

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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

* * * * *

**AMICUS CURIAE BRIEF ON BEHALF OF THE OFFSHORE MARINE SERVICES
ASSOCIATION IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS UNDER RULE 12(B)(1)**

Amicus curiae, the Offshore Marine Services Association ("OMSA"), on behalf of its over 250 member companies, presents this amicus brief in support of the plaintiffs' opposition to the defendants' motion to dismiss under FED. R. CIV. PROC. 12(b)(1). OMSA's members provide marine services in support of oil and gas production in the Gulf of Mexico. Defendants claim the July 12, 2010 decision memorandum is the basis for dismissal because it moots the plaintiffs' suit, but the moratorium¹ continues to affect OMSA's members. These companies, evidenced in

¹ OMSA is of the position that the May 28, 2010 memorandum entitled "Suspension of Outer Continental Shelf Drilling of New Deepwater Wells" and the July 12, 2010 "decision memorandum" are effectively identical in result, and different only in the defendants' claimed justification. The "moratorium," when used herein, refers to both May 28, 2010 memorandum and the July 12, 2010 decision memorandum.

the attached affidavits, are suffering economic harm, losing work, and their employees are at risk of losing their jobs because of the moratorium. Unless enjoined with finality, the moratorium will cause substantially greater harm by creating an atmosphere of uncertainty. A delay in adjudication on the moratorium is no different than upholding it because further uncertainty will result in more jobs lost and businesses closed. As this Court has already concluded, “the issues [in this litigation] are of national significance and to delay resolution would be irresponsible.”² OMSA and its members—vessel operators, shipyards, and marine equipment and service suppliers—have a material interest in the outcome of this litigation.

I. OMSA’s Interest in this Litigation

OMSA represents more than 250 member companies, including 110 companies operating 1,200 marine service vessels. The remaining 140 members include shipyards, surveyors, and vessel equipment manufacturers and distributors.³ OMSA submits this amicus brief in support of the plaintiffs’ opposition to the defendants’, Kenneth Lee Salazar, the United States Department of the Interior, Michael R. Bromwich, and the Bureau of Ocean Energy Management, Regulation and Enforcement’s (the “Government’s”) motion to dismiss.⁴ The effects of the Government’s ongoing moratorium, from OMSA’s perspective, include loss of business, loss of work, and loss of jobs, in both deep and shallow water. The operation, construction, and repair of vessels is responsible for approximately \$18 billion in annual spending, over 100,000 jobs, and \$4.6 billion in wages annually as of January 2010.⁵ OMSA’s members are injured through the Government’s ban on deepwater drilling and its significant collateral damage. Unless the ban is enjoined, OMSA members’ and their employees’ livelihoods are at stake.

² See Order denying the Government’s Motion for Continuance of June 21, 2010 Hearing on Plaintiffs’ Motion for Preliminary Injunction, CM/ECF Doc. No. 23.

³ See affidavit of Kenneth R. Wells, attached hereto as Exhibit A-1, Paragraph 5.

⁴ CM/ECF Doc. No. 125.

⁵ See affidavit of Kenneth R. Wells, Exhibit A-1, Paragraph 5.

II. Statement of the Case

The facts of this suit are well known to this Court. Effective May 28, 2010, the U.S. Department of the Interior, through the Minerals Management Service, issued a “six-month suspension of all pending, current, or approved offshore drilling operations of new deepwater wells in the Gulf of Mexico.” In response, the plaintiffs, Hornbeck Offshore Service, L.L.C., the Chouest Entities and the Bollinger Entities (the “Plaintiffs”) filed this suit and moved for a preliminary injunction, which this Court granted on June 22, 2010. When the Government moved to stay the injunction pending the Government’s appeal on the merits, the Fifth Circuit denied it, concluding on the date of hearing (July 8, 2010) that “the Secretary has failed to demonstrate a likelihood of irreparable injury if the stay is not granted; he has made no showing that there is any likelihood that drilling activities will be resumed pending appeal.” The Government subsequently issued a July 12, 2010 memorandum and moved to dismiss this litigation.

III. The Government’s motion to dismiss should be denied.

A. The Government’s moratorium is not only capable of repetition, it has already repeated.

The legal basis for denying the Government’s motion to dismiss is well explained in the Plaintiffs’ opposition. The Government’s motion to dismiss should be denied unless the Government can show “there is no reasonable expectation that the wrong will be repeated.”⁶ In seeking to have a case dismissed as moot, the defendant’s burden “is a heavy one.”⁷ The defendant must demonstrate that it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.”⁸ The mootness doctrine protects defendants from the maintenance of suit based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from defendants who seek to evade sanction by

⁶ *United States v. W.T. Grant & Co.*, 345 U.S. 629, 633 (1953).

⁷ *Id.*

⁸ *United States v. Phosphate Export Assn., Inc.*, 393 U. S. 199, 203 (1968).

predictable “protestations of repentance and reform.”⁹ OMSA brings to the Court’s attention the particular effects of the Government’s attempts of repentance and reform on the Gulf Coast offshore marine services industry.

In *Super Tire Engineering Co. v. McCorkle*,¹⁰ the Supreme Court held that a plaintiff can defeat the government’s mootness argument by showing “the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest.”¹¹ The Government’s stated policy is the same in both its May 28, 2010 memorandum and its July 12, 2010 memorandum: banning deepwater drilling until November 30, 2010. The adverse effect to present interests is illustrated in the affidavits attached to this brief. OMSA’s members describe the effects to the offshore services industry from not only the Government’s moratorium, but also the specific, material, and long-lasting effects borne by even the threat of a moratorium. The Government contends that plaintiffs’ “exclusive recourse is to bring a separate challenge to the implementation of that decision (i.e. the second moratorium) in federal district court.”¹² OMSA posits that the violation—a moratorium this Court has ruled “simply cannot justify the immeasurable effect on the plaintiffs, the local economy, the Gulf region, and the critical present-day aspect of the availability of domestic energy in this country”¹³—is ongoing because the unsupported ban on deepwater drilling, dressed in new clothes, is ongoing. Amicus respectfully submits that the Government’s motion to dismiss would have the effect of delaying adjudication: obtaining, without the benefit of judicial review, the very same ban on drilling this Court has already enjoined.

⁹ *United States v. Oregon State Medical Society*, 343 U. S. 326, 333 (1952).

¹⁰ 416 U.S. 115 (1974).

¹¹ *Id.* at 125-26; see also *City of Houston v. Dept. of Housing and Urban Development*, 24 F.3d 1421 (D.C. Cir. 1994) (“It is well-established that if a plaintiff challenges both a specific agency action and the *policy* that underlies that action, the challenge to the policy is not necessarily mooted merely because the challenge to the particular agency action is moot) (citing *Payne Enters. v. United States*, 837 F.2d 486 (D.C.Cir.1988); *Better Gov’t Ass’n v. Department of State*, 780 F.2d 86 (D.C.Cir.1986)).

¹² See the Government’s memorandum in support of its motion to dismiss, p. 12. (emphasis in original; citations omitted).

¹³ See Order and Reasons, p. 22, CM/ECF Doc. No. 67.

B. The moratorium's effects on OMSA's members to date

Richard Wells, the Vice President of OMSA, avers as follows regarding the effects of the moratorium:

Our members' vessels are limited to offshore energy production service by their USCG issued (and required) Certificate of Inspection, and cannot move into another temporary service during the moratorium. As boats are laid off by a drilling company, that boat no longer needs to purchase repairs, food, fuel, or spare parts from these vendors. In the case of a prolonged absence of work, the vessel would be taken out of service and the crewmembers laid off work.¹⁴

Most immediately impacted are the employees working on vessels. Day rates have weakened because of oversupply.¹⁵ Vessels are tied up and vessel owners have had to make layoffs as a result of the moratorium.¹⁶ Contracts have been cancelled.¹⁷ Banks have denied credit.¹⁸ Companies are losing revenue.¹⁹ The drilling moratorium "could rapidly place under-capitalized vessel operators in bankruptcy."²⁰ Unsurprisingly, with vessels out of work, the ripples are being felt by companies supporting vessels, which are losing contracts,²¹ revenue,²² and cutting hours.²³ Shipyards report a decline in customers looking for work²⁴ and resultant losses to the labor force.²⁵

¹⁴ See affidavit of Richard Wells, vice-president of OMSA, Exhibit A-2.

¹⁵ See affidavit of L&M Bo-Truc Rental, Inc., Exhibit B-6, Paragraph 6; affidavit of Aires Marine, Exhibit B-2, Paragraph 3.

¹⁶ Affidavit of L&M Bo-Truc Rental, Inc., Exhibit B-6, Paragraph 7. "We will be laying off everyone on an unemployed vessel."

¹⁷ See e.g. affidavit of Candy Fleet, LLC, Exhibit B-4, Paragraph 5: "We have lost 4 specific jobs for the vessels below because the oil companies could not obtain these permits to work."

¹⁸ See affidavit of Southern States Offshore, Inc., Exhibit B-9, Paragraph 4: "We were denied a two million dollar line of credit due to the suspension and moratorium."

¹⁹ See e.g. the affidavit of Harvey Gulf, B-8, Paragraph 5.

²⁰ See affidavit of Kenneth Wells, Exhibit A-1, Paragraph 6.

²¹ See affidavit of Herbert S. Hiller Corporation, Exhibit D-5, Paragraph 5; see also affidavit of Sewart Supply, Inc., Exhibit D-6, Paragraph 6.

²² See affidavit of Advanced Logistics, LLC, Exhibit D-1, Paragraph 5.

²³ See affidavit of Coastal Marine Equipment, Inc., Exhibit D-2, Paragraph 6. "We have been forced to reduce our entire workforce to 36 hours per week in an effort to avoid layoffs."

²⁴ See the affidavit of Master Boat Builders, Exhibit C-3, Paragraph 5.

²⁵ See the affidavit of Eastern Shipbuilding Group, Inc., Exhibit C-1, Paragraph 5.

C. The future effects of the moratorium

The effects of continuing the moratorium—and by extension, the effect of granting the Government’s motion to dismiss—become substantially more onerous the longer the moratorium continues. Work on the BP spill has kept some vessels and liftboats in operation.²⁶ Particularly after the BP spill ends, vessel owners anticipate lower day rates, more vessels stacked (that is, tied up) at the dock, and more layoffs.²⁷ Deep water and ultra-deep water OSV’s, under construction for years, may be moved to foreign waters.²⁸ Plans to build vessels, or even fleets, have been canceled.²⁹ Other vessel owners will face similar effects: first suspending hiring and enforcing wage reductions, then delaying or canceling purchases, stacking vessels, and laying off crew and supporting personnel.³⁰ Many companies see the end of an industry.³¹

The Government is at pains to note that the moratorium is limited to six months and to deepwater work. OMSA’s members have experienced, and continue to experience, far greater fallout. OMSA’s members have already found delays in shallow-water work because of the Bureau of Ocean Management, Regulation, and Enforcement (“BOEM”) has delayed the

²⁶ See e.g. affidavit of Barry Graham Oil Service, LLC, Exhibit B-3, Paragraph 7: “Once the spill has been plugged and BP releases the equipment it has rented for spill containment, the market will be flooded. It is very likely that day rates will collapse, vessels will be laid up and crews will be laid off.”

²⁷ See the affidavits of Aires Marine Corporation, Exhibit B-2, Paragraph 3; Abdon Callais Offshore, Exhibit B-1, Paragraph 7; E.N. Bisso & Son, Inc., Exhibit B-5; L&M Bo-Truc Rental, Inc., Exhibit B-6, Paragraph 8; Laredo Offshore Service, Inc., Exhibit B-7; Harvey Gulf International Marine, LLC, Exhibit B-8; Candy Fleet, LLC, Exhibit B-4, Paragraph 7; Supreme Services, Exhibit B-10; and Barry Graham Oil Service, LLC, Exhibit B-3, Paragraph 8.

²⁸ See the affidavit of Candy Fleet, Paragraph 4.

²⁹ See affidavit of Supreme Services, Exhibit B-10, Paragraph 8. “Since the moratorium, Supreme Services has been forced to cancel a \$50,000,000 supply vessel ‘new build’ program; reduce workforce hours; and cancel all donation to charities.”

³⁰ See *Supra*, note 27.

³¹ See e.g. the affidavit of Aires Marine, Exhibit B-2, Paragraph 7 (“Irreparable damage will be done to the industry if the moratoriums [are] not lifted and the associated chilling-effect on the Gulf of Mexico is not removed.”); affidavit of Laredo Offshore Services, Inc., Exhibit B-7 (“Our annual gross revenue of \$20,000,000 will be cut in half (possibly more over an extended period of time.”); Candy Fleet, LLC, Exhibit B-4, Paragraph 8 “Approximately 225 workers [of 252] will be jobless and existing workers will have pay reductions.”; Southern States Offshore, Inc., Exhibit B-10, Paragraph 8. “If the moratorium is allowed to continue, then we will see drilling in the U.S. Gulf of Mexico grind to a halt. Offshore Drilling will continue but not here. Mexico will continue to drill in the Gulf [. . .] Rigs will work and boats will service them – just not U.S. flag[ged] boats and not American crews.”

approval process of shallow-water permits.³² Even though the moratorium is specifically designed to exclude shallow-water work, there is significant evidence the penumbra of the moratorium is limiting shallow water work as well, harming the entire Gulf oilfield industry.³³

OSV's take years to build, cost millions, and some are right now leaving shipyards to find no work available.³⁴ It comes as no surprise that companies providing equipment and services to vessel owners will be affected.³⁵ Thompson, a distributor of Caterpillar power packages to the offshore industry, anticipates an 80%-90% decrease in sales volume.³⁶ Coastal Marine Equipment believes continuation of the moratorium could be at the expense of its entire business.³⁷

Finally, shipyards will be affected.³⁸ Master Boat Builders in Alabama has no work after its current projects end, even though it had six or seven customers inquiring before the moratorium.³⁹ Once current construction projects have finished, Master Boat Builders expects 50% layoffs, or greater.⁴⁰ Eastern Shipbuilding Group, Inc., already suffering labor force

³² See the affidavit of Aires Marine, Exhibit B-2; see also the affidavit of Trinity Liftboat Services, LLC, Exhibit B-11, paragraph 5. "We are seriously concerned about what the future holds for our company. [. . .] we are concerned that oil production will leave the Gulf of Mexico and go elsewhere because of the uncertainty for future business."

³³ See the affidavit of Aires Marine, Exhibit B-2; Paragraph 5.

³⁴ See the affidavit of Kenneth Wells, president of OMSA, Exhibit A-1.

³⁵ See the affidavits of Herbert S. Hiller Corporation, Exhibit D-5 (selling fire detection, gas detection and fire suppression systems to vessel owners); Thompson Tractor Company, Inc., Exhibit D-7 (selling equipment and power packages based on Caterpillar engines to "nearly all offshore equipment and vessels"); Coastal Marine Equipment, Inc; Exhibit D-2 (manufacturing equipment for OSV's, PSV's, offshore tugs, barges and crew/supply boats); Advanced Logistics, LLC, Exhibit D-1 (providing software for GPS, logs, safety data, crew data, commodities to vessels and rigs); and Dreyfus-Cortney Inc., d/b/a DCL Mooring & Rigging, Exhibit D-4 (providing wire rope and rigging products); and unsworn declaration of Cross Group, Inc., Exhibit D-3 (providing marine equipment sales, service, repair, and charter of multipurpose barges.); affidavit of Sewart Supply, Inc., Exhibit D-6 (providing marine propulsion equipment.)

³⁶ See the affidavit of Thompson Tractor Company, Inc., Exhibit D-7.

³⁷ See affidavit of Coastal Marine Equipment, Exhibit D-2, Paragraph 7; see also unsworn declaration of Cross Group, Inc., Exhibit D-3 ("Customers have placed work opportunities into an undefined suspense mode awaiting a lift of the moratoriums.")

³⁸ See the affidavits of Master Boat Builders, Inc., Exhibit C-3; Horizon Shipbuilding, Inc., Exhibit C-2; Eastern Shipbuilding Group, Inc., Exhibit C-1; and Steiner Shipyard, Inc., Exhibit C-4.

³⁹ See the affidavit of Master Boat Builders, Inc., Exhibit C-3, Paragraph 5.

⁴⁰ *Id.*, paragraph 7.

reduction for lack of work, believes the moratorium “can impact as many as 200-300 employees and their families.”⁴¹

The Fifth Circuit recognized, in its July 8, 2010 Order, the effect of the threat of a moratorium.⁴² The Fifth Circuit held that despite this Court’s injunction, there was no evidence anyone would commence drilling. If the Government’s motion to dismiss is granted, this Court would extend uncertainty while OMSA’s members’ companies and employees hang in the balance. The cause for all these hardships, according to the affiants, is uncertainty: uncertainty over when the moratorium will be lifted and whether there will be work when and if it is.

D. The Government’s Request for a Stay Should be Denied

The Government, in the alternative, asks this Court to stay this litigation until the Fifth Circuit rules on the Government’s motion to vacate. For all the foregoing reasons, a stay is identical to denial for OMSA’s members because no company can begin deepwater work while the possibility of a moratorium looms. The only meaningful relief OMSA’s members can get is through a prompt and final determination on the merits of the moratorium. As the state of Louisiana observed in its amicus brief, “Louisiana is in a state of environmental and economic crisis, and time is the enemy.”⁴³

CONCLUSION

What the Government has labeled a “second moratorium” does not moot the first because both comprise a “an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest.”⁴⁴ The Gulf oil industry and the companies that support it require prompt adjudication of the Government’s moratorium if the already-significant effects have a chance to be curtailed. Plaintiffs justifiably cite to *Marbury v.*

⁴¹ See affidavit of Eastern Shipbuilding Group, Inc., Exhibit C-1, Paragraph 8.

⁴² See the per curiam Order, dated July 8, 2010, Case No. 10-30585, Document 00511168004.

⁴³ See the amicus brief of the State of Louisiana, CM/ECF Doc. No. 52-1, p. 11.

⁴⁴ *McCorkle*, 416 U.S. at 125-26.

*Madison*⁴⁵ for the proposition that the Government cannot evade judicial review. An older legal principle, enshrined in the Magna Carta, is even more apropos: “To no one will we sell, to no one will we refuse or delay, right or justice.”⁴⁶ The Government’s motion to dismiss would delay justice; in point of fact, it would refuse justice to OMSA’s members, who would be deprived of a forum to hear the moratorium with enough speed to prevent the anticipated harm. This Court is in a unique position to prevent the losses to the gulf oil industry from becoming irreversible. Justice delayed in this case is justice denied.

Respectfully submitted,

DUNCAN, COURINGTON & RYDBERG, L.L.C.


/s/

KELLEY A. SEVIN (#25871)
HARRY E. MORSE (#31515)
ELTON F. DUNCAN III (#14967)
400 Poydras Street, Suite 1200
New Orleans, LA 70130
Telephone: (504) 524-5566
Facsimile: (504) 524-9003
E-Mail: ksevin@duncour.com
E-Mail: hmorse@duncour.com
E-Mail: eduncan@duncour.com
Attorneys for Amicus Curiae,
Offshore Marine Services Association

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been electronically filed with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record, this 23rd day of July, 2010.


/s/

⁴⁵ 5 U.S. 137 (1803).

⁴⁶ Magna Carta, c. 29 [c. 40 of King John's Charter of 1215] (1225), translated and quoted in Coke, The Second Part of the Institutes of the Laws of England 45 (Brooke, 5th ed., 1797).