report have been peer-reviewed by seven experts identified by the National Academy of Engineering" and because five of those seven experts later stated that the Safety Report misrepresented that they reviewed and agreed with the recommendation for a six-month blanket moratorium, this Court, in its June 22, 2010 Order and Reasons, questioned "the probity of the process that led to the Report." Rec. Doc. 67.

Following the Secretary's directives, the MMS issued NTL No. 2010-N04, effective May 30, 2010, which notified lessees and operators that "MMS will not consider for six months from the date of this Moratorium NTL" (or until November 30, 2010) "drilling permits for deepwater wells." The NTL also directed lessees and operators drilling deepwater wells "to cease drilling all new deepwater wells" and prohibited the "spudding of any new deepwater wells" during the six month deepwater drilling moratorium.

Plaintiffs then filed this suit seeking declaratory and injunctive relief based on allegations that the blanket moratorium exceeded Defendants' authority under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq.*, and violated the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. The Court expedited consideration of the case. On June 21, 2010, the Court held a hearing on Plaintiffs' Motion for Preliminary Injunction. On June 22, 2010, the Court granted that Motion and issued an Order that "immediately prohibited" Defendants from enforcing the blanket six-month deepwater drilling moratorium. Rec. Doc. 68.

The same afternoon, several hours after entry of the preliminary injunction, Secretary Salazar issued a Statement Regarding the Moratorium on Deepwater Drilling explicitly in reaction to "the decision today in U.S. District Court regarding the deepwater drilling moratorium." The Secretary stated that "The decision to impose a moratorium on deepwater drilling was and is the right decision" and that "I will issue a new order in the coming days that eliminates any doubt that a moratorium is needed, appropriate, and within our authorities." Rec. Doc. 69-2. It took Defendants only a matter of hours after issuance of the preliminary injunction, therefore, to reach their policy decision to reissue the moratorium. Indeed, the next morning, in testimony before the Senate Committee on Appropriations' Subcommittee on Interior and Environment, the Secretary repeatedly stated that the moratorium remained "in

place" and indicated that, in response to the Court's decision, he would issue another order to prevent deepwater drilling. (A copy of the June 23, 2010 Subcommittee Hearing testimony of Secretary Salazar is attached as Exhibit "A").

Defendants also filed with this Court a Notice of Appeal and a Motion for Stay Pending Appeal on June 23, 2010. The same day, the Court denied Defendants' Motion for Stay Pending Appeal "for the same reasons given in" its June 22nd Order. Rec. Doc. 82.

On June 25, 2010, Defendants filed a Motion for a Stay Pending Appeal with the Fifth Circuit. The court of appeals ordered expedited consideration *sua sponte* and held oral argument on the afternoon of July 8, 2010. On the morning of July 8th, just hours before the hearing, a senior administration official announced that the Department of the Interior "would immediately issue a new moratorium if it lost the court case." *See* July 8, 2010 New York Times article (attached as Exhibit "B"). Shortly after the conclusion of oral argument, the Fifth Circuit denied Defendants' motion for a stay.

On July 12, 2010, 45 days after the issuance of the moratorium and 20 days after the issuance of the preliminary injunction, Secretary Salazar implemented his prior statement by issuing a Decision Memorandum that repackaged and reimposed the May 28th Moratorium and provided new post hoc justifications for its imposition. Specifically, the Decision Memorandum orders Defendant BOEM "to direct the suspension of any authorized drilling of wells using subsea BOP's or surface BOP's on a floating facility" and "to cease the approval of pending and future applications for permits to drill wells using subsea BOP's or surface BOP's on a floating facility." Decision Memorandum at p. 19.

The critical features of the May 28th Moratorium and the Decision Memorandum are mirror images of each other. The new order made a superficial change in approach from the

original moratorium: it nominally prohibits drilling based on the use of a subsea BOP or a surface BOP on a floating facility, rather than prohibiting drilling in water depths beyond 500 feet. But, as Defendants themselves acknowledge,[2] the effects of the two orders are identical. All drilling in depths beyond 500 feet is prohibited. Further, the Decision Memorandum also mirrors the duration of the original moratorium, with each having the same purported "end date," November 30, 2010. Decision Memorandum at p. 20. Indeed, notwithstanding that the Decision Memorandum states that it "replaces and supersedes the memorandum dated May 28, 2010, entitled 'Suspension of Outer Continental Shelf (OCS) Drilling of New Deepwater Wells'" and that NTL No. 2010-N04 "is hereby rescinded," the Decision Memorandum explicitly admits that the parameters of the "new" decision are identical in scope to the original moratorium. *See supra* at note 2 (quoting the Decision Memorandum at p. 9, n.6).

On the same day that Secretary Salazar issued the Decision Memorandum, Defendants filed the present Motion to Dismiss Complaint or, in the Alternative, for a Stay Pending Circuit Court's Decision on Defendants' Motion to Vacate the Preliminary Injunction (Defendants' "Motion to Dismiss"). They simultaneously filed a Motion to Vacate the Preliminary Injunction with the Fifth Circuit.

Argument

Defendants assert that the case is moot and that the Court lacks subject matter jurisdiction because "the decision challenged in the Complaint . . . has been revoked and superseded by a

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[2] *See* Decision Memorandum at p. 9, n. 6 ("In my May 28 suspension decision, I used a 500-foot water depth delineation as part of the description of the suspension. This 500-foot delineation served as a shorthand proxy for the risks associated with using subsea BOP's or surface BOP's on floating facilities. To avoid any confusion over the use of the proxy, I have chosen to make this new suspension decision in reference to the types of blowout prevention equipment used in deepwater operations, rather than in reference to the functionally equivalent concept of water depth.")

new decision;" it therefore "no longer has any legal effect;"[3] and the Court cannot award any "meaningful relief" to Plaintiffs. Motion to Dismiss at p. 2 (Rec. Doc. 125-1). The record before the Court and the procedural history of this case demonstrate that the July 12th order, which is a mirror image of the May 28th Moratorium, and this mootness motion are conscious efforts by Defendants to ignore the actions of the Judicial Branch. Put simply, Defendants seek to defeat the Court's jurisdiction and to evade judicial review of a "pre-ordained result" – the imposition of a blanket punitive moratorium on all deepwater drilling in the Gulf of Mexico. *Food Mktg. Inst. v. ICC*, 587 F.2d 1258, 1290 (D.C. Cir. 1978). There is a live dispute between the parties concerning the legality of the drilling moratorium, and the case is not moot under well-established legal principles. For these reasons, the Court should deny Defendants' motion.

I. The Court Continues to Have Subject Matter Jurisdiction over This Lawsuit.

Under settled principles of law, the Court continues to have subject matter jurisdiction over this lawsuit, and the matter has not been mooted by the Secretary's issuance of a putative new moratorium. First, the Court has jurisdiction under the "capable of repetition, yet evading review" exception to mootness. *See Weinstein v. Bradford*, 423 U.S. 147 (1975) (per curiam); *Moore v. Hosemann*, 591 F.3d 741, 744 (5th Cir. 2009) (applying the capable of repetition yet evading review exception); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 661-62 (5th Cir. 2006) (same); *Vieux Carre Property Owners v. Brown*, 948 F.2d 1436, 1447, 1448 (5th Cir. 1991) (reversing the district court's finding of mootness and finding that the challenged action was capable of repetition yet evading review). Although the courts expedited

[3] In this connection, Defendants simply ignore that, at least at present, the Court's Preliminary Injunction Order in fact does have continuing "legal effect" and requires them to file tomorrow (within 30 days of June 22, 2010) "a report in writing setting forth in detail the manner and form in which defendants have complied with the terms of this Preliminary Injunction." Rec. Docs. 68 and 72. Given their actions, Defendants cannot report their compliance as required by this Court's Order, which serves as additional impetus for their assertion that they have defeated this Court's subject matter jurisdiction.

consideration of this lawsuit at every stage, the Secretary made his decision within hours of the preliminary injunction against the May 28th Moratorium, followed by a further order on it only 20 days later, well before judicial review of the preliminary injunction order could be completed. Thus, the Secretary's own action demonstrates that this exception to the mootness doctrine applies.

Second, the Secretary's purported voluntary cessation of his allegedly illegal conduct, especially during the pendency of his appeal from a preliminary injunction that prohibits him from enforcing a deepwater drilling moratorium, does not deprive the Court of jurisdiction to hear and determine the case. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000); *County of Los Angeles v. Davis*, 440 U.S. 625 (1979). Defendants must carry the heavy burden of showing "that there is no reasonable expectation that the wrong will be repeated." *United States v. W.T. Grant & Co.*, 345 U.S. 629, 633 (1953). They cannot possibly meet this burden here because the alleged wrong already has been repeated. The Secretary has issued a new, mirror image order the real-world effects of which are essentially identical to the moratorium whose legality Plaintiffs challenge.

In reality, the Secretary has repackaged his prior action in a different guise and attempted to support it with post hoc rationalizations. The record before the Court shows that the reasons he purportedly "superseded" that action was to pursue a method of frustrating judicial review of the Court's preliminary injunction. The immediate issuance of a nearly identical order, which will have the same adverse effects on Plaintiffs as the May 28th order, demonstrates that Defendants cannot possibly carry their burden of showing that there is no reasonable probability that the challenged activity will be repeated. Accordingly, the lawsuit is not moot.

A. The Court Continues To Have Subject Matter Jurisdiction over the Case under the "Capable of Repetition, Yet Evading Review" Principle.

The Supreme Court has long recognized an exception to the mootness doctrine where the behavior challenged is "capable of repetition, yet evading review." *Weinstein*, 423 U.S. at 149, citing *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911). This doctrine applies where (1) "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration"; and (2) "there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam); *Moore*, 591 F.3d at 744; *Center for Individual Freedom*, 449 F.3d at 661-62; *Vieux Carre Property Owners*, 948 F.2d at 1447, 1448. This doctrine applies squarely in this case.

Although Plaintiffs promptly filed this lawsuit and the courts expedited consideration at every stage, completion of judicial review was not possible before the Secretary issued a second order, which was intended to preempt judicial consideration of this lawsuit. The Secretary took this action only 20 days after this Court issued its injunction – 20 days within which Defendants pursued a strategy of seeking a second bite at the apple by pursuing an appeal that they were prepared to abandon (in favor of a mootness challenge) if their request for a stay pending appeal was denied. If the Secretary's strategy were successful, and this lawsuit was dismissed as moot, nothing would prevent the Secretary from further manipulating the legal system by issuing other, similar orders in succession to moot out any future judicial rulings with which he is dissatisfied concerning the legality of the drilling moratorium.

Defendants' own actions to date demonstrate conclusively that there is a "demonstrated probability" that the same controversy will recur involving the legality of the moratorium. This recurrence has already occurred; it involves Plaintiffs as the same complaining parties; and

Plaintiffs are being injured because deepwater drilling in the Gulf cannot recommence as a result of this reoccurrence. Accordingly, the "capable of recurrence, yet evading review" exception applies here, and the case is not moot.

B. The Secretary's Alleged Voluntary Cessation of the Challenged Activity Does Not Deprive the Court of Subject Matter Jurisdiction.

In *Friends of the Earth*, the Supreme Court stated: "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." 528 U.S. at 189. *See W.T. Grant*, 345 U.S. at 632 (defendant's "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot.") Subject matter jurisdiction, once properly acquired, may abate and the case become moot "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189. As the Court stated in *County of Los Angeles*, jurisdiction may abate if the case becomes moot because:

> (1) it can be said with assurance that "there is no reasonable expectation . . ." that the alleged violation will recur . . .; and
>
> (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

440 U.S. at 631 (internal citations omitted).

Similarly, the Fifth Circuit has concluded that "the voluntary cessation of a complained-of activity by a defendant ordinarily does not moot a case . . . ." *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 324 (5th Cir. 2009).

> If defendants could eject plaintiffs from court on the eve of judgment, then resume the complained-of activity without fear of flouting the mandate of a court, plaintiffs would face the hassle, expense, and injustice of constantly relitigating their claims without the possibility of obtaining lasting relief.

Id. The requirement of proving that the challenged behavior "could not reasonably be expected to recur" is a "heavy burden" that must be borne by the party asserting mootness. *Friends of the Earth*, 528 U.S. at 189.

In determining whether a governmental defendant has carried this burden of proof, the courts may grant solicitude to an assertion by the agency that the challenged behavior has ceased and will not be repeated. The courts, however, must review such a claim carefully to assure that the alleged voluntary cessation is not "a sham for continuing possibly unlawful conduct." *Sossamon*, 560 F.3d at 325. "[T]his exception exists to counteract the possibility of a defendant ceasing illegal action long enough to render a lawsuit moot and then resuming the illegal conduct." *Rio Grande Silvery Minnow*, 601 F.3d at 1115 (internal quotation omitted). In the government context, "'[m]ost cases that deny mootness rely on *clear showings* of reluctant submission [by governmental actors] and a desire to return to the old ways.'" *Id.* at 1117, quoting 13C Wright, Miller & Cooper, *Federal Practice and Procedure* § 3533.6, at 277. In particular, the courts may look "with a jaundiced eye" upon an effort by the government to announce a change in policy and thereby attempt to force a vacatur of an injunction previously issued by the trial court against its actions. *Sossaman*, 560 F.3d at 325.

In this case, Defendants cannot carry their heavy burden of demonstrating that it is "absolutely clear" that the challenged behavior could not reasonably be expected to recur. *Friends of the Earth*, 528 U.S. at 189. Rather, the record shows that Defendants have tried to work around the preliminary injunction and seek to return to a blanket, industry-wide moratorium.

The Secretary already has taken a second action that is substantively identical in its effects to the moratorium that Plaintiffs have challenged. Indeed, Defendant Secretary Salazar's

immediate public announcement of Defendants' intention to reissue the moratorium in reaction to the entry of the preliminary injunction throws into question the regularity, probity and integrity of Defendants' conduct. While Defendants assert that there has been a second agency action that supersedes and moots the May 28th Moratorium, in reality the Secretary simply reissued a mirror image of the prior order. Like the May 28th Moratorium, the July 12th Decision Memorandum prohibits all deepwater drilling, and the initial period of time for which drilling is prohibited is identical to the May 28th order – until November 30th. The July 12th order did not create a new regulatory framework; it reimposed the prior moratorium in conflict with this Court's prior ruling.[4] Defendants have already engaged in the same behavior that was the subject of Plaintiffs' challenge in the Complaint.

While there is no meaningful difference in the terms of the two orders, the July 12th document sets forth post hoc justifications added in the hope that they will help the order survive judicial review. This strategy is as inappropriate as it is transparent. The record before the Court shows that the Secretary made the decision to reimpose the moratorium on the afternoon of June 22, 2010, shortly after the Court issued its preliminary injunction. Any doubt about the date of the Secretary's decision is resolved by his repeated statements in his June 23rd testimony to the Senate Appropriations Subcommittee that he would reissue the moratorium. These statements were intended to, and had, the effect of deterring any operator from resuming drilling operations. The Administrative Record relevant to that decision is the material before the Secretary on June 22nd. The steps taken by Defendants after that date sought to generate post hoc rationalizations

[4] The cases on which Defendants rely for their assertion that the July 12th order rendered the May 28th Moratorium moot involve situations in which the second order created a new regulatory structure, rather than reimposing the prior order. *See, e.g., Rio Grand Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010); *National Mining Ass'n v. U.S. Department of the Interior*, 251 F.3d 1007, 1013 (D.C. Cir. 2001) (challenge to agency rule was not moot when provisions of the original rule "were not changed by the new rulemaking," which was issued after oral argument of a lawsuit challenging the legality of the original rule).

to justify that action. Defendants have repeated the action challenged as unlawful. The record refutes their assertion that the July 12th order is an independent regulatory action that supersedes the May 28th order and renders the case moot. Applying the *Friends of the Earth* test, Defendants cannot carry their heavy burden of showing that it is "absolutely clear" that the allegedly illegal behavior could not reasonably be expected to recur, because that behavior has already recurred.

In the opinion accompanying the issuance of the preliminary injunction, the Court expressed concern with the "probity" of Defendants' action in this matter, as manifested by the misrepresentation in the Executive Summary of the Safety Report that the scientists who had conducted the peer review had approved the recommendation for imposition of a blanket moratorium. Rec. Doc. 67. Defendants' actions after issuance of the injunction present similar concerns. The Department of the Interior has taken actions here that the D.C. Circuit has previously found demonstrate a lack of regularity in the administrative process and mean that the agency's decision is entitled to no deference from the courts. For example, in *Food Marketing Institute v. ICC*, 587 F.2d 1285 (D.C. Cir. 1978), the court stated:

> there is no requirement that the agency arrive at a different substantive result upon reconsideration. At the same time, we must recognize the danger that an agency, having reached a particular result, may become so committed to that result as to resist engaging in any genuine reconsideration of the issues. The agency's action on remand must be more than a barren exercise of supplying reasons to support a pre-ordained result. Post-hoc rationalizations by the agency on remand are no more permissible than are such arguments when raised by appellate counsel.

Id. at 1289-90. Similarly, in *Chamber of Commerce v. SEC*, 443 F.3d 890 (D.C. Cir. 2006), the court observed:

> Although judicial review of informal rulemaking is generally limited in scope . . . and is deferential when rulemaking implicates the agent's expertise . . . more exacting review may be required when the presumption of regularity is rebutted,

> as may occur when the agency arrives at an identical result on remand under circumstances that throw into question the regularity of its proceedings . . . .

Id. at 899 (emphasis added; internal citations omitted).

The Secretary's approach in this matter squarely falls within the pattern described by these decisions and provides ample grounds to doubt the regularity of the administrative process.

For these reasons, Defendants' voluntary cessation and alleged "superseding" of the May 28th Moratorium does not deprive the Court of subject matter jurisdiction.

II. Defendants' Fifth Circuit Motion to Vacate the Preliminary Injunction Is Without Merit, and This Court Should, Therefore, Deny Defendants' Alternative Motion for a Stay.

Defendants request in the alternative that this Court stay these proceedings until the Fifth Circuit rules on their Motion to Vacate Preliminary Injunction purportedly to avoid "'unnecessary duplication of judicial machinery.'" Motion to Dismiss at p. 13-14 (quoting *ACF Indus., Inc. v. Guinn*, 384 F.2d 15, 19 (5th Cir. 1967)). Plaintiffs submit, to the contrary, that there is no sound reason for this Court to delay these proceedings because Defendants' Fifth Circuit motion, like this motion, is without merit. Defendants' Motion to Vacate rests on the same faulty premise that its motion to dismiss does – that Defendant Secretary's Salazar's new decision on a deepwater drilling ban moots Plaintiffs' challenge to the original moratorium. As shown above, it does not. Regardless, Defendants cannot rely on the "secondary remedy of vacatur" when, by their own voluntary actions, they "forfeited" their "legal remedy by the ordinary process of appeal." *Bancorp*, 513 U.S. at 25-27.

Under well-settled law, when the losing party's actions cause mootness, vacatur is inappropriate. *Houston Chronicle*, 488 F.3d at 619-620 ("'[v]acatur of the lower court's judgment is warranted only where mootness has occurred through happenstance, rather than through the voluntary action of the losing party.'") (quoting *Murphy v. Fort Worth Indep. Sch.*

Dist., 334 F.3d 470, 471 (5th Cir. 2003) (*per curiam*)); *see also Rio Grand Silvery Minnow*, 601 F.3d at 1129 ("if the party seeking vacatur has caused mootness, generally we do not order vacatur.") (citations omitted).

Here, even accepting that the preliminary injunction is moot, which is denied, the law still would not entitle Defendants to the "extraordinary remedy of vacatur" because the mootness did not occur through happenstance. *Bancorp*, 513 U.S. at 26. Instead, after losing in this Court and after losing their stay motion at the Fifth Circuit, Defendants voluntarily and deliberately "rescinded" and "superseded" their challenged action (albeit with carbon copy "new" action). Simply put, the law does not allow for the manipulation of "the orderly operation of the federal judicial system" in that fashion. *Id.* at 27. Irrespective of the earnestness of Defendants' belief that their decision is "right" and "needed," the Supreme Court's admonition centuries ago must be applied equally today: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137 (1803). Defendants' alternative request for a stay should be denied.

Conclusion

For all the reasons set forth above, Plaintiffs respectfully ask this Court to deny Defendants' Motion to Dismiss and further to deny their Motion in the Alternative for a Stay.

Respectfully submitted,

s/ Carl D. Rosenblum

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon all parties by email or by using the CM/ECF system which will send a Notice of Electronic filing to all counsel of record, this 20th day of July, 2010.

s/ Carl D. Rosenblum