

Exhibit 2

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ENSCO OFFSHORE COMPANY * Docket 10-CV-1941-F
*
versus * New Orleans, Louisiana
*
KENNETH LEE SALAZAR, et al * September 29, 2010
* * * * *

ORAL ARGUMENT BEFORE THE
HONORABLE MARTIN L.C. FELDMAN
UNITED STATES DISTRICT JUDGE

Appearances:

For the Plaintiff: Fowler Rodriguez Valdes-Fauli
BY: GEORGE J. FOWLER III, ESQ.
LAWRENCE R. DEMARCAY III, ESQ.
400 Poydras Street, 30th Floor
New Orleans, Louisiana 70130

For the Plaintiff: Miller & Chevalier Chartered
BY: ADAM P. FEINBERG, ESQ.
655 15th Street NW
Washington, DC 20005

For the Defendants: U.S. Department of Justice
BY: GUILLERMO A. MONTERO, ESQ.
BRIAN M. COLLINS, ESQ.
601 D Street NW, Room 3108
Post Office Box 663
Washington, DC 20044

1 Appearances:

2 For the Intervenors: Tulane Environmental Law Clinic
3 BY: ADAM BABICH, ESQ.
4 6329 Freret Street
New Orleans, Louisiana 70118

5 For Amicus, State of Louisiana: HENRY T. DART, ESQ.
6 Attorney at Law
7 510 N. Jefferson Street
Covington, Louisiana 70433

8 Also Participating: MILO MASON, ESQ.
9

10 Official Court Reporter: Toni Doyle Tusa, CCR, FCRR
11 500 Poydras Street, Room HB-406
12 New Orleans, Louisiana 70130
(504) 589-7778

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PROCEEDINGS

(September 29, 2010)

THE DEPUTY CLERK: All rise.

Be seated, please.

THE COURT: Call the case, please.

THE DEPUTY CLERK: Civil Action 10-1941,
ENSCO Offshore Company v. Kenneth Salazar, et al.

THE COURT: Enter your appearances, Counsel.

MR. FEINBERG: On behalf of the plaintiff, Adam
Feinberg with Miller Chevalier. With me is George Fowler and
Lawrence DeMarcay from the Fowler Rodriguez firm and the
general counsel of ENSCO Offshore.

THE COURT: Welcome. Thank you.

MR. DART: Henry Dart, amicus, State of Louisiana.

THE COURT: I'm sorry, I didn't hear your name.

MR. DART: Henry Dart.

THE COURT: Oh, hello, Mr. Dart. You're not over
there, so I didn't recognize you. These guys I recognize, but
you have to enter your appearances anyway.

MR. MONTERO: Good morning, Your Honor. Guillermo
Montero for the Department of Justice. With me is Brian
Collins, also from Justice, and Milo Mason from the Department
of Interior.

THE COURT: Welcome. Thank you.

Well, we have cross motions for summary judgment

1 in this case dealing with -- oh, I'm sorry.

2 **MR. BABICH:** Adam Babich from the Tulane
3 Environmental Law Clinic. I represent Sierra Club, holding
4 down the table for the environmental intervenors.

5 **THE COURT:** You were sitting over there last time.
6 That's why I overlooked you. I apologize.

7 As I was about to say, we have cross motions for
8 partial summary judgment in a case involving the second or
9 successor moratorium with regard to deepwater drilling. I'll
10 hear from ENSCO first.

11 **MR. FEINBERG:** Thank you, Your Honor. May it please
12 the Court.

13 The *Deepwater Horizon* tragedy was a terrible
14 event with drastic consequences for the environment, for the
15 economy of the Gulf Coast, and obviously for the 11 individuals
16 who lost their lives and their families, but it cannot justify
17 the second moratorium, a moratorium that continues to place
18 drastic harms on the nation and the Gulf region's ability to
19 produce domestic oil and its economic and employment concerns.

20 Not only that, but that event, the
21 *Deepwater Horizon* event, cannot justify the process with which
22 the defendants came up with their decision, a process that,
23 Your Honor, was a complete sham. They did it not because they
24 undertook the careful decision-making process that is required
25 under the APA of all agency action but because they were trying

1 to avoid the injunction that you entered in the *Hornbeck* case.

2 There are four separate reasons why this
3 moratorium, the second moratorium, is arbitrary and capricious
4 and in violation of the law, any one of which justifies setting
5 it aside under the APA:

6 First, it was an improper, preordained decision;

7 Second, the defendants failed to consider a more
8 limited moratorium that would have allowed certain other
9 low-risk drilling activities to continue.

10 **THE COURT:** Are they under an obligation to do that?

11 **MR. FEINBERG:** Well, they are not, Your Honor, but
12 they are under an obligation to not act in an arbitrary and
13 capricious manner or an irrational manner, and that's precisely
14 what they did by allowing some activities that are more risky
15 than the ones that they don't allow.

16 **THE COURT:** Let me ask you this. This is here on a
17 summary judgment. I take it you agree that there are no
18 disputed material issues of fact?

19 **MR. FEINBERG:** Correct, Your Honor.

20 **THE COURT:** Go ahead.

21 **MR. FEINBERG:** The third reason is that the
22 defendants' moratorium fails to take action on a rig-by-rig
23 basis, which is what their own regulations require --

24 **THE COURT:** I don't agree with that.

25 **MR. FEINBERG:** Well, it's also what the APA requires.

1 **THE COURT:** I don't agree with that either. The
2 regulation that you cite suggests that either a company or the,
3 I think, regional supervisor may suspend a lease, but it
4 doesn't mandate, as I read it -- I'll be happy to hear from
5 you, but I don't see where it mandates that the Secretary only
6 has the authority to suspend on a lease-by-lease basis.

7 **MR. FEINBERG:** Well, one of the regulations we cite
8 specifically says that the duration of the lease is to be
9 determined on an individual basis.

10 **THE COURT:** The duration of the lease.

11 **MR. FEINBERG:** The duration.

12 **THE COURT:** I have in mind 250.168(a).

13 **MR. FEINBERG:** I think that's what I have in mind as
14 well, Your Honor.

15 **THE COURT:** I'm not sure that regulation talks about
16 lease term.

17 **MR. FEINBERG:** Well, it talks about -- actually, I'm
18 sorry, Your Honor. It's the second regulation that we cite. I
19 believe it's 170(a).

20 **THE COURT:** Okay.

21 **MR. FEINBERG:** It says: "At the time MMS may issue
22 suspensions for up to five years per suspension. The regional
23 supervisor will set the length of the suspension based on the
24 conditions of the individual case involved."

25 So the issue isn't so much --

1 **THE COURT:** I see your argument.

2 **MR. FEINBERG:** Your Honor, we have argued that a
3 better solution, one that would have been in compliance with
4 this regulation, would have been they could have a blanket
5 moratorium in the first instance, but you have to limit the
6 duration of that moratorium based on the individual
7 characteristics of each rig, which are very different, which we
8 will get into in a minute.

9 The fourth argument, Your Honor, is one that we
10 include in our complaint but has been briefed by the State of
11 Louisiana, and Mr. Dart will argue that. That argument is that
12 the defendants failed to consult with the affected states,
13 including the State of Louisiana, as is required under OCSLA.

14 Let me start, Your Honor, with the notion of a
15 preordained decision. The briefing, I think, has become overly
16 complicated. The issue is actually quite simple.

17 **THE COURT:** Well, we have been here seven minutes,
18 and nobody has cited Justice Scalia to me. That's a record in
19 itself.

20 **MR. FEINBERG:** Maybe he was smart enough not to get
21 involved in this.

22 **THE COURT:** I've told him, by the way, what you-all
23 have done, and he thought that was very humorous. I happened
24 to be in D.C. and had lunch with him and said that both sides
25 cite him to me. He asked me what I did. I said I rejected

1 both arguments.

2 **MR. FEINBERG:** Well, I'll keep that in mind for the
3 rest of our time.

4 **THE COURT:** Somebody was once arguing to me, and they
5 kept citing Chief Justice Rehnquist, and so in response, I
6 cited Justice Brennan. I just thought that would be kind of
7 cute. Go ahead.

8 **MR. FEINBERG:** Your Honor, here, the problem with the
9 preordained decision is twofold, and they are interrelated.
10 One problem is it is against the very notion that the APA
11 stands for, which is the decision-making process has to be a
12 reasoned decision-making process. The Supreme Court uses that
13 language, *reasoned decision making*, in its decision in
14 *State Farm*, and many other courts, including the Supreme Court,
15 and numerous other cases use that same phraseology.

16 **THE COURT:** Or *reasonably discerned*.

17 **MR. FEINBERG:** Correct. Making the decision before
18 you undertake your process, the fact-finding and analysis
19 process, is inherently not a reasoned decision-making process.
20 We cite the *Islander East Pipeline* case which says exactly
21 that. That's a notable case, Your Honor, because that doesn't
22 involve a reconsideration situation. You can have a
23 preordained decision even when the agency hadn't made a prior
24 decision that it was now reconsidering. The problem is you
25 have to do your analysis first; then you make your decision.

1 The second problem is --

2 **THE COURT:** Like on a remand.

3 **MR. FEINBERG:** What's that?

4 **THE COURT:** Like on remand, when an agency's decision
5 is remanded to it.

6 **MR. FEINBERG:** Yes, it would include a situation on
7 remand, but it includes every situation. As I mentioned, this
8 *Islander East* case didn't involve a remand. The Court found
9 that there was a preordained decision because the agency came
10 to its decision before undertaking its analysis, and there was
11 no remand. It was the very first time the agency had
12 considered the issue. The fact that the agency here has
13 reconsidered the issue is interesting and relevant, but it's
14 not a dispositive fact.

15 The other problem with the preordained decision
16 is it violates the notion that the agency cannot base its
17 decision on post hoc rationalization, another principle that is
18 firmly established in the Supreme Court case law and
19 practically every other APA case that the parties have cited.

20 Here, the decision, we maintain, was made no
21 later than June 22, and yet all of the new information that the
22 defendants claim to be relying on came after June 22. In fact,
23 they readily admit in their papers that the decision to open
24 the record and begin the reconsideration process didn't happen
25 until June 29. They reiterated that contention just yesterday

1 in their filing in *Hornbeck*, that that's when the process
2 began.

3 **THE COURT:** How does that help you?

4 **MR. FEINBERG:** Because if Your Honor concludes the
5 decision was made on or about June 22, then the decision came
6 before the fact-finding and analysis. That is inherently not a
7 reasoned decision making that is required under the
8 Supreme Court's precedent --

9 **THE COURT:** You're relying on the Secretary's public
10 statements before the Senate and in other venues that "We are
11 going to reissue a moratorium."

12 **MR. FEINBERG:** Well, that, Your Honor, is one of the
13 facts that we are relying on.

14 **THE COURT:** What else?

15 **MR. FEINBERG:** We also cite a number of documents
16 from the administrative record that are very troubling,
17 including this e-mail from a Mr. Hauser, who says, "Well, I
18 don't really think a moratorium is the way to go." The most
19 troubling aspect of the e-mail is the last line, which says,
20 "Looks like it's time for somebody else to write this stuff."

21 Well, the implication there, I think, is quite
22 clear that if you weren't on board with the moratorium, then
23 you had no role in this decision-making process.

24 **THE COURT:** In the first case, in posthearing
25 submissions, there was evidence that only some 22 percent of

1 the documents or the material that was under consideration was
2 basically new stuff or something that wasn't already available
3 in the public domain. I found in the first case that the
4 government really had not disputed that. I have made a finding
5 of fact in that regard. Do you continue to rely on that?

6 **MR. FEINBERG:** Well, we do to some extent, but that
7 is not the most critical fact. Clearly, they looked at some
8 new stuff. Exactly how much or how little is a relevant fact,
9 but it's not the key fact. The key fact is simply when did
10 this decision come? Did it come before June 29 or after
11 June 29?

12 We maintain the undisputable evidence -- based
13 in part but not entirely on Secretary Salazar's sworn testimony
14 that he would keep the same moratorium in place -- is that
15 there is no dispute that that decision had been made prior to
16 June 29, when Director Bromwich reopened the administrative
17 record, and in fact maybe was made sometime before June 22.
18 Who knows?

19 We cite a couple other documents, Your Honor,
20 and I would like to share with the Court one other document
21 from the administrative record, if I could. I have shared this
22 with counsel already. May I approach?

23 **THE COURT:** Yes.

24 **MR. FEINBERG:** The government really does not take
25 head on the facts of what Secretary Salazar said. They said it

1 was a statement of opinion and other things that are simply
2 belied by the statements themselves.

3 They respond in their reply brief, one of the
4 only two arguments they make in the reply brief, "Oh, no, no.
5 You should look at the administrative record." You should look
6 at two documents they cite:

7 (1) Director Bromwich's June 29 memo reopening
8 the record and saying, "Let's gather up a bunch of information
9 to figure out what our options are"; and

10 (2) Director Bromwich's July 10 memo, the
11 so-called "options memo" that sets forth the various options
12 from which Secretary Salazar was to choose from.

13 They maintain that this was a good-faith effort
14 designed to give the Secretary a variety of options that were
15 open to him.

16 The first option was no suspensions or no
17 moratorium whatsoever. Your Honor, we submit that that was
18 simply a sham. If you look at this document, which apparently
19 was written on July 9, before the options memo was even issued
20 to Secretary Salazar, it's talking about the information-
21 gathering aspect of the decision. It says on the second page:
22 "This project is premised on the fact" -- not the possibility,
23 not the option, on the fact -- "that a moratorium on deepwater
24 drilling will remain in effect until this project is
25 completed."

1 You simply cannot reconcile that statement with
2 the notion that Secretary Salazar was going to consider a bunch
3 of options, including no moratorium whatsoever, starting the
4 next day. It simply makes no sense.

5 Obviously, Your Honor, there are a variety of
6 other documents in the record which we cite, including this
7 Hauser e-mail and a number of other documents that we have
8 never even seen that the magistrate has pointed out in his
9 order and reasons on the motion to compel, that seem to support
10 the very same conclusion that this was a sham, that the
11 decision had been made, and this was just an exercise to
12 backfill explanations for a decision that had been made.

13 **THE COURT:** Did you-all get a copy of my order
14 regarding the magistrate's orders?

15 **MR. FEINBERG:** Yes, Your Honor.

16 **THE COURT:** I have ordered that all those documents
17 be supplied to you by October 4.

18 **MR. FEINBERG:** Yes, Your Honor.

19 **THE COURT:** So are you saying, then, that you might
20 need more time to respond after you see those documents?

21 **MR. FEINBERG:** Well, I don't think so, Your Honor. I
22 think the evidence is compelling enough as it is. Between
23 Secretary Salazar's statements on the front end before the
24 process began, in fact, a week before the process began, to
25 this document, which comes toward the very end of the process,

1 they say the same exact thing.

2 **THE COURT:** This memo comes from Director Bromwich
3 to -- who is Tommy Beaudreau?

4 **MR. FEINBERG:** I believe he is a special assistant or
5 something of that nature to Director Bromwich.

6 **THE COURT:** And Bakalov?

7 **MR. FEINBERG:** I believe she is also a DOI employee
8 and person who certified the administrative record in this
9 case.

10 **THE COURT:** And Raya, the same?

11 **MR. FEINBERG:** Yes. It's Raya Bakalov.

12 **THE COURT:** Oh, I see. That's one person. Go ahead.

13 Well, let me ask you, then, this. Excuse me for
14 interrupting. I take it this document is in the administrative
15 record?

16 **MR. FEINBERG:** Yes, Your Honor.

17 **THE COURT:** Now, in their principal brief at pages 9
18 and 10 and then again at pages 18 through 20, they refer to a
19 series of documents, "B documents," I call them. They all
20 begin with an exhibit number "B." Are you familiar with those
21 documents? They essentially are claiming that, "Look, here's
22 an example of the new stuff we looked at," and I'm just
23 wondering what your response is to that.

24 **MR. FEINBERG:** Well, Your Honor, I think the response
25 is simple. First of all, those are not new documents. They

1 are all in the joint appendix that we prepared. A lot of these
2 are simply spill response plans that have been prepared by oil
3 companies sometimes years ago, and they cite them for the
4 unremarkable proposition of "Well, here's basically what a
5 spill response plan says."

6 **THE COURT:** I have made the observation once that
7 much of this stuff was unspecific to anything but the
8 *Deepwater Horizon* disaster. Are these documents any different?
9 I haven't looked at them.

10 **MR. FEINBERG:** Not at all, Your Honor. Certainly, by
11 default, the vast majority of them are simply spill response
12 plans that the oil companies have prepared. I don't believe
13 there's a single document in that footnote that is any actual
14 analysis by the defendants. It's simply old historical
15 documents that they claim are part of the administrative
16 record. There's certainly nothing new in there.

17 Your Honor, the fundamental point isn't so much
18 what is in the new analysis they did, as poor as we think that
19 was; it's that that new analysis came too late and that it came
20 after the decision, which is fundamentally against the APA.

21 The parties both have cited the Supreme Court's
22 *Overton Park* decision which says the decision needs to be based
23 on the materials before the agency at the time of the decision.
24 Those materials, whatever new analysis the department did after
25 June 29, was clearly not in front of the agency on June 22 when

1 Secretary Salazar made the decision.

2 That leaves us with a moratorium that is, A, not
3 reasoned decision making under the State Farm decision and, B,
4 one that is based wholly or largely on post hoc rationalization
5 that came after the decision. Thus you're left with the same
6 naked moratorium that Your Honor considered way back when, in
7 June when you were looking at the first moratorium in the
8 *Hornbeck* case. There's nothing new that the defendants are
9 entitled to add to that because everything new that they add
10 came after the decision was actually made.

11 There's one more element of this that is also
12 very troubling, and that is the possibility that the defendants
13 are merely trying to manipulate the judicial system.

14 **THE COURT:** Excuse me.

15 Sorry. I'm still struggling with the
16 21st Century. Go ahead. There's another aspect, you said.

17 **MR. FEINBERG:** Yes. Just to be clear, the
18 preordained aspect of their decision -- which, as I said, I
19 don't think is disputed. In fact, Your Honor has essentially
20 already found that the decision came before the fact-finding
21 and analysis in your September 1 order in *Hornbeck*, and the
22 magistrate obviously made the same conclusion.

23 Aside from that, there's also a troubling aspect
24 of what the defendants are doing here because they were under
25 an injunction, because the Court was already reviewing the

1 first moratorium when their second action came. The problem
2 there is that the very real possibility, as many courts have
3 noted and we have cited them, including the Fifth Circuit's
4 decision in the *Sossamon* case, which I know Your Honor deals
5 with quite a bit in the *Hornbeck* decision -- there's a very
6 real concern that an agency can simply withdraw its action
7 right before judicial review is coming and then reinstitute it.

8 Well, that happened the first time, and I found
9 it quite troubling that on Monday, the government filed a
10 document sort of suggesting that it might happen a second time,
11 that they suggested that you postpone your hearing and not
12 conduct judicial review because they might be doing something
13 again, to say nothing of the fact that Your Honor suggested in
14 the September 1 order that the proper procedure would have been
15 for the government to ask you to remand the case so that they
16 could reconsider it. They clearly aren't going to abide by
17 that.

18 But the *Sossamon* court, the Fifth Circuit very
19 clearly states the very real danger of an agency basically
20 trying to avoid an injunction, avoid judicial review by
21 withdrawing its action and putting it back into place right
22 after the court case is gone. Your Honor pointed out some very
23 real differences between the *Sossamon* case and this case in
24 that in *Sossamon*, it really looked like the agency was trying
25 to fix the problem. They changed the action --

1 **THE COURT:** Well, they gave in, basically.

2 **MR. FEINBERG:** Exactly, exactly, and that is exactly
3 the opposite of what's happened here. The defendants didn't
4 give in the first time. They just pulled back the moratorium
5 and literally announced the same day as your injunction that
6 they were going to replace it with another one. Well, guess
7 what? Then they say, "Well, if *Hornbeck* is moot, let's start
8 all over. We have a new administrative record. We need more
9 time to put that together." Lo and behold, here we are
10 challenging the second moratorium, and we are four months into
11 the six-month moratorium. It appears they might be trying to
12 do that again.

13 There's another distinction in the *Sossamon*
14 case. In *Sossamon*, the plaintiff lost. The plaintiff asked
15 for an injunction in the district court, and the district court
16 said no, and the Fifth Circuit said, "We would feel very
17 differently if an injunction had been granted and then the
18 agency changed its mind." It said, "We would look on that
19 action with a jaundiced eye." I suggest, Your Honor, that a
20 jaundiced eye is a bit of an understatement for what the Court
21 should look at the defendants' action in this case with.

22 Let me turn, Your Honor, to the second point,
23 the different drilling activities that are allowed.

24 **THE COURT:** How much time did I give you-all?

25 **MR. FEINBERG:** Well, there was some confusion about

1 that. The order actually said an hour, but then we understood
2 from your clerk that it might be half an hour.

3 **THE COURT:** Well, we'll compromise. I'll give you
4 each 40 minutes.

5 **MR. FEINBERG:** That sounds fair. I would like to
6 reserve about ten minutes for rebuttal and five minutes for
7 Mr. Dart.

8 **THE COURT:** Well, then your time is getting close to
9 ending.

10 **MR. FEINBERG:** Well, let me take five minutes, if I
11 could, Your Honor, to talk about the different drilling
12 activities. May I approach again with some demonstrative
13 exhibits?

14 **THE COURT:** Yes. Have they seen them?

15 **MR. FEINBERG:** Yes, they have. Let me tell you what
16 you have there, Your Honor. The red and green one is a
17 demonstrative exhibit that we have prepared, and the other one
18 that is mostly in black and white is basically a competing
19 exhibit that the defendants have prepared. I'm sure they will
20 talk about theirs.

21 Let me just give you an overview of ours, the
22 one that's in color. These are some of the drilling activities
23 at issue listed in the undisputed order of risks, from least
24 risky to most risky. The ones in red are not allowed under the
25 moratorium, and the ones in green are allowed under the

1 moratorium. You can see, just at a glance, it looks like quite
2 a random pattern of what is allowed under the moratorium and
3 what is not allowed under the moratorium.

4 Just a word about the order of risk. The order
5 is essentially what the government's own consulting experts --
6 by that, I mean the experts who consulted on the original
7 safety report and who prepared a presentation that they
8 personally delivered to Secretary Salazar and Director Bromwich
9 on June 21. That covers the first eight. Then completion
10 activities they do not recommend being allowed, and that's
11 listed as the most risky activity because in the Department of
12 Interior's own analysis, they list that as the most risky
13 activity.

14 The defendants in the administrative record
15 don't really consider items 1 and 2 discretely, but the rest of
16 the activities, either specifically or as part of a larger
17 group, they do rank the risk, and their analysis is exactly the
18 same as the consulting experts' analysis. So there's no
19 dispute about which activities are more risky than other
20 activities.

21 Let me just cover three examples of the problems
22 with the defendants' decision. Take, for example, No. 3,
23 reentries and sidetracks. The defendants claim, "Well, we
24 don't allow that because that might involve drilling into a new
25 reservoir," and drilling into a new reservoir is sort of the

1 touchstone for what's too risky versus not too risky. If you
2 look at the reasons why they allowed certain things, that is
3 almost always the reason.

4 **THE COURT:** Risk.

5 **MR. FEINBERG:** Exactly. They say, "Well, if it's
6 drilling into a known reservoir, you know the characteristics,
7 you know the risks that will allow." For example, if you look
8 at No. 2, No. 4, and No. 6, the reasons they allow all of those
9 activities includes the fact that it's drilled into a known
10 reservoir.

11 I'm looking on Row 3 in the far right-hand
12 column. They say that this activity might involve drilling
13 into an unknown reservoir which potentially involves more risk
14 than, for example, development drilling into a fully
15 characterized reservoir.

16 Our response is simple: Well, why not allow
17 reentries and sidetracks when it involves drilling into a known
18 reservoir and bar it only when it involves drilling into an
19 unknown reservoir? They don't even consider that option, yet
20 alone give a good explanation for why that's not allowed.

21 Let me give another example: No. 8, a
22 delineation or confirmation or appraisal well. The problems
23 here are several. First of all, the defendants inappropriately
24 group this activity with a more dangerous activity or a more
25 risky activity, that being exploration drilling. They

1 literally say in their own analysis that this activity has less
2 risk. There's a document cited at Footnote 15, which is their
3 memorandum, that says a confirmation well or a delineation well
4 has less risk than an exploration well.

5 Well, guess what? They don't consider that
6 fact. They lump it together with an exploration well and treat
7 the two exactly alike. In fact, if you look at their chart,
8 they admit to that fact. When you look at the first page under
9 No. 6, they lump it together again, exploration or confirmation
10 wells. Well, the two are not the same. One involves more
11 risk, as they themselves admit.

12 The reason, of course, is the reason that is
13 very relevant for why they allow other activities.
14 Specifically, a confirmation well involves drilling into a
15 known reservoir. You have already drilled your exploration
16 well. Now you are just trying to figure out the parameters,
17 how big that well is, so you are drilling additional wells, but
18 you already know what the risk level is.

19 They are also inaccurate in their chart when
20 they say that there's nothing more risky that is allowed.
21 That's not true. Completion activities are more risky. Their
22 own analysis lists completion activities as the single most
23 risky activity, yet it's allowed and delineation wells are not
24 allowed.

25 The third example I would like to mention,

1 Your Honor, is development wells to known reservoirs, No. 5.
2 This perhaps is the most troubling of all of the things that
3 the defendants excluded and, as it happens, is a major activity
4 that could occupy a lot of rigs and a lot of workers and keep
5 them employed during any moratorium.

6 If you look at how the defendants characterize
7 No. 5, development wells, they say it involves drilling into a
8 known reservoir. Oh, that's the same reason they allowed
9 No. 2, 4, and 6. It also is an activity that they themselves
10 describe as "normally considered routine by all parties."
11 That's the same exact language that they used to describe
12 No. 4, which is allowed, "normally considered routine by all
13 parties," yet they allow No. 4 and No. 6 but not No. 5. The
14 consulting experts, the experts that they consulted with on the
15 safety report, say that this activity is less risky than the
16 allowed workover activities.

17 Your Honor, perhaps the most telling element of
18 the problems here are in the defendants' own chart. If you
19 look at the first page of defendants' chart, they once again
20 lump together development wells and workover activities, the
21 first and less risky being not allowed and the second and more
22 risky being allowed, and they say that -- the first three
23 bullet points basically summarize what I've just said. They
24 are both drilled into known reservoirs.

25 They note that there are different types of

1 risks, but they present the same level of risk. That's
2 actually not true, Your Honor. There is one e-mail that says
3 that, but every single formal memo that they wrote -- the
4 Hauser memo, the Cruickshank memo, and the final Bromwich
5 option memo -- all list workover activities as being more risky
6 than development wells. So that second bullet is simply not
7 true.

8 The most telling element comes in the very last
9 bullet, where they say, "Well, we need workover activities
10 because they are necessary to bring the well back to full
11 production. Failure to conduct a workover would reduce the
12 ultimate recovery of mineral resources from an already
13 producing field. No such exigency applies to development
14 wells."

15 There are at least three fundamental problems
16 with that. First of all, it's all post hoc rationalization.
17 There is not one word about any of this in the administrative
18 record. In fact, the only reason that we, as the plaintiff,
19 know that the reason they allowed workover activities was
20 because of the need for oil is because they stated it after the
21 fact in a Q&A that the department released on the same day it
22 released the second moratorium memo on July 12, not one word in
23 the administrative record about this being the reason why
24 workover activities were allowed.

25 The second problem is even if this was the valid

1 reason or a valid reason on which defendants could rely, it
2 makes absolutely no sense. They don't do any analysis that
3 says, "Well, workover activities, if we don't allow that,
4 that's going to decrease the production of oil by so much. If
5 we don't allow development wells, that's going to decrease the
6 production of oil by so much."

7 They do no analysis whatsoever to justify the
8 fact that presumably they think it's okay for us not to have
9 oil next year or the year after, but it's not okay for us not
10 to have oil right now. There's no analysis whatsoever of the
11 quantification of how much oil will be lost, and there's no
12 reason given for why oil today is somehow more important than
13 oil tomorrow and next year and the year after.

14 The third problem is perhaps the biggest --

15 **THE COURT:** It's an election year.

16 **MR. FEINBERG:** Well, Your Honor --

17 **THE COURT:** I didn't fall off a turnip truck.

18 **MR. FEINBERG:** I was sort of trying to stay away from
19 that.

20 **THE COURT:** Well, I have life tenure. I don't have
21 to apologize and say I'm sorry to anyone.

22 **MR. FEINBERG:** Obviously, there's a very real
23 possibility also that two years from now, who is going to
24 remember about this moratorium and how much oil production we
25 lost, but today, "Oh, if the public found out we are decreasing

1 current oil production and oil prices went up today, well, that
2 matters." Well, this sort of politicking is simply not allowed
3 under the APA. You have to make a reasoned decision based on a
4 rational nexus between the facts and your choice, and that's
5 not what they did.

6 **THE COURT:** If you want to reserve some time, I think
7 you should wind down.

8 **MR. FEINBERG:** I will do that, Your Honor. Just 30
9 seconds. Because the most fundamental problem with their not
10 allowing development drilling and allowing workover activities
11 is that it undermines the entire rationale for the moratorium.

12 They say, "Well, there's some activities that
13 are just too dangerous. The risks are unacceptable." They
14 don't really do much analysis on that fact, as Your Honor has
15 pointed out, but that's what they say, poses unacceptable
16 risks. Well, again, Your Honor, that is a complete sham
17 because they allow activities that are even more risky because
18 we need oil. Well, why didn't they do the same analysis for
19 development drilling and say, "Well, let's do a cost/benefit
20 analysis"?

21 Again, the only other argument that the
22 defendants make in their reply is that they weren't required to
23 consider factors like the economics, or the need for oil or any
24 of these other things other than safety. Well, I don't want to
25 get into a debate about whether they were required to do it,

1 but they did it. They considered the need for oil when they
2 were deciding whether to allow workover activities, and then
3 they failed to consider that very same factor when deciding
4 whether or not to allow development wells.

5 **THE COURT:** Now, are you going to comment at all, or
6 are you going to reserve some time about the failure to give
7 public notice and comment under the Notice to Lessees?

8 **MR. FEINBERG:** I will.

9 **THE COURT:** That's the Count 3 issue.

10 **MR. FEINBERG:** Yes, it is. Let me address that very
11 briefly because I think this issue has been briefed, and it's
12 really quite simple. Are these new regulations, new
13 requirements or not? If they are, you have to use notice and
14 comment rule making.

15 The government trying to say these are not new
16 requirements is, quite frankly, absurd. The whole reason they
17 put in place the first moratorium is because of these new
18 requirements. They use the phrase *new requirements* all over
19 the place in the safety report, in NTL 05 itself. To say that
20 these are somehow not new is beyond the pale, Your Honor, and
21 that's really the only question. Let me say one other word
22 about that.

23 **THE COURT:** No, your time is up.

24 **MR. FEINBERG:** Okay, Your Honor. Thank you.

25 **THE COURT:** I think the last time, I told a story

1 about Justice Rehnquist. The red light went on, but
2 Justice O'Connor had asked a question. The counsel said to the
3 Chief Justice, "May I respond to Justice O'Connor?" and
4 Chief Justice Rehnquist looked at him and said, "No," so it's
5 time for you to sit down.

6 **MR. FEINBERG:** Very good, Your Honor. Thank you.

7 **THE COURT:** Do we want to hear from the intervenors
8 for 10 seconds or --

9 **MR. DART:** If you don't mind, that would be fine.
10 Thank you.

11 **MR. MONTERO:** One clarification. Are they
12 intervenors or amicus?

13 **THE COURT:** I'm not sure what they are.

14 **MR. DART:** We are amicus in this case.

15 **THE COURT:** Amicus in this case. All right. Well,
16 that means you only have five seconds.

17 **MR. DART:** Yes, sir. Good morning, Your Honor.
18 Henry Dart representing amicus State of Louisiana.

19 **THE COURT:** Your position, basically, is that you
20 were given 24 hours to respond to all this and it was
21 impossible to do so.

22 **MR. DART:** That's right. The statute, OCSLA, makes
23 it very clear that the federal government must consult with the
24 state in making policy decisions such as the ones they made
25 here today.

1 Equally important, Your Honor, when the
2 government makes a broad-based policy decision such as issuing
3 a Gulf-wide moratorium, OCSLA requires that the defendants
4 consider the economic, social, and environmental values of the
5 Outer Continental Shelf resources and the potential impact of
6 oil and gas exploration on the marine, coastal, and human
7 environments. The human environments include the economy, the
8 social network, our lifestyle in the state of Louisiana.

9 **THE COURT:** I'm a little confused about that.
10 Somewhere in this mass of data, is there -- am I right or
11 wrong? Is there a comment by the government that -- or
12 actually conflicting comments: "Well, we did consider economic
13 harms," and then another instance, "Well, we didn't consider
14 economic harms"? Is that a fair or unfair characterization of
15 my own confusion?

16 **MR. DART:** No, I think it's fair, but I think
17 Secretary Salazar in his July 12 declaration said specifically
18 that he didn't have to consider it --

19 **THE COURT:** That's what I'm thinking. Okay.

20 **MR. DART:** -- and, therefore, he didn't.

21 **THE COURT:** That was July 12.

22 **MR. DART:** Exactly. So we don't have to comb through
23 the administrative record looking for this evidence because he
24 admitted he didn't consider it at all.

25 **THE COURT:** I didn't want to misstate it, but I

1 thought there was something to that effect. Do you have
2 anything else to add?

3 **MR. DART:** One other thing, Your Honor. The
4 Secretary says it's self-evident that the economic and
5 environmental costs of the current spill outweighs the impacts
6 of a temporary suspension. First of all, the likelihood of a
7 subsea blowout has not been shown at all by the Secretary. On
8 the contrary, if you consider --

9 **THE COURT:** Well, historically, not many have
10 happened, thank goodness.

11 **MR. DART:** That's true.

12 **THE COURT:** I think only one other one in the Gulf of
13 Mexico since '79 or something like that.

14 **MR. DART:** Correct. In the administrative record,
15 it's interesting that Mr. Bromwich, in his opinion memo,
16 discusses these new -- I wouldn't call them regulations but
17 more scrutiny that the MMS was putting on BOPs on the relief
18 wells, and they found all these problems. They went in,
19 inspected them, and corrected them, and they tested out fine.
20 So just by careful scrutiny and enforcement of existing
21 regulations, the likelihood of another subsea blowout on the
22 scale of the *Deepwater Horizon* just is very low.

23 **THE COURT:** As I recall, there were a couple of
24 companies that had some so-called "minor infractions" in terms
25 of safety, but the vast majority of the other companies out

1 there had passed at least the then applicable safety --

2 **MR. DART:** Correct. I think of the 33 rigs that were
3 inspected, only 2 or 3 had minor infractions. All the rest
4 passed with flying colors.

5 **THE COURT:** I understand your position. Let me hear
6 from the government.

7 **MR. DART:** Thank you.

8 **THE COURT:** Thank you.

9 Mr. Moreno [*sic*], let me ask you the same
10 question I asked counsel. The government agrees that there are
11 no material issues of fact in dispute for purposes of either
12 summary judgment motion?

13 **MR. MONTERO:** That's right, Your Honor.

14 **THE COURT:** Okay.

15 **MR. MONTERO:** Guillermo Montero for the record.
16 Your Honor, Mr. Collins is going to address our standing
17 arguments. He is also going to address ENSCO's challenge to
18 NTL 05. I'm going to address ENSCO's arguments concerning the
19 July directive. I will start by addressing the preordained
20 business, which I view here as the threshold issue, and then I
21 will address ENSCO's arguments that Interior should have
22 considered narrowing the scope of the July directive.

23 One comment as to Mr. Dart's argument for the
24 State. The State's arguments are not properly before the
25 Court. An amicus cannot inject new issues into a summary

1 judgment motion. That's why I asked if he was an intervenor or
2 an amicus.

3 **THE COURT:** So you agree I shouldn't let the
4 environmentalists argue?

5 **MR. MONTERO:** If they are injecting new issues,
6 absolutely. Yes, absolutely. I take that very seriously.

7 **THE COURT:** Well, I don't agree with you. I think it
8 would be appropriate. This is too important to stand on the
9 head of a pin. I mean, if the environmentalists want to add
10 something, I'm going to let them as well.

11 **MR. MONTERO:** Understood, Your Honor. Let me say
12 this. On the economic impacts issue, I'm able to talk about
13 that today. On the notion that the State is entitled to
14 consultation on suspension decisions, I am not prepared to --

15 **THE COURT:** Well, that doesn't necessarily even
16 inform whatever judgment I make about this.

17 **MR. MONTERO:** That's fine, Your Honor.

18 **THE COURT:** I don't know if this is in your area of
19 responsibility or your colleague's, but I would be very
20 interested in some brief response to the arguments regarding
21 the two charts that were just raised.

22 **MR. MONTERO:** Absolutely, Your Honor. I think what I
23 will do again, as an initial matter, with the Court's
24 permission, I will address this preordained thing.

25 As an initial matter, subjective intent is

1 irrelevant in APA cases. We reject the notion that the
2 Secretary's state of mind is somehow at issue here. Even if it
3 was, though -- well, let me back up, actually.

4 As long as the administrative record contains an
5 adequate factual basis and provides an exclamation, joint, or
6 rational connection between the facts found and the choice
7 made, that's enough. But even if the Secretary's subjective
8 intent were at issue here, ENSCO's argument is fundamentally
9 incompatible with the administrative record, and here I'm
10 referring to that same June 29 memorandum from Mr. Bromwich.

11 In that memorandum, Mr. Bromwich directed his
12 Bureau employees to compile data and to answer 11 questions
13 with multiple subparts. Three of those are in direct response
14 to this Court's order on the May directive, and those are
15 whether current oil spill response plans are adequate, whether
16 there's a viable option for dealing with drilling operations on
17 a case-by-case basis, and whether there are potential terms and
18 conditions that, if met, could justify the lifting of the
19 suspension for a particular operator.

20 Now, as a general matter, the purpose of this
21 data-gathering endeavor was to put together possible options
22 for the management of drilling on the OCS. My point here is
23 the fact that these open-ended questions were asked, and the
24 fact that the Bureau then invested hundreds of man-hours in
25 compiling relevant data and answering them is completely

1 inconsistent with ENSCO's argument, with the notion that
2 Interior was just trying to explain away a preordained result,
3 that it was trying to rationalize it, post hoc
4 rationalizations.

5 ENSCO's main response here is to point to the
6 Secretary's statements on June 22 and June 23. The Court is
7 familiar with those. That's a press release and congressional
8 testimony where the Secretary said he would impose a new
9 moratorium in a way that left no doubt as to its legality.

10 The problem with relying on those statements is
11 that they only tell you what the Secretary intended to do as of
12 the time when those statements were made. They don't say
13 anything about the Secretary's intent in the weeks that
14 followed, and they don't say anything about how the Secretary's
15 thinking may have changed as a result or may have been
16 influenced as a result of the evidence that he reviewed.
17 Ultimately, the Secretary did issue another suspension
18 decision. Ultimately, it is very similar to the one he issued
19 in May.

20 **THE COURT:** Well, I know you're staying on message,
21 Mr. Moreno [*sic*], but that sort of falls short of the fact that
22 the day after the Fifth Circuit United States Court of Appeals
23 with one dissent temporarily upheld this Court's decision in
24 the *Hornbeck* case, one day later, Mr. Bromwich is saying that
25 this project is premised on the fact that a moratorium on

1 deepwater drilling will remain in effect until this project is
2 completed. That was one day after the Fifth Circuit Court of
3 Appeals announced its affirmance in a 2-to-1 decision. Three
4 days later, Moratorium 2 was issued. How does that square with
5 everything that you have just said?

6 **MR. MONTERO:** Your Honor, I don't see it as being
7 inconsistent.

8 **THE COURT:** Well, I do.

9 **MR. MONTERO:** The July 9 --

10 **THE COURT:** It seems staggering that one day after
11 the Fifth Circuit affirmed this Court, that the government was
12 circulating a memorandum saying that all of this stuff depends
13 on the fact that a moratorium on deepwater drilling will remain
14 in effect.

15 **MR. MONTERO:** Understood, Your Honor. One thing --

16 **THE COURT:** As of July 9, the fact of a moratorium on
17 deepwater drilling could not lawfully remain in effect unless
18 you all had decided that another one was coming because the
19 Fifth Circuit affirmed this Court.

20 **MR. MONTERO:** Your Honor, it was three days before
21 the decision issued. It stands to reason that the Secretary
22 would know by then or that the Bureau would know by then that
23 there was going to be a new decision and there was going to
24 be --

25 **THE COURT:** It also stands to reason that in his

1 Senate testimony and his public comments long before that, he
2 knew that the moratorium was going to remain in effect. How do
3 you respond to that?

4 **MR. MONTERO:** I respond to that by saying that at
5 that time, that's what he intended to do. Now, let me say it
6 was an appropriate thing to say. It was the right thing to
7 say. Remember that this Court, in its May decision, didn't say
8 anything about the Secretary lacking authority to issue a
9 moratorium, didn't say anything about the Secretary lacking an
10 analytical or factual basis. It couldn't have. It didn't have
11 the administrative record. It was a ruling based on the
12 limited record before it. What it said was, "You failed to
13 explain."

14 So on June 22 and 23, what the Secretary said
15 was, "I'm providing the explanation in the following days." On
16 June 29, he reopened the administrative record. He reopened
17 the evidentiary process. So what he did was he took a step
18 back, and he decided to analyze new evidence because, again,
19 this has been a dynamic process from the start. New evidence,
20 new information is being generated every day by studies, by
21 status reports. So he reopened the administrative record --

22 **THE COURT:** I would like to hear your comments about
23 the inconsistencies counsel argued a few minutes ago from least
24 risky to most risky activities in deepwater drilling.

25 **MR. MONTERO:** Will do, Your Honor. I will point out

1 here I have both a legal response and a factual response. This
2 Court is asking about the factual premise, so I will address
3 that first.

4 The factual predicate for ENSCO's argument here
5 is incorrect. For the record, the purpose of this
6 demonstrative is to road-map the administrative record for the
7 Court. Our hope is that the Court will scrutinize both
8 demonstratives, the administrative documents that are cited
9 therein, and reach its own conclusions.

10 Let me address two of these things. For
11 workover activities, the argument is that workover activities
12 which are permitted under the July directive are riskier than
13 development wells which are not permitted. ENSCO is wrong.
14 These two wells are actually equally risky. I map out the
15 Interior's deliberations and the way in which it reached its
16 conclusion in Row 4, Footnote 10. That's in our demonstrative.
17 Now, I also want to say here just for the record, ENSCO's
18 exhibit is marked "Undisputed." We clearly dispute it.

19 Okay. So these two things are equally risky,
20 and that begs the question: Why were workovers allowed and why
21 were development wells not allowed?

22 The answer is: Workovers are time sensitive;
23 development wells are not. When you do a workover, if you
24 don't do it at the time when you need to, you risk losing the
25 ultimate recovery of minerals from the reservoir. A

1 development well, by contrast, if you don't do a development
2 well in the moment, you put off the recovery of those minerals,
3 but you do not irretrievably lose them. That's why one was
4 permitted and the other was not.

5 ENSCO says this wasn't adequately explained. Of
6 course, if it can be reasonably discerned from the record,
7 that's enough.

8 As completion activities, ENSCO argues that
9 completion activities are the riskiest drilling activities of
10 all and that Interior was arbitrary to allow those but not
11 others, and the problem is they are not drilling activities.
12 Completions are what you do to wells after you finish drilling
13 them. They're inseparable from the drilling activity the same
14 way flying a plane is inseparable from landing it.

15 Just to push that analogy, landing a plane is
16 unquestionably the most dangerous part of flying, but you don't
17 analyze the flight and the landing separately because it
18 wouldn't make sense in terms of assessing risk, and that's what
19 the Bureau did here. It reasonably determined that it didn't
20 make sense to rank completions against the wells to which they
21 pertained.

22 Now, we explain all this in Row 7. That's
23 Note 20. By the way, ENSCO's declarants, these so-called
24 "experts," they actually agree with the Bureau on this. ENSCO
25 says, "Oh, those declarants did not recommend completions."

1 Well, that is literally correct because they didn't address
2 completions at all because it's not a drilling activity. It
3 wasn't on the list of drilling activities they would recommend
4 allowing, and it wasn't on the list of drilling activities that
5 they would recommend prohibiting. They simply didn't address
6 it. So they agree with the Bureau on this. That is Row 7 of
7 our exhibit, Notes 21 and 22.

8 I just wanted to dispute a few discrete points
9 here, Your Honor. ENSCO says drilling into a known reservoir
10 is the touchstone for the Bureau's analysis? No, it was one of
11 many considerations.

12 **THE COURT:** Excuse me. The B documents that are
13 cited in your demonstrative exhibit, are those the same
14 documents that are referred to in pages 9 and 10 and 18 through
15 20 in your brief?

16 **MR. MONTERO:** Some of them may be, some of them
17 probably not, and I will address that. I wasn't able to follow
18 as quickly on the brief and identify what B documents those
19 were. There was some talk about oil spill response plans, and
20 I can address that next.

21 Let me address actually the legal point that I
22 had mentioned here. I said there was a problem with ENSCO's
23 factual predicate. There's also a problem with the legal
24 points.

25 Again, ENSCO says that prohibiting certain less

1 risky wells while allowing other wells that they view as more
2 risky is arbitrary and capricious under the APA. This is wrong
3 as a matter of law, and here, I rely on *Guste v. Verity*. It's
4 a Fifth Circuit case. It's 853 F.2d 322. In that case the
5 State of Louisiana challenged the rule requiring certain turtle
6 protection devices to be installed on shrimping trawlers. The
7 State argued that the rule was arbitrary and capricious because
8 it failed to address serious causes of harm to turtles other
9 than shrimping.

10 The Fifth Circuit rejected the argument. It
11 said: "The government need not choose between attacking every
12 aspect of a problem or not attacking any problem at all." So,
13 in other words, the validity of the regulation was not
14 undermined by the existence of other unaddressed threats, and
15 the same thing goes here.

16 **THE COURT:** Is this a new case? Is it cited in the
17 brief?

18 **MR. MONTERO:** No, it's not cited, Your Honor.

19 **THE COURT:** What's the name again?

20 **MR. MONTERO:** *Guste v. Verity*, G-U-S-T-E.

21 **THE COURT:** *Guste*.

22 **MR. MONTERO:** So, Your Honor, the same thing applies
23 here. It was appropriate for the Secretary to suspend certain
24 drilling activities because of their risks, in this case,
25 development wells. The fact that he didn't suspend other

1 sources of risk does not undermine the validity of the July
2 directive.

3 **THE COURT:** Thank you.

4 **MR. MONTERO:** You're welcome, Your Honor. I want to
5 address a few things here, just a few more points on this
6 preordained business, and then I will move on to the suspension
7 standard.

8 There's an e-mail by William Hauser. He is a
9 Bureau employee, and he says, "The more I write this stuff, the
10 more I think we can, should, could regulate activities or stop
11 activities through prudent management process versus a
12 moratoria scheme." Then he says, "It looks like it's time to
13 find another writer for this stuff." Mr. Hauser was tasked
14 with writing this stuff on June 29. It was a very quick
15 process.

16 A few points here. One thing that ENSCO fails
17 to mention is later that same day, he sent an e-mail saying you
18 have to defer -- this, I'm paraphrasing. You have to defer to
19 Lars Herbst on this stuff about ranking wells because "I've
20 been out of touch from drilling details for over six years."

21 So the point being Mr. Hauser was suggesting
22 that another author should take over is probably because he
23 realized someone else was better capable of doing it based on
24 technical knowledge and up-to-date knowledge, not because he
25 wasn't on board with a preordained result.

1 Another thing I'm told is Mr. Hauser was working
2 on all the rule makings and the safety report at this time.
3 Remember the circumstances in July: The oil was spewing; it
4 was emergency circumstances. So he was working on all the rule
5 makings and the safety report. He was very overworked and he
6 remains overworked, so that was also part of his thinking.

7 There was some talk of *Sossamon*, the *Sossamon*
8 case. The Court says in *Sossamon*, the agency actually gave in.
9 I submit, Your Honor, that here, Interior also gave in and did
10 exactly what this Court said. This Court said, "Explain your
11 reasoning," and the July directive does that. This Court
12 didn't find any substantive errors in the May directive, so
13 there would be no reason to change the end result. This case
14 is actually identical to *Sossamon*.

15 **THE COURT:** I can see it now, the world press:
16 "Government admits giving in to Judge Feldman."

17 **MR. MONTERO:** I didn't mean to do that.

18 **THE COURT:** I know you didn't. I can't wait to be
19 interviewed.

20 **MR. MONTERO:** With that, Your Honor, I'm going to
21 move on to the merits. No, actually, let me say one more
22 thing.

23 Ultimately, the Secretary did issue a very
24 similar decision in May, very nearly identical suspension, very
25 similar parameters. There are a few things that are different.

1 All that means is that the administrative record as a whole,
2 including new evidence, supported once again the decision to
3 issue a suspension, supported once again that suspension of
4 drilling activities was appropriate. The Secretary has a
5 presumption of regularity here. If ENSCO really means to argue
6 that everything that happened after June 22 was a facade, they
7 have to prove it, and they haven't done that here.

8 All right, Your Honor, moving on to the merits.
9 The Court is familiar with the standard here. It's
10 Section 250.172. In this case the Secretary explained that
11 drilling operations present a threat of harm to life, property,
12 and the environment for three reasons.

13 One of these reasons the Court is familiar with
14 is drilling and workplace safety. We know the regulations and
15 inspection protocols in place as of July 12 were inadequate.
16 We know they need to be upgraded, and the extent to which they
17 need to be upgraded was informed by ongoing studies as of that
18 time. There are loss containment issues and OSRP issues.

19 **THE COURT:** What issues?

20 **MR. MONTERO:** Oil spill response plan issues, which I
21 refer to as OSRP.

22 **THE COURT:** I'm not a social worker. I would
23 appreciate it if you speak English and not by initials. Okay?

24 **MR. MONTERO:** Understood, Your Honor.

25 **THE COURT:** Thank you.

1 **MR. MONTERO:** So when a blowout occurs, operators
2 need to be able to contain it, to plug it. We know now that
3 containment technology as of July 12 was inadequate. And this
4 is industry-wide, not just BP. The same thing goes for oil
5 spill response plans, which I will refer to as OSRPs.

6 **THE COURT:** Well, I think I can take judicial notice
7 of the fact that in congressional testimony, other oil
8 companies commented, if not admitted, that they didn't know
9 whether their companies were prepared for such a disaster if it
10 occurred again.

11 **MR. MONTERO:** That's correct, Your Honor.

12 **THE COURT:** But your argument prompts me again to
13 think and recall that, thank goodness, such a disaster hasn't
14 occurred as often as the government seems to assume that it
15 will. I could be wrong, but I believe historically, there has
16 only been one other such disaster in the Gulf of Mexico, and
17 that was in 1979.

18 **MR. MONTERO:** Understood, Your Honor.

19 **THE COURT:** So that sort of triggers the concern that
20 I expressed in *Hornbeck* about tainting an entire industry
21 because of perhaps the improper conduct of a company or
22 companies that were involved out in the *Deepwater Horizon*
23 explosion.

24 **MR. MONTERO:** Understood, Your Honor. Let me say
25 three things:

1 First, there's this notion that for many
2 decades, deepwater drilling has been safe. It's a minor point,
3 but actually, deepwater drilling didn't begin in earnest until
4 the late 1990s, so we are really talking about a 13-, 14-year
5 safety record. Everything else was shallow water drilling
6 before that.

7 The second thing is the regulations implementing
8 OCSLA require redundancy. It doesn't matter if you have the
9 safest blowout preventer in the world. You have to have
10 containment capability. You have to have oil spill response
11 capability. You have to have a bunch of other things. That's
12 what the regulations require.

13 So I understand this Court's thinking that,
14 "Well, if we're never really going to have a BOP failure, why
15 do you need redundancy?" The answer is the regulations require
16 it. These are preexisting regulations. They are not at issue
17 here. That's in the July directive.

18 The last thing I will say is these OSRPs --

19 **THE COURT:** So you're saying that the regulations
20 require that in any industrial event such as the examples that
21 prompted me to make my comments in *Hornbeck*, in any industrial
22 event, a tragic plane crash in which, God forbid, hundreds and
23 hundreds of people are killed and property destroyed and
24 neighborhoods in flames, that redundancy would require that a
25 moratorium be issued on the entire airline industry? Is that

1 your argument?

2 **MR. MONTERO:** I'm not familiar with the FAA
3 regulations. It may very well be that the FAA regulations
4 require that.

5 **THE COURT:** Are you familiar with trains?

6 **MR. MONTERO:** No. I'm not familiar with any of that.

7 **THE COURT:** Are you familiar with anything other than
8 this?

9 **MR. MONTERO:** No. My point here, Your Honor, is this
10 is not a torts case. It's not a matter of what is the
11 appropriate policy. My point here is --

12 **THE COURT:** You're arguing that redundancy requires
13 that in order to avoid a deepwater drilling tragedy, that the
14 entire industry should be banned from working.

15 **MR. MONTERO:** As of July 12, there wasn't a single
16 operator that had effective containment capabilities. These
17 are required by regulation, and no one had them. As of July
18 12, there wasn't a single operator that had a valid OSRP. They
19 are required by regulations. No one had them. That is a
20 systemic flaw, a systemic risk, and each of those is an
21 independent and adequate basis for the issuance of the
22 suspensions.

23 **THE COURT:** There were a couple of violations of the
24 then-in-place safety regulations. As I understand it, in large
25 measure, most of the companies out there had passed all of the

1 safety regulations.

2 **MR. MONTERO:** They had been inspected and they passed
3 those inspections.

4 **THE COURT:** All right.

5 **MR. MONTERO:** That's not the same thing, Your Honor.
6 The reason we put so many OSRPs in the administrative record,
7 those B documents Your Honor was referring to, is to show that
8 they are all identical. They all cite to the same resources:
9 the same fleets of skimmers, the same floating boom. Oil
10 companies don't have their own resources for oil spill
11 response. They don't have the same capabilities. They all
12 hire the same company, so they all have the same resources.
13 Those resources are inadequate, or were as of July 12.

14 We know that because in the BP spill, they were
15 barely able to make a dent in the amount of oil that was
16 spewing out. So now we know that OSRPs are inadequate
17 industry-wide. And the same thing with containment. It wasn't
18 just BP trying to cap that well. This was an industry-wide
19 collaboration, and they weren't able to do it for 86 days.
20 Advances have been made since then. So that's what Director
21 Bromwich is analyzing, and that's what the Secretary may issue
22 its decision on, but as of then, there was no capability.

23 Now, Your Honor, I will just say ENSCO doesn't
24 have a response to this. They don't try to undermine any one
25 of these rationales. They don't say that a moratorium isn't

1 needed. In fact, they concede that it is. They only argue at
2 the fringes, so let me address those.

3 **THE COURT:** I don't know how much time your colleague
4 wants, but you have about seven minutes, Mr. Moreno.

5 **MR. MONTERO:** Montero, Your Honor.

6 **THE COURT:** I'm sorry. I apologize.

7 **MR. MONTERO:** Ms. Moreno is the assistant attorney
8 general. I'm going to take my seat very quickly, then.

9 **THE COURT:** I apologize.

10 **MR. MONTERO:** No, that's fine. The State says that
11 the Secretary --

12 **THE COURT:** You have been here so many times that you
13 feel like my cousin. I didn't say whether you were a wanted or
14 an unwanted cousin.

15 **MR. MONTERO:** I'm not presuming, Your Honor.

16 **THE COURT:** You certainly feel like a cousin. Go
17 ahead.

18 **MR. MONTERO:** Just a few things. The economic
19 impacts, was there a consideration of them? Yes, there was.
20 Did they have to be considered? No. The Secretary has
21 discretion to consider those things. He doesn't have to.

22 As to narrowing the scope of the moratorium,
23 this is the last thing I will say. I've already spoken about
24 the factual predicate and the legal predicate being wrong as to
25 arbitrariness of the ranking of the wells.

1 I will say this as well. Even though
2 alternatives do not need to be considered -- and I will say
3 this. No Court has ever held that an agency has to consider
4 alternatives prior to taking an emergency action bearing on
5 public health and safety, and that's what this was.

6 Even though they don't need to be considered,
7 the Secretary in the July directive did two things to narrow
8 the scope of the directive. It exempted four drilling
9 activities. Those are water flood wells, gas injection wells,
10 disposal wells, and workovers.

11 **THE COURT:** Workovers.

12 **MR. MONTERO:** Now, each of these presents some level
13 of risk, but Interior determined the risk was low enough to be
14 tolerable and that allowing these to move forward on a timely
15 basis was necessary for proper reservoir development. Again,
16 ENSCO actually concedes that this helped lessen the economic
17 impact.

18 **THE COURT:** Tell me about a workover.

19 **MR. MONTERO:** Workover is when you have some problem
20 in the actual -- I'll try to be as accurate as I can. When you
21 have some problem with a preexisting well, you go down and
22 you -- sort of like snaking plumbing.

23 **THE COURT:** Fix it.

24 **MR. MONTERO:** Right. That's right.

25 **THE COURT:** So it involved an existing well --

1 **MR. MONTERO:** That's correct.

2 **THE COURT:** -- which could involve a potential oil
3 spill.

4 **MR. MONTERO:** That's correct, Your Honor. These all
5 present some level of risk.

6 **THE COURT:** Why did the government conclude that a
7 workover wasn't as risky and that there could be less scrutiny
8 of oil spill response in the case of a workover?

9 **MR. MONTERO:** That's not what it concluded. What it
10 found was that it was actually equally risky with another well
11 that it decided to prohibit. However, it made a policy
12 decision, which is perfectly fine within its discretion granted
13 under --

14 **THE COURT:** If it's reasonably discerned.

15 **MR. MONTERO:** Pardon me? Yes. Yes, that's correct.

16 **THE COURT:** Would you rather me use initials? If
17 it's RD'd.

18 **MR. MONTERO:** Fair enough, Your Honor.

19 **THE COURT:** Look, I'm just trying to get you to be
20 more specific to some arguments that were raised that can't be
21 simply glossed over. The argument is, as I understand it --
22 now, I might mistake something because I'm not the technician
23 that you-all on either side are.

24 As I understand the argument, the argument is
25 that there was no rationality distinguishing between a workover

1 and a development well. Your argument has been all of these
2 companies have to answer to the government's concerns about oil
3 spill response, and they weren't equipped to do so, and that's
4 why we have this blanket moratorium, which was driven in part
5 by a concern over oil spill response. Yet as I understand it,
6 in a workover well, there is an equal risk of inadequate oil
7 spill response. I'm just trying to find out what reason can I
8 discern from that choice in order to uphold the choice under
9 the Administrative Procedure Act. It's very simple.

10 **MR. MONTERO:** Thank you, Your Honor.

11 **THE COURT:** You're frowning, but I think I asked a
12 simple question.

13 **MR. MONTERO:** No, no. That's fine. I guess I have a
14 few responses. One is the Court is asking about what basis was
15 there for distinguishing workovers with development wells. The
16 basis, again, is they're both about production, but one is
17 production that is irretrievably lost, and one is production
18 that is held off until later. That's why they are
19 distinguishable.

20 As to the OSRP issues, if it's a systemic flaw
21 and everybody is subject to it, why were some operations
22 allowed to proceed and others not? This is a policy call. It
23 is informed by --

24 **THE COURT:** It's a policy call which I'm not enslaved
25 to accept unless I find that it was reasonably discerned within

1 the meaning of decisions under the Administrative Procedure
2 Act.

3 **MR. MONTERO:** That's correct, Your Honor. But the
4 context here is, remember, the Secretary does not have to
5 address all risks.

6 **THE COURT:** Right.

7 **MR. MONTERO:** He can address some and not others.

8 **THE COURT:** Right. He can do so as long as it's
9 rational.

10 **MR. MONTERO:** That's correct, Your Honor. If I have
11 sufficiently answered the Court's questions --

12 **THE COURT:** Yes.

13 **MR. MONTERO:** -- I'll yield my time to Mr. Collins.
14 One last thing.

15 **THE COURT:** Sure.

16 **MR. MONTERO:** On this chart, the right-most column --

17 **THE COURT:** Wait, wait. You are referring to the --

18 **MR. MONTERO:** Defendants' demonstrative exhibit.

19 **THE COURT:** Hold on. I have it.

20 **MR. MONTERO:** The right-most column, for all of these
21 various entries, it shows that ENSCO is quite right for various
22 of these entries, that the industry consultants and their
23 declarants did prefer to have certain of these wells allowed
24 and exempted from the suspension only after compliance with
25 NTL 05. I find it ironic that ENSCO here is trying to overturn

1 NTL 05 while at the same time saying that these wells should
2 proceed. Thank you, Your Honor.

3 **THE COURT:** Thank you. We have been here an hour and
4 11 minutes, and nobody has mentioned Justice Scalia.
5 Mr. Collins, are you going to cite Justice Scalia?

6 **MR. COLLINS:** I have planned to.

7 **THE COURT:** Good, good. I'm going to his daughter's
8 wedding in a week, so I'm sure he is waiting with bated breath
9 to find out whether I have rejected his decisions again. Go
10 ahead.

11 **MR. COLLINS:** Thank you, Your Honor.

12 **THE COURT:** You're going to talk about NTL 05 and the
13 public comment issue --

14 **MR. COLLINS:** Yes.

15 **THE COURT:** -- and standing.

16 **MR. COLLINS:** Exactly. I think I might take them in
17 that order just because --

18 **THE COURT:** Either way.

19 **MR. COLLINS:** To get to the merits of the NTL 05
20 claims, Count 3 of plaintiff's complaint --

21 **THE COURT:** As I understand it, the question is
22 whether or not the notice is interpretive or substantive.

23 **MR. COLLINS:** Exactly.

24 **THE COURT:** In which case, if it's substantive, you
25 have to put out notice and give comments. If it's

1 interpretive, you don't have to.

2 **MR. COLLINS:** Exactly. I think that's exactly right,
3 Your Honor. I think the sort of flaw in ENSCO's argument here
4 is they take the position that essentially any mandatory
5 requirement whatsoever, no matter what the level of the
6 substantive effect is, makes it a rule subject to -- or a
7 notice, in this case, subject to notice and comment rule
8 making, and that's simply not the case.

9 The main case we cited to in our brief, the
10 *British Caledonian Airways* case, that was a case in the
11 Fifth Circuit where the Civil Aeronautics Board had a
12 regulation that said all fares, charges, and rates must be on
13 file with the Civil Aeronautics Board before they can be
14 charged to customers that are using the charter services.

15 Now, the dispute arose over a customer who was
16 charged a cancellation charge that was not on file with the
17 CAB -- the Civil Aeronautics Board. Sorry. In that case, the
18 Civil Aeronautics Board issued a notice to all the charter
19 carriers saying, "From now on, you must have cancellation
20 charges included within our regulation that says all fares,
21 rates, and charges must be on file," even though previously,
22 charterers had not put cancellation charges on file with the
23 CAB.

24 The court held that that was not required to go
25 through notice and comment rule making even though it imposed a

1 new requirement on these operators. They had to now put
2 cancellation charges where it wasn't clear that they had to
3 before. The Court said the fact that this order has some
4 effect does not, under the substantial impacts doctrine,
5 require that it be promulgated through rule-making procedures.

6 That's exactly what we are arguing here,
7 Your Honor. Yes, NTL 05 has some substantive effect on these
8 operators and lessees. As I'll talk about in standing, it
9 doesn't have any substantive effect directly on ENSCO. It's to
10 the operators and lessees. Nonetheless, it is a substantive
11 effect, but it's not a substantial impact on anybody's
12 operations.

13 I think if you look at the NTL, a lot of these
14 things are certification requirements and verification that
15 we're in compliance with regulations. There are some new
16 testing protocols that are tweaking testing protocols that are
17 already existent in the existing regulations. This is not the
18 sort of substantial impacts.

19 I think most of the cases that ENSCO cites to
20 are cases where you had sort of a wholesale reversal of
21 interpretations. I think one of the cases was the Title X
22 abortion counseling case where doctors under a previous -- the
23 regulation was passed through notice and comment rule making
24 where doctors could not counsel women on abortion. A new
25 administration came in, issued an interpretive rule saying now

1 you can do that. It was a complete reversal of the regulation
2 that had gone through notice and comment rule making, and the
3 court said you can't just do that without going through
4 additional notice and comment rule making. That's the kind of
5 situation where you get into this distinction between
6 substantive and interpretive rules. So that, in essence, is
7 our argument under that.

8 If you look at the requirements of NTL 05, and
9 then I would just point the Court primarily to -- these are
10 just the primary ones. It's 250.446(a) and 250.516(i) and (j).
11 Those incorporate a lot of the testing requirements, which are
12 some of the more substantive requirements mentioned in the NTL.
13 Those two provisions, those are the main ones that are being
14 interpreted through those testing requirements. There are
15 other provisions in the regulations that require reporting and
16 that sort of thing where the NTL would be an amplification
17 perhaps of the reporting requirements, but there are existing
18 reporting requirements that are there.

19 **THE COURT:** Let me ask you this. Keeping in mind the
20 Fifth Circuit case that you rely on, the APA defines *rule* as
21 the whole or part of -- I'm omitting some language but the
22 language that might refer here.

23 The APA defines *rule* as the whole or a part of
24 an agency's statement of general applicability and future
25 effect designed to implement, interpret, or prescribe law or

1 policy.

2 I don't recall. How did the Fifth Circuit
3 distinguish this case from the definition of the rule itself in
4 the U.S. Code?

5 **MR. COLLINS:** Well, I'm not sure that they addressed
6 specifically distinguishing it from the rule. What they did
7 was they looked at it and they said it's unsurprising that an
8 interpretive rule may have some sort of substantive effect.
9 Otherwise, it's kind of a waste of time to interpret it if it's
10 not going to have an actual effect on anything. So they said
11 that aspect of it does not categorically make it subject to
12 notice and comment --

13 **THE COURT:** Doesn't that make it sort of open-ended?
14 I'm not expressing any disrespect for Fifth Circuit precedent,
15 but I'm just wondering how fair your characterization is of
16 that decision. Did it really leave it as open-ended -- I would
17 have a hard time applying your argument to characterizing
18 anything as substantive. Anything could be interpretive under
19 that. I'm just wondering if the Fifth Circuit went that far.

20 **MR. COLLINS:** No. They said you have to look at the
21 substantial impacts, the impacts on the regulated entity to see
22 whether it should be classified as substantive or interpretive.
23 Again, I think the --

24 **THE COURT:** Considering the facts of this case, why
25 couldn't or shouldn't the NTL be characterized as substantive?

1 **MR. COLLINS:** Well, I think there's a couple of
2 points there, Your Honor. I think one of the, just sort of
3 intuitive points is you don't have actual lessees and operators
4 under the regs who are subject to the Notice to Lessees here
5 challenging it.

6 **THE COURT:** Well, that's the standing issue.

7 **MR. COLLINS:** Well, it is. It's a standing issue,
8 but I think it also informs whether -- if it was really that
9 Draconian and that substantive, I think they would also be here
10 before you complaining about it.

11 More to the point, Your Honor, is if you look at
12 the NTL itself, yes, it uses prescriptive language in some
13 instances. It says you must do this, you must have these
14 certifications, you must get this, but I would not quantify
15 them as substantive requirements. They already have to report
16 these things. In many cases, it says, "Now we want you to have
17 a third party come in and just verify that what you're
18 reporting is accurate and submit that certification to us." So
19 these are not hugely burdensome new tweaks to the regulation,
20 Your Honor. I think that's where the substantial impact --

21 **THE COURT:** You're running a little short. Standing.

22 **MR. COLLINS:** Standing, just briefly Your Honor. We
23 have raised an Article III standing count with regard to
24 Count 3, the NTL count that we just have been discussing.
25 ENSCO, nowhere in its affidavit -- I think it's Exhibit U to

1 its motion for summary judgment, where they list out some of
2 the harms that they have suffered as a result of the July --

3 **THE COURT:** You're basically saying they are not
4 lessees.

5 **MR. COLLINS:** They are not lessees and operators, and
6 they haven't alleged an injury traceable to NTL 05. They
7 haven't provided any evidence as to how they're impacted by
8 NTL 05. There's just no evidence before the Court on that.

9 Prudential standing, it goes to both Counts 2
10 and 3. The prudential standing argument is essentially part
11 of -- prudential standing inquiry is whether this is the proper
12 plaintiff to be invoking the Court's remedial powers. Where we
13 get to here with Count 2, they are not the proper party because
14 the gravamen of the relationship here is between the Bureau and
15 the lessees.

16 ENSCO says the Secretary's suspension authority
17 emanates from OCSLA and not the lease. That's true, but the
18 only reason ENSCO has any interest here is because a lessee or
19 operator has a lease or a permit with the Bureau that's subject
20 to these suspension notices that are the actual final agency
21 action that's at issue here. So without that lease or permit,
22 they are not the proper party to be bringing this suit.

23 An example -- this is a case that was not cited
24 in our brief, but it was cited in some of the Fifth Circuit
25 briefing on the *Hornbeck* issue -- is *North Shore Gas Co. v.*

1 *EPA*, and it's 930 F.2d 1239. It's a Seventh Circuit case,
2 Your Honor. In that case, Judge Posner noted, "It's too
3 difficult to trace out all the ramifications of a violation of
4 law to justify allowing every person conceivably injured by the
5 eddies of illegal conduct to bring suit." His point was just
6 simply you can't be -- because of this prudential standing --

7 **THE COURT:** The point is I examine everything by law
8 and economics.

9 **MR. COLLINS:** Yes, but you can't trace every
10 potential injury as a result of a violation of statute to every
11 potential party. Fishermen may not have standing to bring a
12 challenge under the OCSLA and that kind of thing.

13 The same rationale applies to Count 3. Count 2,
14 the gravamen is this lease and permit issue.

15 **THE COURT:** I understand.

16 **MR. COLLINS:** Count 3 with NTL 05, again, it's even
17 more direct here or their claim for standing is even further
18 removed because this is a Notice to Lessees. They are not a
19 lessee. They are not an operator. They are not the proper
20 party to be invoking this Court's remedial power against the
21 Notice to Lessees. That's essentially what it boils down to
22 here, Your Honor. I think, with that, unless the Court has any
23 further questions, I will yield.

24 **THE COURT:** No. Thank you very much.

25 **MR. BABICH:** Thank you, Your Honor. Adam Babich

1 again here for Sierra Club. Just a couple of quick points.

2 **THE COURT:** Why you want me to disqualify myself.

3 **MR. BABICH:** No, Your Honor. I want to point out
4 that when we talk about the policy behind the moratorium, there
5 are two basically legitimate points of view. There's room for
6 reasonable people to differ. I think this Court very
7 eloquently explained one of them in the preliminary injunction
8 decision, pointing out if an airplane crashes, do we ground
9 them all.

10 There is another point of view in that and, in
11 fact, one of the fundamental issues in environmental law is how
12 cautious is cautious enough? Where do you draw the line? If
13 we have now shown that we are unable to stop a deepwater
14 blowout, what does it take before we are willing to let that
15 production go on? Is this really about an airplane crashing,
16 or is it more like what happens when Apollo 1 burns or what
17 happens when Challenger crashes? Does it make sense to pause
18 the space program and revisit what we think we are doing and
19 how protective we are being?

20 I think, Your Honor, it was very appropriate in
21 the context of the *Hornbeck* opinion when the agency had
22 basically failed to explain its opinion and its findings, other
23 than essentially repeating what the regulation said about a
24 finding of risk, for the Court then to interject these deep
25 questions and say, "Hey, basically, these haven't been

1 answered." Now, of course, we continue to take the position
2 that the agency's path could be reasonably discerned, but
3 nonetheless, those were sketchy findings. There's no denying
4 it.

5 What the agency did next really was give in to
6 Judge Feldman. The agency really did exactly what was geared
7 to correct that problem, which was to explain itself. So now
8 we are in a position where we have got the point of view that
9 Your Honor eloquently expressed, another point of view that the
10 agency has now explained at length about the need to know that
11 we have the capability to respond, about the need to know that
12 the blowout preventers are going to be reliable pieces of
13 equipment. The question at that point is one of policy, one of
14 philosophy. There's no way we can point to one and say this
15 one is right, this one is wrong, but that's why elected
16 officials and their appointed administrators make these
17 decisions.

18 So the question now is: Is it within their
19 authority? I think it's clear that the moratorium is within
20 their authority. Did they explain --

21 **THE COURT:** That's never been disputed, not even by
22 this Court.

23 **MR. BABICH:** Then the question is: Did they explain?
24 That was a tough argument the first time around. Now it's not
25 a tough argument. Yes, they explained.

1 Then finally: Is the explanation arbitrary? I
2 would submit, Your Honor, it's not.

3 **THE COURT:** I have Judge Dennis on the speaker, by
4 the way. I know he is very interested in knowing that you
5 agree with me and not him.

6 **MR. BABICH:** I've tried to kind of caution and say,
7 "Well, we do think the agency's path was reasonably discerned."

8 **THE COURT:** Sometimes you have to break the tension.
9 At any rate, I understand your argument.

10 **MR. BABICH:** The second point, real quickly,
11 Your Honor, is just to go to this preordained type argument,
12 and that is if you take anything approaching its logical
13 extension, it's really an unworkable argument.

14 So, for example, if you were going to hire an
15 administrator who said, "Gee, we need seat belts on cars.
16 Let's start an administrative process," well, because the
17 administrator had said that, essentially that decision could
18 never be made because it would have been preordained.

19 **THE COURT:** How do you explain the July 9 memo?

20 **MR. BABICH:** Which is the "given the fact that" memo?

21 **THE COURT:** Uh-huh.

22 **MR. BABICH:** Your Honor, normally, I oppose, as
23 representative of organizations like Sierra Club, the
24 government; so I would be delighted to go through the
25 government's e-mails, and every time I find a place where one

1 of the government employees said, "Gee this decision is already
2 made," or "Nobody is going to listen to me about this," or
3 "Gee, I disagree," to be able to say, "Here it is. This was
4 set in stone. There was nothing that could be done." That
5 would be great, and I could use that precedent.

6 Nonetheless, in terms of having a functioning
7 government, there is going to be those kinds of conversations,
8 those memos are going to be sent, but the bottom line is you
9 can't have a situation where the agency can never make a
10 decision, for example, in favor of a moratorium because at some
11 point, somebody said, "I think there should be a moratorium."

12 **THE COURT:** Well, I don't disagree with you about
13 that. I guess the operative issue is whether it goes beyond
14 that. I don't know if Justice Scalia wrote -- who wrote the
15 *Burlington Truck Lines* case? If Scalia wrote it, I'm going to
16 slit both wrists because I'm about to cite *Burlington Truck*
17 *Lines*.

18 I think *Burlington Truck Lines* agrees with you
19 but nevertheless says reviewing courts are not mere automatons.
20 We are not indentured to the administrative record. There is
21 some force to making district courts, reviewing courts of
22 agency decisions, consistent with the parameters of the
23 Administrative Procedure Act.

24 **MR. BABICH:** At that point, Your Honor, then,
25 frankly, I think you would need depositions, testimony to

1 really resolve the issue. In a record review case, if this is
2 going to go forward as a record review case -- and here, I will
3 cite this *Estate of Landers v. Leavitt* case. We actually cited
4 this in a filing in *Hornbeck*.

5 So the quote was: "In the ordinary case, we
6 uphold or set aside the agency's action on the grounds that the
7 agency has articulated," and the court went on to say it is
8 unwilling to ascribe nefarious motivations to the agency.

9 Even ENSCO, when ENSCO was arguing about, "Well,
10 maybe this is an attempt to end-run the judicial process,"
11 counsel introduced his argument by referring to a possibility.
12 Your Honor, this Court isn't in a position to extrapolate
13 possibilities and what they might have been thinking.

14 **THE COURT:** I'm also in the position to read the mind
15 of Mr. Hawser. The red light is on.

16 **MR. BABICH:** Thank you, Your Honor.

17 **THE COURT:** Thank you very much for being here.

18 Any response?

19 **MR. FEINBERG:** Your Honor, may I have just two
20 minutes?

21 **THE COURT:** Yes.

22 **MR. FEINBERG:** I just wanted to briefly respond to
23 three points, mostly about the NTL 05 issue and the standing
24 issue.

25 **THE COURT:** Before you do that, I'm interested in

1 what your responsive comments might be to your argument
2 regarding the two charts, the green and red chart and the
3 government's chart, because Mr. Montero was very specific in
4 responding to your argument.

5 **MR. FEINBERG:** Well, I guess there was nothing that
6 Mr. Montero said that I think changes the fundamental facts.
7 For example, he went --

8 **THE COURT:** Well, he essentially said that there were
9 policy justifications for what you find to be inconsistencies
10 out in the Gulf and the decisions that the Secretary made.

11 **MR. FEINBERG:** Well, I guess I go back to the three
12 problems I mentioned before: One, where is that in the
13 administrative record? Where is it in the administrative
14 record where it says, "We need more oil. We have an immediate
15 need for oil, so we are going to allow workovers, but we don't
16 have a need for oil in the future, so we are not going to allow
17 development drilling"? Not one word in the administrative
18 record about that.

19 **THE COURT:** Well, forget about my maybe-cynical
20 comment about this being an election year. Having been in
21 politics for 24 years, I still have a healthy skepticism about
22 some aspects of what I observed during my 24 years. Forget
23 about that. Forget that it's an election year. Does the
24 Secretary of the Interior have some authority to say, "Well, we
25 need to preserve capturing minerals now as a matter of policy

1 and as a matter of national importance, and future production,
2 we can put off for a while. So if the risks are the same,
3 maybe right now we don't want the cost of natural gas or
4 heating oil to go up in Maine"? Don't they have the discretion
5 to say that?

6 **MR. FEINBERG:** Well, theoretically, perhaps, but the
7 important fact here is they didn't. Not only did they not say
8 that, but they didn't do any analysis. So, for example, they
9 don't even bother to analyze how much oil will be lost in the
10 near term or immediate term if we didn't allow workover
11 activities. They do analyze the oil that will be lost based on
12 the disallowed activities, but they never do the other side of
13 the equation. So it's impossible to know, on this record, at
14 least, whether there's any substantial savings or benefit in
15 terms of immediate oil production by allowing workover
16 activities.

17 **THE COURT:** Standing and the NTL.

18 **MR. FEINBERG:** Your Honor, if I may, I have one more
19 document to the Court, sort of a three in one.

20 **THE COURT:** The red light is about to go on.

21 **MR. FEINBERG:** All right. This, Your Honor, is a
22 printout from BOEM's Web site.

23 **THE COURT:** Have counsel seen it?

24 **MR. COLLINS:** Yes, he gave it to us.

25 **MR. FEINBERG:** First of all, Mr. Montero said that

1 ENSCO is trying to invalidate NTL 05. I just want to remind
2 the Court that we are only trying to invalidate it on a
3 procedural ground, at least as it relates to deepwater
4 drilling. We don't have any problem with the substance of it,
5 but they have to follow the rules when they put --

6 **THE COURT:** Notice and public comment.

7 **MR. FEINBERG:** Exactly.

8 **THE COURT:** How long does that process take?

9 **MR. FEINBERG:** Well, it may take a little bit of
10 time, but there are, of course, emergency procedures that they
11 could use too which would have allowed notice and comment to go
12 on after the regulation is introduced, and they don't do that
13 either, nor did they even state the need for it as would be
14 required.

15 **THE COURT:** Well, let's assume that I were to agree
16 with you and that they had to put out notice and request public
17 comment and go through this process. Does that mean that
18 they're also required to extend or put in place another
19 moratorium so that this process can be played out properly?
20 What impact does that have on your client, for example?

21 **MR. FEINBERG:** Well, at this point, Your Honor, you
22 may be right, it may have no impact, because I believe the
23 agency -- they can correct me if I'm wrong, but particularly
24 based on Monday's filing, I think they are going to introduce
25 regulations to do exactly what we have been suggesting all

1 along they do. There's actually a document in the
2 administrative record that suggests that that's what they
3 planned to do all the time. So at the end of the day, it may
4 not have the biggest practical impact, but there's an important
5 issue of following the rules, and I think that's the main
6 impact.

7 There are a few interesting things about this
8 document. First of all, it shows that ENSCO really cares about
9 the requirements in NTL 05. You will see at the top of the
10 page here are the seven rigs that have complied -- of the 33,
11 the seven rigs that have complied already with NTL 05. You
12 will notice that ENSCO has two of the seven and actually now
13 has three of the eight. This isn't updated, but the ENSCO 8502
14 has now been certified as being in compliance with NTL 05. So
15 the issue isn't that ENSCO wants to ignore NTL 05; it's did the
16 agency follow the rules in terms of implementing the
17 requirements.

18 This document also, I think, destroys the
19 government's standing argument. It says in the second
20 sentence, "The NTL also requires a one-time BOP certification
21 for floating drilling operations. The following is a list of
22 rigs that BOEMRE has accepted the certifications submitted."

23 Well, they're saying that this only affects
24 operators and lessees. Well, why is ENSCO listed on this?
25 This is something that NTL 05 requires. The fact is it

1 shouldn't have been done by an NTL. It clearly affects much
2 more than operators and lessees.

3 I think along with that, the substantive impact
4 of NTL 05 really cannot be disputed. One of the requirements
5 is a certification by the CEO, the sort of Sarbanes-Oxley-like
6 requirement. That is pretty substantive, Your Honor. And, of
7 course, without looking at the 10 individual requirements, the
8 whole basis of the first moratorium was, "We need all this time
9 to implement this new stuff." Well, that has to be almost by
10 definition substantive.

11 **THE COURT:** You're talking about NTL 04?

12 **MR. FEINBERG:** No, no.

13 **THE COURT:** NTL 05? This one?

14 **MR. FEINBERG:** The safety report that the first
15 moratorium was based on says, "We need to implement a bunch of
16 new things," and NTL 05 is a bunch of those things.

17 **THE COURT:** All right.

18 **MR. FEINBERG:** Thank you, Your Honor.

19 **THE COURT:** You don't feel the need to have some time
20 to respond to the production of all these documents?

21 **MR. FEINBERG:** I don't believe so, Your Honor.

22 **THE COURT:** Then, why have you requested them?

23 **MR. FEINBERG:** Well, we are in a little bit of a
24 quandary because the moratorium only has two months left. I
25 think what's happened here is the need to move quickly has

1 overtaken the desire for the documents. It may be that the
2 documents may be relevant down the road.

3 **THE COURT:** Well, on the other hand, let's say, just
4 speculating, if a summary judgment were granted in your favor
5 and not the government's and if the Court got reversed and for
6 some reason neither side prevailed, there would have to be a
7 trial, and I guess then the documents would be somehow possibly
8 relevant. I don't know. I asked the question because I'm in
9 the same quandary that counsel are in because I think that
10 you-all and the government and the public are entitled to as
11 quick a decision as is possible.

12 **MR. FEINBERG:** Your example -- and there are other
13 examples, too, including the fact that because this is a
14 judicial review of an agency action, if the case were to go on
15 appeal, the Fifth Circuit is looking at it *de novo* and
16 essentially undertaking the same task that you are, and so
17 those new documents could be used in that proceeding.

18 **THE COURT:** That's true.

19 **MR. FEINBERG:** In addition to that, if you're asking
20 the plaintiff, we much would prefer that we move quickly and
21 not wait on the documents.

22 **THE COURT:** All right.

23 **MR. FEINBERG:** Thank you, Your Honor.

24 **THE COURT:** Anything else?

25 **MR. MONTERO:** Your Honor, may I?

1 **THE COURT:** Yes.

2 **MR. MONTERO:** Very quickly. Just one housekeeping
3 thing and two substantive points.

4 We said that if the objection was overruled, we
5 would probably file a motion seeking a 30-day stay to allow the
6 associate general to determine whether appeal is appropriate,
7 and also we would intend to seek a protective order. I'm
8 somewhat disconnected from --

9 **THE COURT:** You mean on the magistrate's decision?

10 **MR. MONTERO:** That's correct, Your Honor. At this
11 moment, I don't know where that stands, but it's something I
12 will look into when I get back to the office.

13 **THE COURT:** Well, I don't have anything before me
14 right now.

15 **MR. MONTERO:** That's right.

16 **THE COURT:** Thank you for alerting me.

17 **MR. MONTERO:** Just the last couple things, ENSCO says
18 they don't have a problem with the substance of the NTL; their
19 only problem is with the process that was followed. According
20 to *Summers v. Earth Island Institute* -- that is a Scalia
21 case -- they have just conceded the standing argument.

22 **THE COURT:** It took an hour and 45 minutes. I'm
23 going to e-mail Justice Scalia and tell him he is a has-been.

24 **MR. MONTERO:** The next point is on the July 9 memo.
25 I don't mean to reargue that. I just want to make one

1 potential clarification.

2 **THE COURT:** Go ahead.

3 **MR. MONTERO:** It says, "This project is premised on
4 the fact that a moratorium of deepwater drilling will remain in
5 effect until this project is completed." It says, "This
6 project is premised" I want to make clear the project
7 is not referring to the analysis and the questions that were
8 submitted in the June 29 memorandum, the one that's reopened
9 the evidentiary record. When it says "this project," it's
10 talking about Director Bromwich's outreach, public hearings,
11 all that stuff to determine whether it's possible to end the
12 moratorium before November 30. So they are two very different
13 things.

14 The last thing I will say just to clarify: I
15 know the Court is going to scrutinize the development
16 well/workover, oil now/oil later. It's not about oil now or
17 oil later. Our point is oil now or oil never on a workover
18 well, and on a development well, it is oil now or oil later.
19 In a workover, if you don't do a workover and you have to --

20 **THE COURT:** Of course, there's one point of view that
21 says both Moratorium 1 and Moratorium 2 might result in oil
22 never. I don't know. Just out of curiosity, is there any
23 shallow water drilling going on?

24 **MR. MONTERO:** I don't know. The only thing that
25 shallow water drilling is subject to --

1 **THE COURT:** I'm just interested generally. I know
2 it's not involved in any of this.

3 **MR. MONTERO:** I couldn't answer that. I don't know.

4 **THE COURT:** I should mention again I have no known
5 extensive interests in shallow water drilling either.

6 **MR. MONTERO:** Thank you, Your Honor.

7 **THE COURT:** Thank you all. I don't believe the
8 gentleman from Interior was here before. Were you here before?

9 **MR. MASON:** Yes, Your Honor.

10 **THE COURT:** Well, now I have committed two sins: I
11 called Mr. Montero "Mr. Moreno," and I didn't recognize you.
12 Of course, when *Hornbeck* was here, I thought the lieutenant
13 governor was a woman. When I thanked the lieutenant governor
14 for being here, I turned to some woman, who I'm sure thought I
15 was some kind of nut. The lieutenant governor was obviously
16 sitting right next to her. I want to thank all of you. I want
17 to thank you for your work.

18 There he is. Lieutenant Governor, thank you.
19 Thank you for being here again.

20 I want to thank everybody. I want to thank the
21 visitors. I thank you for your very hard work, and I will try
22 to get a decision out as quickly as reasonable. Thank you very
23 much. Court is adjourned.

24 **THE DEPUTY CLERK:** All rise.

25 (WHEREUPON the Court was in recess.)

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CERTIFICATE

I, Toni Doyle Tusa, CCR, FCRR, Official Court Reporter for the United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

s/ Toni Doyle Tusa
Toni Doyle Tusa, CCR, FCRR
Official Court Reporter

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