IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

HORNBECK OFFSHORE SERVICES, LLC, et al. **Plaintiffs,**	**CIVIL ACTION No. 10-1663(F)(2)**
v.	**SECTION F**
KENNETH LEE "KEN" SALAZAR, et al,	**JUDGE FELDMAN**
Defendants.	**MAGISTRATE 2** **MAGISTRATE WILKINSON**

SUPPLEMENTAL BRIEFING
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants, Kenneth Lee Salazar, United States Department of the Interior, Michael Bromwich, and the Bureau of Ocean Energy Management, Regulation, and Enforcement, ("Defendants"), hereby file this Supplemental Brief in compliance with the Court's Orders dated August 11 and August 17, 2010.

I. BACKGROUND

On July 12, 2010, Defendants filed a Motion to Dismiss this action, contending that the Secretary of the Interior's rescission of the challenged agency decision – the May 28, 2010, Memorandum re Suspension of Outer Continental Shelf (OCS) Drilling of New Deepwater Wells ("May Directive") – rendered the action moot. During the hearing on Defendants' motion to dismiss on August 11, 2010, and later in a minute order issued on that same date, this Court ordered the parties to submit supplemental briefing addressing whether and to what extent the instant Motion to Dismiss is governed by the Supreme Court's holding in Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656 (1993). The Court

also ordered Defendants to submit a demonstrative exhibit comparing the Administrative Record documents that relate exclusively to a new Secretarial decision directing the suspension of certain drilling operations ("July Directive"), with the record documents that relate to both the May Directive and the July Directive. See Transcript, Dkt. 152 at 48 (requesting a "comparison of the information in the July 12 memorandum that was old information, namely information from before May 28 . . . [to the] new information [that] formed the basis of the Secretary's memorandum decision of July 12").

Shortly thereafter, the Fifth Circuit Court of Appeals issued an order remanding certain evidentiary issues to this Court relating to the controversies raised by Defendants' Motion to Vacate the Preliminary Injunction as Moot. See Dkt. #156 at 3. This Court then issued a new Order, on August 17, 2010, instructing the parties to submit a single combined response to both Court's questions in their respective orders. Specifically, the parties are now instructed to address the Supreme Court's decision in City of Jacksonville, and to provide a response to the following additional questions:

> 1. Whether the Secretary has the authority under the provisions of the Outer Continental Shelf Lands Act and the Administrative Procedure[] Act to declare the provisions of the May 28 Moratorium to be withdrawn, cancelled, and no longer in force and effect, especially given that the May 28 Moratorium is the subject of a preliminary injunction issued by the district court and an appeal filed by the Secretary under the provisions of 28 U.S.C. 1292(a)(1).
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> 2. Whether the evidence upon which the Secretary relied in issuing the July 12 Moratorium and not asserted in the May 28 Moratorium was available or unavailable to the Secretary when the May 28 Moratorium was issued, and the nature of such additional evidence.
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> 3. With respect to the scope and substance of the May 28 Moratorium and the July 12 Moratorium, what are the differences, if any, and, considering such differences and any other circumstances--including changed conditions, changed facts, and changed positions or subsequent conduct of the parties--whether the preliminary injunction of the May 28 Moratorium was mooted by the issuance of the July 12 Moratorium.

Dkt. #153. This brief responds to each of the above questions:

II. DEFENDANTS' RESPONSES

A. Response to this Court's request for supplemental briefing concerning the effect of City of Jacksonville on this case

The Supreme Court's decision in City of Jacksonville, 508 U.S. 656 (1993), provides no support for denying Defendants' motion to dismiss because it is distinguishable from the case at hand.

At issue in City of Jacksonville was a city ordinance requiring that 10% of the funds spent on City contracts be set aside each fiscal year for "Minority Business Enterprises," which the ordinance defined as businesses whose ownership was composed of at least 51% "black, Spanish-speaking, Oriental, Indian, Eskimo, Aleut, or handicapped" people. Id. at 658. The petitioner, an association consisting primarily of members that did not qualify as Minority Business Enterprises, challenged the ordinance on grounds that it violated the Equal Protection Clause of the Fourteenth Amendment. Id. at 659. The Circuit Court dismissed the challenge for lack of standing because the petitioner "ha[d] not demonstrated that, but for the program, any [petitioner] member would have bid successfully for any of these contracts." Id. at 660. The Supreme Court then granted certiorari to review the issue of standing but, promptly thereafter, the City repealed the challenged ordinance and replaced it with a new one. The new ordinance, while in some respects different from the old one, did not materially change the facts underlying the plaintiffs' Equal Protection claim because it still "accord[ed] preferential treatment to black- and female-owned contractors." Id. at 662. The City then moved to dismiss on grounds that there was no longer a live case or controversy regarding the constitutionality of the repealed ordinance. Id. at 660-61.

In the context of reviewing the issue of standing, the Court denied the motion to dismiss and held that the case was not moot under the doctrine of voluntary cessation because the new ordinance merely repeated the allegedly illegal conduct that the petitioners had challenged with respect to the

first ordinance. Id. at 662. City of Jacksonville is distinguishable, however, and its holding does not control this case. Unlike City of Jacksonville, a favorable result on the merits in this case would not redress Plaintiffs' alleged injuries. As a result, this case does not present a live case or controversy and must be dismissed. Moreover, even if the lack of redressability were not dispositive of the case, the July Directive also presents a "substantially different controversy," see id. at 662 n.3, in that the decision-making process and Administrative Record underlying the July Directive do not present the same legal infirmities attributed to the decision-making process underlying the May Directive. Thus, the doctrine of voluntary cessation would not apply.

1. City of Jacksonville presented a live case or controversy, whereas the instant case does not.

City of Jacksonville is distinguishable from this case in that it involved an alleged violation of the Equal Protection Clause through racial discrimination – a situation in which federal courts have broad discretion and authority to grant system-wide prospective injunctive relief. Cf. Columbus Bd. of Ed. v. Pennick, 443 U.S. 449, 459 (1979) ("In default by the school authorities of their obligation to proffer acceptable remedies [for racial segregation], a district court has broad power to fashion a remedy that will assure a unitary school system."). In light of its broad authority, the Court could have enjoined both the challenged minority set-aside ordinance *and its amended successor*, even though the successor ordinance was not itself before the Court. Redressability, therefore, was not lacking in City of Jacksonville.

The current case, by contrast, involves a challenge to an agency action that is governed by the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. While a federal district court in an APA case may set aside and enjoin implementation of a *challenged* agency action, it may not grant relief with respect to agency actions that are not before the court and for which the limited waiver of sovereign immunity in the APA has not

been invoked. Cf. Lujan v. Nat'l Widlife Fed'n, 497 U.S. 871, 891 (1990) ("[A] respondent cannot seek wholesale improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm."). Unlike in City of Jacksonville, therefore, this Court cannot enjoin the Department of the Interior's implementation of the July Directive in this case, nor is there anything this Court could hold with respect to the rescinded May Directive that would relieve the Plaintiffs from the suspensions that correspond to the July Directive. Accordingly, there is no redressability, and thus, no live case or controversy in this case.

2. The decision-making process and Administrative Record underlying the July Directive do not repeat the legal infirmities attributed to the May Directive.

Even if Plaintiffs could carry their burden of showing that their alleged injury is "likely to be redressed by a favorable judicial decision," Spencer v. Kemna, 523 U.S. 1, 7 (1998) – which they cannot – this case would still have to be dismissed because the decision-making process and Administrative Record underlying the July Directive do not repeat the violations that Plaintiffs alleged with respect to the May Directive.

The Court in City of Jacksonville held that the case was not moot because the new ordinance merely repeated the allegedly illegal conduct that the petitioners had challenged with respect to the first ordinance. Id. at 662 ("There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so."). Here, however, the gravamen of Plaintiffs' Complaint is *not* that the May Directive suspended drilling operations; the gravamen is instead that the May Directive lacked an adequate factual and analytical basis, and that it lacked an explanation articulating a rational connection between the facts found and the choices made. See Dkt. #5 ¶¶ 78-88. Those alleged shortcomings are not repeated by the decision-making process and Administrative Record

underlying the July Directive. The doctrine of voluntary cessation, therefore, does not prevent a finding of mootness in this case.

3. Unless Plaintiffs file a complaint challenging the July Directive, this Court is without power to resolve the merits of Plaintiffs' claims.

At bottom, Plaintiffs must file a new complaint, or amend their current Complaint, before this Court may review the merits of the current suspension of drilling operations. City of Jacksonville is not to the contrary. It is telling that while the Supreme Court did overturn the dismissal of the complaint in City of Jacksonville, the merits of the original ordinance were never adjudicated. The Court resolved only the issue of standing. See City of Jacksonville, 508 U.S. at 666, 669. When the Eleventh Circuit Court of Appeals ultimately remanded the case to the district court, moreover, it did so with instructions to "permit plaintiff to amend its complaint to raise the validity of the second ordinance . . . ." N.E. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 997 F.2d 835 (11th Cir. 1993). The practical effects of the Supreme Court's holding in City of Jacksonville, therefore, were merely to confirm that the plaintiff possessed standing to challenge the minority set-aside, and to afford the plaintiff an opportunity to amend its complaint. An amended complaint, as Defendants have already explained, is precisely what the Plaintiffs must file in this case if they wish to have this Court review the merits of the Secretary's most recent suspension of certain drilling operations.

For all of the foregoing reasons, City of Jacksonville does not provide any basis for denying Defendants' motion to dismiss.

B. Response to the Circuit Court's query as to whether the Secretary has authority under the provisions of the Outer Continental Shelf Lands Act and the Administrative Procedure Act to rescind the May Directive

The Secretary's authority under the OCSLA and the APA to withdraw the May Directive is beyond question. The OCSLA imposes on the Secretary a "continuing duty to guard all the

resources of the outer Continental Shelf," See Gulf Oil Corp, v. Morton, 493 F.2d 141, 146 (9th Cir. 1974), including the responsibility to ensure that operations are "conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, . . . or other occurrences which may cause damage to the environment or to property, or endanger life or health," 43 U.S.C. § 1332(6). Congress instructed the Secretary to carry out that continuing duty by promulgating regulations to govern the suspension of lease operations or activities. 43 U.S.C. § 1334(a)(1). The Secretary has done so. 30 C.F.R. §§ 250.170, 250.172. Thus, the Secretary has the power to decide whether to suspend lease operations, and "[e]mbedded in an agency's power to make a decision is its power to reconsider that decision." ConocoPhillips Co. v. U.S. E.P.A., --- F.3d ----, 2010 WL 2880144, at *8 (5th Cir. 2010).

Nothing in either the OCSLA or Interior's implementing regulations precludes Interior from giving its suspension decision further consideration, withdrawing the May Directive, and directing new suspension with further explanation. See 30 C.F.R. § 250.170(e). Absent some statutory or regulatory prohibition on the Secretary's authority to withdraw agency action or take superseding agency action to correct alleged errors in his decisions, doing so is consistent with fundamental principles of administrative law, as "it is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions." Macktal v. Chao, 286 F.3d 822, 825-26 (5th Cir. 2002); accord Ideal Basic Indus. v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976) (Secretary of the Interior has "broad" powers to correct or reverse an erroneous decision); Friends of Boundary Waters Wilderness v. Bosworth, 437 F.3d 815, 823 (8th Cir. 2006) (agencies are "presumed to have the authority" to amend or revoke their decisions); Dun & Bradstreet Corp. v. United States Postal Serv., 946 F.2d 189, 193 (2d Cir. 1991) ("It is widely accepted that an agency may, on its own initiative, reconsider its

interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review."); Albertson v. FCC, 182 F.2d 397, 399 (D.C. Cir. 1950) ("The power to reconsider is inherent in the power to decide.").

Here, the Secretary has merely fulfilled his continuing duty to manage the OCS by reanalyzing the previously directed suspensions, evaluating new information on the adequacy of safety and environmental protection standards for OCS lease operations in the Gulf of Mexico, and issuing a new decision. See Union Oil Co. v. Morton, 512 F.2d 743, 752 (9th Cir. 1975) ("Because of the Secretary's continuing supervisory obligations, injunctive relief against further interference with Union's operations would be inappropriate."). Even Plaintiffs have recognized that the Secretary may properly do so by conceding in their preliminary injunction brief that even if a preliminary injunction was issued, "if [Interior] could marshal appropriate facts to support such an action, [it] would retain [its] authority" to issue a new suspension decision. Dkt. #7-1 at 22. The Secretary thus had authority to withdraw the May Directive and replace it with the July Directive.

Neither this Court's preliminary injunction nor the United States' appeal of that injunction changes that result. In issuing its preliminary injunction, this Court concluded that Plaintiffs were likely to succeed on their claim that Interior failed to adequately explain its decision in the May Directive to suspend drilling in water deeper than 500 feet for six-months. Dkt. #67 at 4, 20. There is no contention in this case that the Secretary lacks the authority to suspend lease operations. The only question is whether the Secretary's rationale was supported in the record and not arbitrary or capricious. The conclusion that deepwater drilling poses a threat to life, property, or the environment sufficient to warrant a suspension of lease activities under the OCSLA and Interior's regulations is entirely within Interior's exclusive province, subject only to arbitrary or capricious review. Indeed, respect for the agency's primary

jurisdiction required this Court to refrain from making its own findings of fact on the necessity of deepwater-drilling suspensions or from resolving issues that Interior did not consider. See Nader v. Allegheny Airlines Inc., 426 U.S. 290, 303-04 (1976).

Thus, this Court could not issue relief under the APA, even after final judgment, that would prevent the Secretary from suspending lease operations. "The function of the reviewing court ends when an error is laid bare. At that point the matter once more goes to the [agency] for reconsideration." FPC v. Idaho Power Co., 344 U.S. 17, 20 (1952). The Supreme Court recently reinforced the proposition that even where there is a final judgment finding a statutory violation a court cannot prevent an agency from acting within its statutory authority. Monsanto Co. v. Geertson Seed Farms, --- U.S. ---, 2010 WL 2471057, at *9 (June 21, 2010). As the Supreme Court explained in Monsanto, after a judicial determination that the order in question was procedurally defective "it was for the agency to decide whether and to what extent it would pursue" an interim solution while correcting its procedural errors and issuing a new final decision. Id. And the agency was free to take that action even in the absence of a remand and while the case was pending. Id.

Neither a final judgment nor an interlocutory order can prevent an agency from exercising its statutory authority to adopt an interim solution while addressing a procedural error, or from addressing alleged errors by issuing a new decision. Because the potential relief in this case is limited to a remand to the agency for further consideration, and because the agency retains the inherent power to give its decisions further consideration, this court's preliminary injunction – an interlocutory decision – does not foreclose Interior from making a new decision to carry out "the legislative policy committed to its charge" under the Outer Continental Shelf Lands Act. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 145-46 (1940). An agency must

be able to carry out its statutory duties while litigation is pending, particularly in dynamic and emergency circumstances like those surrounding issuance of both the May and July Directives.

Finally, agencies are free to act before an appeal is complete, as they "possess authority to address issues identified by the court prior to the issuance of its mandate." Chamber of Commerce of U.S. v. S.E.C., 443 F.3d 890, 898, (D.C. Cir. 2006). Well-established practice in the courts bears that out. Each of the mootness cases cited by the parties that involved a superseding agency action necessarily involved an agency action taken while litigation was pending before a court, often a court of appeals, and not a single one of those cases questions the agency's *authority* to act, regardless of whether the court ultimately concluded that the case is moot. In sum, the Secretary acted within his authority when he withdrew the May Directive and replaced it with the July Directive.

C. Response to both Courts' requests for information concerning the nature of the evidence considered in the context of the May and July Directives

In its Order dated August 11, 2010, this Court requested a comparison of the Administrative Record documents that relate exclusively to the July Directive with the Administrative Record documents that were considered in the context of both the May and July Directives. This element of the August 11 Order has been overtaken by the Circuit Court's more recent request for similar information, and this Court has instructed the parties accordingly. For efficiency and convenience, however, Defendants provide responses to both Court's queries.

1. The Circuit Court's request

Defendants submit the Declaration of Jamie L. Burley which attaches a Response Index identifying each of the documents considered with respect to the July Directive that were generated after the Secretary's issuance of the May Directive. The documents identified in the Response Index meet the Circuit Court's criteria because (1) they were drawn from the Administrative Record for the

July Directive and, accordingly, were "relied [upon] in issuing" the July Directive; and (2) they post-date the May Directive and therefore were not considered (i.e., "asserted") in the course of the decision-making process for the May Directive. See Burley Decl. ¶¶ 3-8.

The Response Index only includes documents that post-date the May Directive because, as a general matter, documents available to the Secretary prior to May 28, 2010, were considered in the course of the May Directive and therefore do not satisfy the Circuit Court's criteria for inclusion in the Index. See Kemkar Decl. ¶ 7. For the same reason, all of the documents in the Response Index were "unavailable to the Secretary when the May [Directive] was issued."

Finally the Response Index describes the "nature of [the] additional evidence" by identifying the document type and document title for each entry. Additional information reflecting the "nature of [the] additional evidence" can be obtained from the "Table" which, as explained below, is submitted as Exhibit 1 to the Declaration of Raya Bakalov. Those exhibits, taken together, show that the Secretary conducted significant additional fact finding and analysis relevant to the various conclusions presented in the July Directive. Defendants will lodge a CD-ROM with the Court on August 25, 2010, containing each of the documents listed in the Response Index for the Court's convenience.

2. The District Court's request

Defendants submit the Declarations of Raya Bakalov and Neal Kemkar in response to the Court's original request for a comparison of Administrative Record documents. The requested information appears in a Table submitted as Exhibit 1 to the Bakalov Declaration. The Table lists significant findings and/or conclusions from the July Directive – including those referenced by the Court during the August 11, 2010, hearing – and identifies significant Administrative Record evidence that forms part of the basis for each finding and/or conclusion in the following manner:

a. Evidence that was considered solely in the context of the decision-making process for the July Directive, i.e., "new" information, see August 11, 2010 Transcript (Dkt. #152) at 48, appears in the right-hand column.

b. Evidence that was considered in the context of decision-making for both the May and July Directives is listed in the left-hand column.

c. Evidence in the left-hand column which was provided previously to this Court via the Declarations of Steve Black (Dkt. #33-1) and David J. Hayes (Dkt. #33-2) – and which formed the basis for this Court's June 22, 2010, decision granting Plaintiffs' motion for a preliminary injunction – is denoted with an asterisk.

In providing this information, Defendants realize that this Court is most interested in seeing what "new" documents were compiled in support of the July Directive. Clearly an examination of such documents is appropriate to determine whether the Secretary reopened the evidentiary record after May 28, 2010. Defendants submit, however, that the documents in the left-hand column are also relevant to this Court's review in two ways.

First, this Court's June 22 Opinion and Order indicated that the record then before the Court did not provide a sufficient basis for the May Directive. See Dkt. #67 at 21. The record "then before the Court," however, was not the entire administrative record for the May Directive. See Dkt. #28 at 13-14. It instead contained only the May 28 Secretarial Memorandum, the May 30 Notice to Lessees, and eight other documents (six of which appear in the left column of the Table and are marked with an asterisk). Id. at 14. The Court's June 22 Opinion and Order, therefore, expressed no opinion as to the sufficiency or adequacy of other documents which, despite having been considered in the decision-making process leading up to the May Directive, could not be provided to the Court during the expedited proceedings on Plaintiffs' motion for a preliminary injunction. Those other documents also form part of the Administrative Record for the July Directive and should be given

appropriate weight as this Court determines whether the decision-making process and Administrative Record for the July Directive avoid repeating the legal infirmities that this Court attributed to the record before it in the preliminary injunction proceedings.

Second, this Court's June 22 Opinion and Order found that the Secretary had failed to provide an adequate explanation for his exercise of discretion, including a reasonable connection between the facts found and the choice made. In this context, Defendants submit that the explanation provided in the July Directive appropriately relies on both "new" and "old" evidence. Cf. Nat'l Grain & Feed Ass'n, Inc. v. Occupational Safety and Health Admin., 903 F.2d 308, 310-311 (5th Cir. 1990) (recognizing that an agency need not always conduct supplemental fact gathering on remand).

D. Response to the Circuit Court's request for a description of the differences between the May and July Directives and whether those differences render Plaintiffs' challenge to the May Directive moot

The Circuit Court's third question – by focusing on the differences in scope and substance presented by the May and July Directives – essentially parallels the question posed by the Supreme Court in City of Jacksonville: whether a new action is "sufficiently altered" vis-à-vis the challenged action "so as to present a substantially different controversy." See City of Jacksonville, 508 U.S. at 662 n.3. The doctrine of voluntary cessation does not prevent a case from being dismissed as moot when this question is answered in the affirmative because in those circumstances there is "no basis for concluding that the challenged conduct [is] being repeated." Chem. Producers and Distribs. Ass'n v. Helliker, 463 F.3d 871, 875 (9th Cir. 2006).

As an initial matter, the doctrine of voluntary cessation does apply here because, as explained in Section II.A.1 above, a favorable result on the merits would not redress Plaintiffs' alleged injuries. Absent redressability there is no live case or controversy and the case must be dismissed. But even if a case or controversy existed here, the decision-making process and Administrative Record for the

July Directive are "sufficiently altered" vis-à-vis those underlying the May Directive "so as to present a substantially different case or controversy."

In addressing this issue, a court must look to the "gravamen" of the plaintiff's complaint. City of Jacksonville, 508 U.S. at 662; see also Diffenderfer v. Cent. Baptist Church of Miami, 404 U.S. 412 (1972) (focusing on the "crux of [plaintiffs'] complaint"); Helliker, 463 F.3d at 876 ("[T]he case or controversy giving rise to jurisdiction is the touchstone."). Here, the gravamen of Plaintiffs' Complaint is *not* that the May Directive suspended drilling operations; the gravamen is instead that the May Directive lacked an adequate factual and analytical basis, and that it lacked an explanation articulating a rational connection between the facts found and the choices made. See Dkt. #5 ¶¶ 78-88. Agreeing with the Plaintiffs, this Court observed in its June 22 Order and Opinion that the Plaintiffs – based on the materials then before the Court – where likely to succeed on their claims that Interior had (1) failed to explain the relationship between its factual findings and the scope of the challenged suspension order; (2) failed to analyze the safety threat posed by the rigs affected by the suspension order; (3) failed to explain the six-month duration of the challenged suspensions; and (4) failed to cogently explain why it exercised its discretion in the given manner. Dkt. #67 at 17, 19-21.

The decision-making process and Administrative Record underlying the July Directive do not repeat these alleged legal infirmities. The decision reflects consideration of the unique and heightened risks associated with drilling operations that use subsea blowout preventers ("BOP") or BOPs on floating platforms, Ex. A at 7-9,[1] as well as the risks presented by drilling in deepwater environments. See id. at 9-10. In addition, the Record reflects, and the July Directive

[1] As used in this Brief, "Ex. A" refers to the Secretary's July 12, 2010, Directive, which was attached as Exhibit A to the Declaration of Walter D. Cruickshank (Dkt. #125-4). Defendants submitted the Cruickshank Declaration with their opening papers in support of this Motion to Dismiss.

describes, the systemically deficient state of the oil and gas industry's current spill containment, wild-well intervention, and oil spill response capabilities. Compare Ex. A at 12-15; with June 21, 2010 Transcript, Dkt. #72, at 24-25 (conceding that a widespread suspension of drilling operations would be an appropriate response to a finding of "systemic" risk). These and other factual findings – which are based on new information considered after the issuance of the May Directive as well as information that supported the May Directive – provide a robust basis for the Secretary's July 12 conclusion that allowing certain drilling operations to continue at this time would present an unacceptable risk of harm within the meaning of 30 C.F.R. § 250.172(b). In this way, the July Directive resolves Plaintiffs' primary legal grievance with the May Directive. See Hornbeck's Memorandum of Law in Support of its Motion for Preliminary Injunction (Dkt. #7-1) at 13-14 (arguing that Defendants had failed to engage "in any fact-finding or rational factual inquiry to show that [the suspended drilling operations] posed a threat of 'serious, irreparable, or immediate harm or damage.'").

The July Directive also resolves the shortcomings that this Court perceived in its June 22 Order and Opinion. See e.g., Ex. A at 20-21 (explaining the rationale for the duration of the suspensions ordered by the July Directive); id. at 4 n.2, 7-10, 17-19 (explaining the rationale underlying the July Directive's other parameters); id. at 4, 8-10, 13 (explaining basis for finding of industry-wide risks that extend beyond the particular circumstances of the Deepwater Horizon); id. at 16-17 (explaining consideration of economic impacts from the July Directive); id. at 17-19 (explaining the Secretary's consideration of other alternative options for addressing perceived risks); id. at 21 (explaining means by which suspensions directed by the July Directive may be lifted prior to the current end-date of November 30).

Dismissal on grounds of mootness is appropriate in such situations, as illustrated by the Seventh Circuit's decision in Zessar v. Keith, 536 F.3d 788 (7th Cir. 2008), cert. denied, 129 S.Ct.

2734 (2009). The plaintiff in Zessar alleged that his due process rights under the Fourteenth Amendment had been violated because election officials had failed to provide him with notice and a hearing prior to rejecting his absentee ballot in a general election. Id. at 791. Defendants, however, amended the Election Code while the litigation was pending. Absentee voters were entitled under the new Code to immediate notice and an opportunity to appear before the election authority to show cause why the ballot should not be rejected. Id. at 792. The court dismissed the case as moot in light of the amendment to the Election Code. It also distinguished City of Jacksonville on grounds that the Code had not merely been changed "in insignificant ways"; it had instead been "sufficiently altered" because the amendment had directly addressed plaintiff's alleged deprivation of certain procedural rights, even if it did not go so far as to cure all of the alleged infirmities. Id. at 794-95.

Similarly in Lamar Adver. of Penn, LLC v. Town of Orchard Park, 356 F.3d 365 (2nd Cir. 2004), a plaintiff challenged a local ordinance governing the use of commercial signs on grounds that it violated the First Amendment. While litigation was pending, the defendant amended the ordinance to address some, but not all, of the plaintiffs' claims. Id. at 367. Despite recognizing that "the amended provisions of the [challenged] ordinance may present new constitutional problems," the court nonetheless found that the defendant had "sufficiently overhauled the regulatory scheme . . . . 'so as to present a substantially different controversy from the one' that existed when this suit was filed." Id. at 377-78 (citing City of Jacksonville, 508 U.S. at 662 n.3, 671).

As in Zessar and Town of Orchid, the decision-making process and Administrative Record underlying the July Directive are "sufficiently altered" vis-à-vis" those underlying the May Directive "as to present a substantially different controversy." The Secretary's issuance of the July Directive therefore moots this case.

Respectfully submitted this 24th day of August, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2010, I caused a copy of the foregoing to be served through the Court's CM/ECF System to all parties.

/s/Guillermo A. Montero
Guillermo A. Montero