

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

**HORNBECK OFFSHORE SERVICES,
LLC,**

Plaintiff,

VS

**KENNETH LEE “KEN” SALAZAR, in,
his official capacity as Secretary, United States
Department of the Interior;**

**UNITED STATES DEPARTMENT OF THE
INTERIOR; ROBERT “BOB” ABBEY, in his
Official capacity as Acting Director, Mineral
Management Service; and**

**MINERALS MANAGEMENT SERVICE,
Defendants**

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CIVIL ACTION NO.: 10-1663

SECTION: “F”

MAGISTRATE: “2”

**AMICUS BRIEF ON BEHALF OF BOBBY JINDAL, GOVERNOR
OF THE STATE OF LOUISIANA, AND THE STATE OF LOUISIANA
IN OPPOSITION TO DEFENDANT’S MOTION TO DISMISS**

The Governor and State of Louisiana, through the Louisiana Attorney General, James D. “Buddy” Caldwell, present this amicus brief in opposition to Defendant’s Motion to Dismiss, and more specifically, to respond to this Court’s Order of August 17th (Rec. Doc. 153), requesting supplemental briefing on questions raised by this Court and the Fifth Circuit on limited remand.

As an “Affected state” under the Outer Continental Shelf Lands Act (“OCSLA”), the

State of Louisiana has a real interest in the outcome of this litigation and is uniquely harmed by the Moratorium. No state's fiscal health is more closely aligned to the health of the deepwater drilling industry than Louisiana's. The drilling Moratoria are having a systemic effect on Louisiana's economy¹, including the loss of 4,000 Louisiana jobs and anticipated loss of 20,000², reduced tax revenue for the State, increased output of unemployment benefits, and the depletion of numerous funds dependent on oil and gas revenue. For instance, Louisiana's Budget Stabilization Fund (La. Const. Art. VII, §10.3), the Coastal Protection and Restoration Fund (La. Const. Art. VII, §10.2), Oil Spill Contingency Fund (La. Const. Art. VII, §10.7), and Investment Fund for Enhancement (La. Const. Art. IX, §10), are all partially or totally funded by oil and gas revenues and are adversely impacted by the Moratorium. The Moratoria also diminish Louisiana's share of revenues pursuant to the Gulf of Mexico Energy Security Act of 2006; funds earmarked for coastal conservation, restoration, and hurricane protection.³

The State is particularly well-positioned to provide this Court with information responsive to the third question raised by the Fifth Circuit and noted in this Court's August 17th Order. As set forth below, Defendants' conduct, subsequent to this Court's issuance of the preliminary injunction, has remained unchanged as it concerns the State. Although they have recognized the OCSLA's requirement to notify affected States and provide them with an opportunity to participate in policy and planning decisions affecting outer continental shelf ("OCS") activity, Defendants continued to ignore Louisiana as a requisite partner in the decision

¹ For a detailed discussion as to the State's interest in this litigation, see the Amicus Brief on Behalf of Bobby Jindal, Governor of the State of Louisiana, and the State of Louisiana in Support of Plaintiffs' Motion for Preliminary Injunction (Rec. Doc. 66).

² Studies report that 4,000 Louisiana jobs are immediately lost (See Jim Richardson, Economic Impact of Offshore Moratorium on Louisiana 8, Louisiana State University, 2010)("Richardson"), while 10,000 Louisiana jobs will be idle within a few months, and another 20,000 disappearing within 18 months (See Gulf Economic Survival Team Report, available at <http://www.crt.state.la.us/GEST/FactsFigures.aspx> (last visited August 21, 2010)). Other studies estimate that the Moratorium will result in the loss of up to 46,000 jobs (See Richardson, supra).

³ Additionally, even the newly executed Deepwater Horizon Oil Spill Trust, administered by Kenneth Feinberg, lists as collateral, BP's U.S. oil and natural gas production payments, which are affected by the Moratorium.

making process. Additionally, the Defendants' decision to issue the second (July 12th) Moratorium, like the first, is arbitrary and capricious and in violation of the law.

ARGUMENT

Fifth Circuit question number 3

The policy of the United States of granting “affected States” the opportunity to participate in “the policy and planning decisions made by the Federal Government” in relation to the “enforcement of safety, environmental, and conservation laws and regulations” is codified in the OCSLA, 43 U.S.C. §1331, *et seq.*⁴ The status of the State of Louisiana as an “affected State” is all too apparent and has been briefed at length in prior memoranda to this Court⁵ as well as to the Fifth Circuit.⁶ The focus of this brief is on the Third question posed by the Fifth Circuit, and to update this Court as to the Defendants' continued disregard for the provisions of the OCSLA mandating them to notify Louisiana and provide the State with a meaningful opportunity to participate in and comment on the July 12th Moratorium and its effects.

⁴ OCSLA, 43 U.S.C. § 1332 states that it is “declared to be the policy of the United States” that:

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments-

...

(C) such States, and through such States, affected local governments, **are entitled to an opportunity to participate**, to the extent consistent with the national interest, **in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf**.
(emphasis added).

See generally, *State of Texas v. Sec'y of the Interior*, 580 F. Supp. 1197 (1202-03 (E.D. Tex. 1984) (Parker, J.) (describing 1978 amendments to the OCSLA which “sharply curtailed the Secretary’s discretion, and concomitantly provided for substantially increased participation by affected states”). In view of that stated policy, 43 U.S.C. § 1334(a) reads, in pertinent part, as follows: “**In the enforcement of safety, environmental, and conservation laws and regulations, the Secretary [of the Interior] shall cooperate with** the relevant departments and agencies of the Federal Government and of **the affected States**.” (emphasis added).

⁵ See the Amicus Brief on Behalf of Bobby Jindal, Governor of the State of Louisiana, and the State of Louisiana in Support of Plaintiffs’ Motion for Preliminary Injunction (Rec. Doc. 66).

⁶ See the Amicus Curiae Brief Filed on Behalf of the State of Louisiana, Through the Louisiana Attorney General, James D. “Buddy” Caldwell in Opposition to the U.S. Department of Justice’s Motion for Stay, Doc. No. 00511156044 (filed on 6/28/10) in the appeal entitled *Hornbeck Offshore Services, LLC, et al. v. Kenneth Lee “Ken” Salazar, et al.*, Case No. 10-30585, (5th Cir.).

The May 28th Moratorium and the State (a brief recap)

The State of Louisiana was completely ignored by Defendants in the establishment of the May 28th Moratorium. As discussed in earlier briefing to this Court, this constituted a clear violation of the OCSLA, especially given that a stated justification for the Defendants' May 28th Moratorium was "an unacceptable threat of serious and irreparable harm to wildlife and the marine, coastal, and human environment."⁷ Nothing in the report relied upon by the Department of the Interior ("DOI") appears to have taken into account the effects of the Moratorium on the State. Prior to issuing the May 28th Moratorium, the Defendants made no attempt whatsoever to discuss pertinent issues with the State regarding the enforcement of existing regulations, the availability of alternatives, and most importantly, the effect of the Moratorium on the State.

The July 12th Moratorium (continued violation of the OCSLA)

On or about June 28, 2010, Defendants, apparently recognizing their obligation under the OCSLA to provide the State of Louisiana notice and an opportunity to comment and participate in the decision to issue a Moratorium, made a half-hearted and informal request for the State to provide comment to the "concept" of a second Moratorium. Defendants did not supply the State with a draft of the proposed Moratorium, or any other documentation whatsoever. Despite a total lack of documentation, Defendants requested that the State respond within 24-hours.

On June 29, 2010, Governor Jindal issued a letter to Secretary Salazar in response to the Secretary's request for comment. (Exhibit "A," Letter fro Governor Bobby Jindal to Ken Salazar, dated June 29, 2010). Governor Jindal cited the Secretary's non-compliance with the OCSLA, and in particular, the Secretary's failure to comply with 43 U.S.C. §1331, *et seq.*, and

⁷ Salazar Memorandum, Attachment 1 to Plaintiffs' First Supplemental and Amended Complaint for Declaratory and Injunctive relief. (DOC # 5-1, p. 2).

43 U.S.C. §1334(a), in particular, by failing to give the State the opportunity to undertake a “meaningful review” of “Interior’s concept to restructure the deepwater drilling moratorium.”⁸ The governor specifically cited the impossible timeframe (24-hours) given to the State to respond to a “concept” without any documents whatsoever upon which to base an informed response.

Governor Jindal again cited the Moratorium’s devastating effect on Louisiana’s economy, including the loss of Louisiana jobs and tax revenues.⁹ The Governor again implored the Secretary to consider other options as would allow for the continued drilling in the Gulf of Mexico.¹⁰ The Governor concluded his letter by assuring the Secretary that the State was “prepared to provide meaningful and timely feedback on any specific proposal, which ideally would propose to safely and promptly resume operations in the Gulf in a manner that protects the workers and the citizens of this State and the Gulf region....”¹¹

The Governor received no reply to his June 29th letter. On July 12th, the second Moratorium was issued. Again, the State was not given the opportunity to participate in any meaningful way with the promulgation of the Moratorium. The OCSLA’s requirements were again ignored. In fact, the Defendants made no attempt to meaningfully confer with any of the affected States prior to issuing the July 12th Moratorium.¹²

Application of the *City of Jacksonville* case

As highlighted by the dissenters in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656 (1993), the

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See for example, paragraphs 19, 24, 25, 28, 29, of the Petition for Judicial Review filed by the State of Texas in: *State of Texas, et al. v. Kenneth Lee Salazar, et al.*, (S.D. Tx. 2010) (No. 4:10-cv-02866).

mootness doctrine is most appropriately applied to support the dismissal of a lawsuit when the challenged law is subsequently revised in such a way as to cure the alleged defect and remove live controversy.¹³ Here, as it concerns Defendants' obligation to provide the affected states with notice and a meaningful opportunity to participate in OCS planning decisions, neither has the May 28th Moratorium been revised in such a way as to cure its alleged defects, nor has the controversy over the Defendants' issuance of that Moratorium been removed. Defendants' superficial attempt to cure past violations of the OCSLA, with regard to notifying and including the State in the decision making process, prior to issuing the second Moratorium, was wholly inadequate.

The facts present in the instant matter more closely resemble those addressed in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), a case upon which the dissenters in *City of Jacksonville* agreed, highlighted the exception to the dismissal of challenges to expired legislation.¹⁴ In *City of Mesquite*, the Supreme Court decided to reach the merits of the plaintiff's claim, even though the contested language had been removed from the subject ordinance while the case was pending before the Court of Appeals.¹⁵ The Supreme Court found that "the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated."¹⁶ In striking similarity to the present case, the Supreme Court noted "that the city in fact had announced an intention" to reenact the same objectionable provision.¹⁷

As in *City of Mesquite*, immediately following this Court's June 22nd decision, enjoining

¹³ *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 670 (1993).

¹⁴ *Id.* at 669-70, and 676-678.

¹⁵ *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982).

¹⁶ *Id.* at 289.

¹⁷ *Id.*

the enforcement of the May 28th Moratorium, the Secretary of the Interior announced his intention to issue the second Moratorium. The July 12th Moratorium, in effect circumvents this Court's order by swapping the original May 28th Moratorium for a "new" directive transparently identical to the first. In fact, in a press release, DOI stated "[l]ike the deepwater drilling moratorium lifted by the District Court on June 22, the deepwater drilling suspensions ordered today apply to most deepwater drilling activities and could last through November 30."¹⁸ Like the first Moratorium, the July 12th Moratorium restricts major development operations already underway, to which vast resources have already been committed, and which will therefore result in immediate and long-term economic dislocations for Louisiana workers and their families, for associated support industries, for the deepwater drilling industry, and for Louisiana's overall fiscal health.

Conclusion

As the State is concerned, precisely the same controversy exists now, with respect to the July 12th Moratorium, as was present prior to the issuance of the first; the Defendants continue to ignore the express provisions of the OCSLA, requiring notice of OCS policy and planning decisions and a meaningful opportunity to comment and participate in the decision-making process. The effect of the July 12th Moratorium is no different from that of the first. The State continues to suffer economic hardship as a result of Defendants' arbitrary and capricious conduct.

The State's request to participate in meaningful consultation with the Secretary has remained constant. Since the first Moratorium, the State remained willing and able to work with the Secretary and to provide him with new evidence, including alternatives to the Moratorium

¹⁸ Press Release, "Secretary Salazar Issues New Suspensions to Guide Safe Pause on Deepwater Drilling," (July 12, 2010). <http://www.doi.gov/news/doinews/Secretary-Salazar-Issues-New-Suspensions-to-Guide-Safe-Pause-on-Deepwater-Drilling.cfm>. Site last visited 8/23/2010.

recommended by the State’s Gulf Economic Survival Team (GEST)¹⁹, but all offers have been ignored. Defendants had a legal obligation under the OCSLA to provide the State with a meaningful opportunity to participate in a decision that will undoubtedly have significant negative impacts on Louisiana. The Secretary was required to, and did not, consider the most relevant factor of all, namely, the severe hardship the State of Louisiana and its citizens would suffer before he shuttered an industry that sustains so many of their families and businesses.

Respectfully submitted,

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¹⁹ The State’s Gulf Economic Survival Team (GEST) was formed at the request of Governor Jindal to specifically address alternatives to the drilling Moratorium. GEST recommended that the Moratorium could be reduced to thirty days through a more efficient procedure. GEST’s recommendations included:

- Minerals Management Service inspectors maintain a full-time presence on all ongoing deepwater drilling locations, with all MMS inspection reports reviewed by the U.S. Coast Guard;
- strict compliance with American Petroleum Institute (API) standards on all equipment used in well construction;
- implement all of the prescriptive safety recommendations as set forth in the DOI safety report which can be implemented within 30 days;
- Re-certify all BOP equipment used in floating drilling operations and ensure their suitability for the rig and well design;
- Ensure rig personnel are trained to industry- and government-accepted standards for well-control procedures;
- Review operator well plans, with particular emphasis on casing and cementing designs to ensure sufficient pressure barriers and that designs are fit for purpose;
- After confirming the correctness and preparedness of each rig and well design, these deepwater rigs should be permitted to resume work, and the DOI should resume issuing permits for new deepwater work. Meanwhile, industry and government can work through additional recommendations outlined in DOI’s Safety Report.

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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, the 24th day of August, 2010.

/s/ Henry T. Dart
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