Exhibit 11

No. 10-30585

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HORNBECK OFFSHORE SERVICES, LLC, ET AL.,

Plaintiffs-Appellees,

v.

KENNETH SALAZAR, in his official capacity as Secretary of the Interior, UNITED STATES DEPARTMENT OF THE INTERIOR, THE BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION, AND ENFORCEMENT, and MICHAEL R. BROMWICH, in his official capacity as Director of that Bureau,

Defendants-Appellants.

On Appeal from the U.S. District Court for the Eastern
District of Louisiana, No. 10-CV-1663(F)(2)
(Hon. Martin Feldman)

MOTION TO VACATE PRELIMINARY INJUNCTION AS MOOT

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INTRODUCTION

Defendants, Kenneth Lee Salazar, United States Department of the Interior, Michael R. Bromwich,[1] and the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEM), respectfully move this Court to vacate the preliminary injunction entered by the district court because that injunction is now moot. We have simultaneously filed a motion to dismiss the lawsuit in the district court. Vacatur is required because the agency action enjoined by the district court—the suspension of all pending, current, and approved deepwater drilling operations for six months—has been rescinded and superseded by a new agency action that is based on new information, separate analysis, and a separate administrative record. In its motion and reply in support of a stay pending appeal, the government informed this Court of the Secretary's plan to issue a new decision. Because the Secretary's prior decision, which was enjoined by the district court, no longer has any legal effect, the district court's injunction has no remaining force and must be vacated. To the extent that Plaintiffs believe they will suffer any injury and have any cognizable claims as a result of the new suspensions, the proper recourse is to bring a separate challenge to the implementation of that new decision through the new suspension letters.

[1] Mr. Bromwich is automatically substituted for Bob Abbey as Director of the Bureau of Ocean Energy Management, Regulation, and Enforcement pursuant to Fed. R. Civ. P. 25(d).

FACTUAL BACKGROUND

I. THE MAY 28, 2010, DIRECTIVE AND THE DISTRICT COURT'S PRELIMINARY INJUNCTION

Following a blowout and explosion on the Deepwater Horizon drilling platform, the President ordered the Secretary of the Interior ("Secretary") to conduct a thorough review of the incident and to report, within thirty days, on additional precautions and technologies that would improve the safety of drilling operations on the outer continental shelf ("OCS"). The results of the Secretary's review were set forth in a report released on May 27, 2010. Increased Safety Measures for Energy Development on the Outer Continental Shelf ("Safety Report"). Dkt. 7-2. The Safety Report explained that a more thorough investigation into the causes of the blowout and oil spill is ongoing but also recommended immediate implementation of a number of specific measures necessary to improve safety in offshore drilling.

Based on the findings and recommendations in the Safety Report, and further evaluation of the issue, on May 28, 2010, the Secretary directed the Minerals Management Service (since renamed the Bureau of Ocean Energy Management, Regulation, and Enforcement) to issue a temporary six-month suspension of certain pending, current, and approved offshore drilling operations involving deepwater wells. Memorandum re Suspension of Outer Continental Shelf (OCS) Drilling of New Deepwater Wells, dated May 28, 2010 ("May 28

Directive") (Dkt. #7-2 at 66). MMS implemented the Secretary's May 28 Directive by sending temporary suspension letters to each affected operator and by issuing a Notice to Lessees. NTL No. 2010-N04, effective May 30, 2010 ("NTL") (Dkt. #7-2 at 68).

On June 7, 2010, Plaintiff Hornbeck Offshore Services, L.L.C., filed this action, asserting that the May 28 Directive and the NTL violated the Administrative Procedure Act ("APA") because, among other things, the facts and evidence in the administrative record for that Directive did not support the Secretary's finding of a "threat of serious, irreparable, or immediate damage" to life or property. Dkt. #5 ¶¶ 78-81. On June 9, 2010, Hornbeck and other Plaintiffs moved for a preliminary injunction. Dkt. #7. On June 22, 2010, the district court granted Plaintiffs' motion and issued a preliminary injunction enjoining Interior from enforcing the May 28 Directive and NTL. Dkt. #68. Interior immediately complied with the Order by (1) notifying all Department employees that they were not to take any action to enforce the May 28 Directive and NTL and (2) notifying each operator who had received a suspension letter that "neither the NTL nor the order directing suspension of operations has legal effect on your operations at this time." Dkt. #77.

Interior also filed this appeal and moved for a stay pending appeal. This Court expedited consideration of the stay motion and, on July 8, 2010, a divided

panel issued an order denying the stay but recognizing Interior's right to file a renewed stay motion if Interior became aware that any deepwater drilling had commenced or was about to commence. This Court also expedited consideration of the appeal and has established a briefing schedule under which Interior's opening brief is due July 23, 2010, and oral argument is to be scheduled for the week of August 30, 2010.

II. THE JULY 12, 2010 DIRECTIVE

On July 12, 2010, the Secretary issued a new decision directing the suspension of certain drilling operations and the cessation of approval of pending or future applications of such drilling until November 30, 2010 ("July 12 Directive"), subject to modification if the Secretary determines that the existing threats to life, property, and the environment have been sufficiently addressed. *See* Ex. A.[2] Interior then implemented that Directive by issuing individual temporary suspension letters to each of the affected operators. Cruickshank Decl. ¶¶ 3-4 and Ex. B. The July 12 Directive expressly supersedes the May 28 Directive and rescinds NTL No. 2010-N04. Ex. A. at 21. Similarly, the new suspension letters rescind and supersede the temporary suspension letters that implemented the May 28 Directive. *Id.*; Cruickshank Decl. ¶ 4.

[2] Interior is filing the Declaration of Walter D. Cruickshank concurrently with this Motion. References to that Declaration appear as "Cruickshank Decl. ¶ ___." References to the exhibits to that Declaration appear as "Ex. ___."

With certain exceptions, the July 12 Directive suspends drilling operations that rely on subsea BOPs (blowout preventers) or surface BOPs on floating facilities. Ex. A at 1. The July 12 Directive expressly does not suspend certain related activities, including: production activities; drilling operations that are necessary to conduct emergency activities; drilling operations necessary for completions or workovers; abandonment or intervention operations; or waterflood, gas injection, or disposal wells. *See* Ex. A at 19. The July 12 Directive also instructs BOEM to develop and gather information about safety, blowout containment capabilities, and oil spill response capability and provide a report to the Secretary regarding conditions for the resumption of drilling. Ex. A at 5, 21. Finally, the July 12 Directive instructs BOEM to hold public meetings and outreach to gather additional information concerning the most significant issues for resuming deepwater drilling. *Id.*

In issuing the July 12 Directive, the Secretary analyzed information that supported the May 28 Directive as well as new information gathered since the issuance of that Directive and addressed the concerns raised by the district court in its preliminary injunction decision.[3] *Id.* at 7-17. The Secretary's July 12 Directive

[3] The district court's preliminary injunction order found, among other things, that Interior, based on the record then before the Court, (1) had failed to explain the relationship between its factual findings and the scope of the challenged suspension order; (2) had failed to analyze the safety threat posed by the rigs affected by the suspension order; (3) had failed to explain the six-month duration

explains the unique risks associated with the suspended drilling operations and explains the need for additional safety procedures, equipment and inspection protocols to address those risks prior to the resumption of deepwater drilling. *Id.* at 9-12. Of equal importance to these drilling safety issues, the Secretary's July 12 Directive explains the need for a temporary suspension to address critical spill containment and response deficiencies, including deficiencies in response plans required by existing regulations and operators' ability to comply with such plans. Ex. A at 12-16. Specifically, the Secretary recognized that the OCS drilling industry currently does not have the capability to stop the uncontrolled blowout of an oil well in deepwater. Ex. A at 12-13. The Secretary also recognized that there are insufficient available response resources should another deepwater spill occur while the containment and clean up efforts relating to the Macondo well continue. Ex. A at 14.

Taking those factors into account, the Secretary determined that it was necessary to suspend drilling operations that rely on subsea BOPs or surface BOPs on floating facilities and cease approval of pending or future applications for such drilling until November 30, 2010. He determined that a suspension until that date was necessary in part because the Macondo well is not expected to be contained or killed until mid-August 2010, which will affect spill containment and response

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of the challenged suspensions; and (4) had failed to cogently explain why it exercised its discretion in the given manner. Dkt. #67 at 17, 19-21

capabilities, as well as the ability to obtain the physical evidence necessary to determine the root causes of the blowout and spill. Ex. A at 3. In addition, suspensions until November 30 will allow Interior time to promulgate and implement the interim rules on measures recommended in the Safety Report, to take into account reports from technical working groups that are to report within 180 days from the issuance of the Safety Report, and to receive a report based on public outreach efforts by October 31, 2010. Ex. A at 2-3, 20.

In making his new decision, the Secretary received information from multiple sources, Ex. A at 5, identified and analyzed the increased risks associated with deepwater drilling, Ex. A at 7-10, and considered in detail the recommendations of the Safety Report, Ex. A at 10-12, the need for new blowout containment strategies, Ex. A at 12-13, the limited availability of spill-response resources if there were another spill, Ex. A at 14-16, and the economic impacts of suspension of deepwater drilling.[4] Ex. A at 16-17. The Secretary also considered and rejected three other options: no suspensions; suspensions with defined criteria

[4] As noted in the Decision, consideration of economic impacts is not required under OCSLA, but was considered as part of the Secretary's reasoned and prudent decisionmaking process.

to allow resumption of drilling; and various proposals recommended by industry representatives.[5] Ex. A at 17-18.

ARGUMENT

I. THE DISTRICT COURT'S PRELIMINARY INJUNCTION MUST BE VACATED BECAUSE THE ENJOINED SUSPENSION LETTERS HAVE BEEN RESCINDED AND NEW SUSPENSION LETTERS ISSUED.

This Court should vacate the district court's preliminary injunction because Interior's new suspensions letters were validly issued and replace the enjoined suspension letters, which have been rescinded. The preliminary injunction is therefore moot.

Plaintiffs' Complaint asserts challenges to the Secretary's decision to issue a six-month suspension of offshore drilling at depths greater than 500 feet, which is embodied in the May 28 Directive, the corresponding NTL, and the individual suspension letters. Dkt. #5 ¶¶ 22, 68, 79, 81. The Complaint repeatedly challenges the language and scope of the May 28 Directive, as well as the adequacy of the analysis that supports it. *Id.* ¶¶ 22, 49, 50-54, 68, 79, 81. In the prayer for relief, Plaintiffs ask the district court to declare the May 28 Directive and NTL invalid and unenforceable and to enjoin their operation. *Id.* ¶ 92 & Relief Requested, ¶¶ 1-3. This case is thus entirely focused on the prior suspension decision.

[5] One of the Industry proposals for continued drilling operations was accepted: the July 12 Directive does not suspend the drilling of disposal wells. *See* Ex. A at 18-19.

Just as the Complaint was focused on the prior suspension decision, the district court's preliminary injunction was based on the likelihood that Plaintiffs could demonstrate that Interior failed to adequately explain that prior suspension decision. Dkt. #67at 4, 20. For example, the district court concluded that the Safety Report made "no effort to explicitly justify" the Secretary's decision and that Interior had "fail[ed] to explain the reasons for the suspension of operations or the depth of operations to be affected." Dkt. #67at 4. The court also found that Interior did not "cogently explain why it has exercised its discretion in a given manner." *Id.* at 20.

The Secretary's July 12 Directive expressly rescinds the May 28 Directive, the NTL, and the suspension letters. Interior has thus withdrawn the challenged agency action that was preliminarily enjoined by the district court and has issued a new decision that is based on a full and robust explanation and supersedes the prior suspension letters. Accordingly, all of the prior actions have been rescinded and superseded and there is no remaining challenged conduct to provide a basis for maintaining the preliminary injunction. Plaintiffs invoke the APA, which provides for review of "final agency action," 5 U.S.C. § 704; *see also* 5 U.S.C. §§ 702, 706, and thus requires a plaintiff's challenge to be directed to a particular discrete "agency action," *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 882-83, 890-91 (1990). Here, the particular "agency actions" Plaintiffs challenged—the

suspension letters issued to the operators—have been withdrawn and are no longer before this Court. The challenge to those prior letters therefore now is moot. The new suspension letters implementing the Secretary's July 12 Directive are new and distinct "agency actions," and they therefore could be challenged under the APA only in a new lawsuit.

Interior's authority to issue the July 12 Directive and corresponding suspension letters is beyond question. As Plaintiffs conceded in their district court brief, 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. In issuing its preliminary injunction, the district court concluded that Plaintiffs were likely to succeed on their claim that Interior failed to adequately explain its decision in the May 28 Directive to suspend drilling in water deeper than 500 feet for six-months. Dkt. #67at 4, 20. But the ultimate question whether, in the current circumstances, deepwater drilling poses a threat to life, property, or the environment that warrants a suspension of lease activities under the OCSLA and Interior's regulations is within Interior's exclusive province. Indeed, respect for the agency's primary jurisdiction required the district 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). "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). Thus, even when a case challenging agency action goes to final judgment, the proper course if the court finds that the agency did not adequately support or explain its decision "is to remand to the agency for additional investigation and explanation." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). A fortiori, nothing in the district court's preliminary injunction—an interlocutory decision—foreclosed Interior from making a new decision to carry out "the legislative policy committed to its charge" under the Outer Continental Shelf Lands Act, nor could it have. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940).

At bottom, 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), and the Secretary has merely fulfilled those duties in reanalyzing the adequacy of safety and environmental protection standards for OCS lease operations in the Gulf of Mexico, evaluating new information, 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."). Thus, a court could not prevent the agency from acting within its

statutory authority by issuing injunctive relief directly preventing the agency from acting. *Monsanto Co. v. Geertson Seed Farms*, --- U.S. ---, 2010 WL 2471057, at *9 (June 21, 2010).

Consistent with those fundamental principles, the Secretary's July 12 Directive and the corresponding suspension letters render moot the preliminary injunction running against the May 28 Directive and its corresponding suspension letters. This Court should therefore vacate the injunction because that injunction is now moot. *See ICEE Distributors, Inc. v. J&J Snack Foods Corp.*, 445 F.3d 841, 850 (5th Cir. 2006). That is particularly true because the superseding agency action corrects errors identified in the prior agency action. As the Seventh Circuit has noted, "such self-correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine." *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988) (citation omitted).

Because they have been superseded, the May 28 Directive and corresponding suspension letters have no continuing legal effect and no longer cause Plaintiffs any harm, and the preliminary injunction directed at them no longer provides any effective relief. Thus, because Interior's July 12 Directive and suspension letters withdraw the prior Directive and suspension letters and supersede them, the preliminary injunction preventing enforcement of the May 28 Directive and suspension letters is moot. *See Railway Labor Executives' Ass'n v.*

Gibbons, 455 U.S. 457, 464 & n.8 (1982); *Spencer*, 523 U.S. at 18 ("[Federal courts] are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong."); *Sannon v. United States*, 631 F.2d 1247, 1250-51 (5th Cir. 1980) ("That newly promulgated regulations immediately applicable to litigants in a given case can have the effect of mooting what was once a viable case is without doubt."); s*ee also, Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 414 (5th Cir. 1999) (finding claims moot where superseding agency order eliminated challenged methodology and therefore, "any further judicial pronouncements would be purely advisory"); *Steere Tank Lines, Inc. v. ICC*, 667 F.2d 490 (5th Cir. 1982) (holding case moot where nearly identical superseding agency action taken while case was pending). This Court should therefore vacate the injunction as moot. [6]

[6] Indeed, as we argue in our motion to dismiss in the district court, because this case challenges only the prior suspension letters, the entire case is moot and must be dismissed. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (holding that "throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision"); *Carr v. Saucier*, 582 F.2d 14, 15 (5th Cir. 1978) ("[I]f a controversy becomes moot at any time during the trial or appellate process, the court involved must dismiss the suit for want of jurisdiction."); *Environmental Conservation Org. v. City of Dallas*, 529 F.3d 519, 525 (5th Cir. 2008) ("a federal court has no constitutional authority to resolve the issues that it presents" and must dismiss "before considering any other matters raised by the parties"). *Accord Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1114 (10th Cir. 2010) (holding agency's issuance of superseding biological opinion mooted challenge to precursor because court could provide "no effective relief"); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1096 (9th Cir.2003) (same); *Gulf of*

At the very least, rescission of the prior suspension letters and issuance of the new suspension letters fundamentally alters the factual circumstances underlying the preliminary injunction. As a result, the preliminary injunction should be vacated. 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2961 (2008 ed.) (noting that "changes in operative facts" are one of the three "traditional reasons for ordering the modification or vacation of an injunction").

To the extent that Plaintiffs believe they will suffer any injury and have a cognizable claim as a result of the new decision, their recourse is to bring a separate challenge to the implementation of that new decision in federal district court. *Texas Office of Pub. Util. Counsel*, 183 F.3d at 415. And any such judicial review will be based on the record before Interior when it issued the July 12 Directive and corresponding suspension letters, and the Secretary's extensive explanation in his decision of the basis for that Directive. *Milena Ship Mgmt. Co. v. Newcomb*, 995 F.2d 620 (5th Cir. 1993) (review of an agency decision is based "on the full administrative record that was before the [administrative officer] ... at

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Maine Fisherman's Alliance v. Daley, 292 F.3d 84, 90 (1st Cir. 2002) ("This court has no means of redressing either procedural failures or substantive deficiencies associated with a regulation that is now defunct."); *Nat'l Mining Ass'n v. U.S. Dep't of the Interior*, 251 F.3d 1007, 1011 (D.C. Cir. 2001) (partially vacating district court's decision as moot where new rules replaced challenged rules).

the time he made his decision") (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)).

CONCLUSION

The July 12 Directive and suspension letters now govern deepwater drilling activities on the Outer Continental Shelf in the Gulf of Mexico, and any claims arising out of those agency actions must be asserted in a challenge to them. The district court's preliminary injunction barring enforcement of agency action that has now been rescinded is moot and should therefore be vacated.

Respectfully submitted this 12th day of July, 2010,

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CERTIFICATE OF SERVICE

On July 12, 2010, in accordance with Fifth Circuit Rule 25.2.5, I served copies of the foregoing motion to vacate preliminary injunction as moot on counsel of record by filing the reply using the Court's the EC/CMF system.

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