

Exhibit 6

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HORNBECK OFFSHORE SERVICES, * Docket 10-CV-1663-F
LLC, et al *
 *
versus * New Orleans, Louisiana
 *
KENNETH LEE "KEN" SALAZAR, et al *
 * June 21, 2010, 9:30 a.m.
* * * * *

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

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16 Proceedings recorded by mechanical stenography; transcript
17 produced by computer.

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1 PROCEEDINGS

2 (June 21, 2010)

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

4 Be seated, please.

5 **THE COURT:** Good morning. Before the case is called,
6 let me burden the public and counsel with a few announcements
7 and remarks.

8 First of all, I want to welcome the public to
9 United States District Court for the Eastern District of
10 Louisiana. You're welcome to stay throughout the proceeding,
11 but the Court will tolerate no outbursts, no expressions of
12 points of view. If anyone does so, they will be invited to
13 leave.

14 Secondly, I would appreciate that everybody in
15 the audience show respect for the lawyers on both sides who are
16 here today. I recognize that there are highly conflicting
17 points of view and issues of deep national and local
18 significance, and I will expect that everybody in the public
19 will respect the attorneys who are here today in their
20 professional capacities.

21 The Court has announced earlier that each side
22 will have one hour. There have been some late interventions on
23 both sides. I have permitted interventions, but I will not
24 permit an extension of the time limits on these proceedings.
25 Therefore, any intervenor who has come in on either side, the

1 plaintiff or the defendant, if they wish to argue, they will
2 have to share the time of the principal parties in this case;
3 namely, the plaintiff and the government of the United States.

4 This hearing has been scheduled on a highly
5 expedited basis for obvious reasons, and I want to take this
6 brief opportunity to thank counsel on both sides for their
7 excellent and professional cooperation with the Court in
8 keeping things on schedule.

9 Finally, because United States District Judge
10 Nancy Atlas in Houston has a similar proceeding pending before
11 her involving, I believe, a different plaintiff, I just wanted
12 everybody to know that Judge Atlas is listening in to this
13 proceeding as a spectator, just like everybody else, but I
14 wanted everyone to know that.

15 Call the case.

16 **THE DEPUTY CLERK:** Civil Action 10-1663, Hornbeck
17 Offshore Services versus Kenneth Salazar, et al.

18 **THE COURT:** Enter your appearances, Counsel.

19 **MR. ROSENBLUM:** Good morning, Your Honor. Carl
20 Rosenblum on behalf of the plaintiffs. I also have with me
21 Lele Hainkel, Grady Hurley, and Margie McKeithen as co-counsel
22 with me, and special co-counsel John Cooney from the Venable
23 firm in Washington, D.C.

24 **THE COURT:** Welcome, sir.

25 **MR. COONEY:** Thank you, sir.

1 **THE COURT:** How about the other side?

2 **MR. MONTERO:** Good morning, Your Honor. Guillermo
3 Montero from the Department of Justice. With me are my
4 colleagues Brian Collins and Jack Haugrud, also with the
5 Department of Justice.

6 **THE COURT:** Washington?

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

8 **THE COURT:** Welcome.

9 **MR. MONTERO:** Thank you. I have with me Peter
10 Mansfield of the U.S. attorney's office and then Milo Mason
11 from the solicitor's office, Department of the Interior. Thank
12 you.

13 **THE COURT:** Thank you for being here and, again,
14 thanks for your cooperation.

15 **MR. BABICH:** Good morning, Your Honor. I'm Adam
16 Babich here for defendant intervenors. With me are Catherine
17 Wannamaker and Monica Reimer, both of whom have pending
18 *pro hac vice* motions before this Court.

19 **THE COURT:** I've granted them.

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

21 **THE COURT:** You are not amazed that I was able to
22 remember all the names?

23 All right. Mr. Rosenblum.

24 **MR. ROSENBLUM:** Thank you, Your Honor. May it please
25 the Court. Good morning. Your Honor, as I said, I'm here on

1 behalf of the plaintiffs. At the start, we would like to
2 provide the Court with a copy of plaintiffs' benchbook that has
3 copies of the affidavits that are attached, the various
4 motions, and some certain number of demonstrative aids. They
5 have been presented to both sides. Thank you.

6 **THE COURT:** Are these things I haven't seen?

7 **MR. ROSENBLUM:** There are some demonstratives at the
8 back, Your Honor, that you have not seen. There are
9 photographs. There is one demonstrative aid of a number of the
10 editorial headlines in the back on the demonstrative, but I
11 have presented copies to the government and to the intervenors.

12 **THE COURT:** You assume I'm not familiar with the
13 editorial headlines? Go ahead.

14 **MR. ROSENBLUM:** Thank you, Your Honor. Your Honor,
15 as the Court has already recognized, the present situation is
16 of national significance, and we suggest that the extraordinary
17 relief set forth by Rule 65 of the Federal Rules of Civil
18 Procedure is tailor-made, Your Honor, for this situation.

19 This is an unprecedented industry-wide shutdown.
20 The Gulf of Mexico deepwater drilling industry, that's what we
21 are talking about, Your Honor. Never before has the government
22 done this. This was done by the stroke of a pen, without any
23 rule-making, and it has far, far-reaching implications. The
24 need for a preliminary injunction, indeed, Judge, is about
25 industry survival, the deepwater drilling industry.

1 I will make the opening argument on behalf of
2 the plaintiffs. With the Court's permission, I would like to
3 have Mr. Cooney, who is an expert in the Administrative
4 Procedure Act and administrative law in general, Judge, address
5 the first element of the preliminary injunction test, which is
6 the substantial likelihood of success on the merits. I will
7 then come back, with the Court's permission, and discuss the
8 threat of substantial irreparable harm element and the
9 remaining two elements under the preliminary injunction test.

10 Also with the Court's permission, Judge, we
11 would like to reserve 10 minutes of our time, if we could, for
12 rebuttal.

13 **THE COURT:** All right.

14 **MR. ROSENBLUM:** Your Honor, my clients each play a
15 key role in the Gulf of Mexico deepwater drilling industry, and
16 they seek an order this morning enjoining the defendants'
17 blanket moratorium against deepwater drilling in the Gulf of
18 Mexico Outer Continental Shelf.

19 I would like to introduce quickly to the Court
20 representatives of my clients: Mr. Todd Hornbeck for Hornbeck
21 Offshore Services, Mr. Dino Chouest for the Chouest entities,
22 and Mr. Ben Bordelon on behalf of the Bollinger entities.

23 Up front, Judge, this is an Administrative
24 Procedure Act case. It is not a citizen suit case under OCSLA
25 that seeks attorneys' fees or of civil penalties.

1 **THE COURT:** You sort of retreated from that, though.
2 You started out really underscoring OCSLA more than the
3 Administrative Procedure Act.

4 **MR. ROSENBLUM:** Judge, we would suggest that OCSLA is
5 the statute that is at issue here in terms of the foundation
6 for whether or not the government's blanket moratorium was
7 arbitrary and capricious within the meaning of the
8 Administrative Procedure Act.

9 **THE COURT:** OCSLA, of course, triggers a notice
10 requirement that the APA doesn't. I think that's why the
11 government is coming down on the fact that there's been no
12 compliance with the notice requirements. What is your comment
13 about that?

14 **MR. ROSENBLUM:** Two things, Judge:

15 Number one, we believe this is an APA case so
16 that the OCSLA notification requirement or the notice
17 provision, whether you are looking at subparagraph 2 or
18 subparagraph 3, simply don't apply here.

19 Secondly, Judge, even if you believe that that
20 subparagraph 3, which is talking about notification that has no
21 requirements for any particular --

22 **THE COURT:** As opposed to notice?

23 **MR. ROSENBLUM:** As opposed to formal notice, which is
24 set forth in subset 2, which has the 60-day requirement --
25 obviously, Judge, we are here on an emergency basis. So if any

1 provision under OCSLA for notification or notice would apply --
2 and we suggest neither one does because we are here on an APA
3 case. In fact, we cite in our brief, Judge, that the
4 government has taken positions in other cases suggesting that
5 various notification provisions of various statutes do not
6 trump the APA. We suggest, therefore, it is simply a red
7 herring, Judge. With no pun intended, it is absolutely a red
8 herring.

9 Twofold, no notice was required and --

10 **THE COURT:** I would have missed that pun unless you
11 had told me. I guess I should announce like I did once in a
12 patent case to lawyers who were all engineers that they have a
13 judge who has degrees in anthropology, Spanish, and English, so
14 please be kind to me. Well, I don't fish or hunt either, so be
15 kind to me.

16 **MR. ROSENBLUM:** Judge, if I'm not being kind, I urge
17 you to make sure that I'm aware of it.

18 **THE COURT:** I'm sure you will know it if I feel like
19 you're not.

20 **MR. ROSENBLUM:** I've been before you one or two times
21 before, Judge. I'm fully aware --

22 **THE COURT:** I remember every one of them.

23 **MR. ROSENBLUM:** Therefore, Judge, that issue of
24 notification is a nonissue in this case. Finally, we suggest
25 who better to notify the government than the Governor of the

1 State of Louisiana, before this lawsuit was filed, of the
2 problem with this moratorium.

3 The suggestion -- and I want to come right off
4 after this point. The suggestion that the government was
5 surprised somehow that somebody would file a lawsuit to
6 challenge that moratorium, we suggest, is simply not tenable.

7 **THE COURT:** There was a June 2 letter, as I recall.

8 **MR. ROSENBLUM:** That's exactly the letter I'm talking
9 about, Judge, and that is five days before we filed this
10 lawsuit initially on June 7.

11 At the outset, Judge, I want to point out that
12 there are numerous accounts in the press that suggest that the
13 various constituents affected by this moratorium, as well as
14 the defendants and the intervenors themselves, they may have
15 various hidden agendas or are playing politics. The relief we
16 seek here today has none of that, Judge. This is not a matter
17 of a pro oil and gas or anti-environment. This is a case where
18 we are asking Your Honor to make sure that the government here,
19 the defendants, follow the law. That's all we are asking,
20 Judge. We are not asking you to write new rules. We are not
21 asking you to do anything like that. We are just asking you to
22 enforce what's already there.

23 Nor, very importantly, Judge, is what we are
24 seeking contrary to the ultimate goal of safety. Nothing that
25 we are asking for is contrary to safety, and I'm going to get

1 into that in a minute. As eight of the government's own
2 experts that were brought in to consult or peer-review on this
3 safety report recognized, a six-month blanket moratorium could
4 prove more economically devastating than the oil spill itself.
5 And, indeed, those experts, the government's experts, indicated
6 that such a blanket moratorium would be counterproductive to
7 safety.

8 Now, Judge, the Congress, in enacting the APA,
9 asked the Court to act as a gatekeeper. That's why we are here
10 today, Your Honor. When an agency acts arbitrary and
11 capricious, we ask you to be at that gate. We know and we
12 recognize the huge amount of deference that Your Honor has to
13 pay to the Executive Branch, but that deference is not without
14 limit. Accordingly, the relief requested is fully consistent
15 with the Court's normal deference to the government.

16 Your Honor, the system that we have set up under
17 the Constitution is a system of checks and balances. That's
18 exactly what we are talking about. We would defer the Court,
19 if there's any ambiguity in the Court's mind, to the
20 Fifth Circuit *Garner* case, which recognized that that deference
21 is not the Court to rubber-stamp what the government has done.

22 **THE COURT:** Let me ask you. The government, I think,
23 takes the position that there's some 7,000 leases in the Gulf
24 and that only 30 or 33 rigs are affected. I know that the
25 moratorium has been characterized by these scientists, the

1 commission members -- I don't know which commission it was,
2 there were so many commissions, but some commission. A bunch
3 of experts basically said it should be a limited and not a
4 blanket moratorium. Exhibit F is the document, I think.

5 How do you respond to the comment that the
6 government makes which seems to be saying, "Yes, it's a general
7 moratorium, but it's not that big a deal"?

8 **MR. ROSENBLUM:** Your Honor, it is a big deal. We
9 have seen the "big deal" expressed in editorials in the
10 *Wall Street Journal*. We have seen it expressed here. We have
11 seen it expressed by the governors. The lieutenant governor,
12 on behalf of the State of Louisiana, last night filed an amicus
13 brief to explain what the big deal is.

14 In essence, Judge, once you shut down for six
15 months -- and it's a minimum of six months, Your Honor. Once
16 you shut down the deepwater drilling industry, it's a series of
17 dominos that's endless. Once the toothpaste is out of the
18 tube, it cannot be put in there, Judge.

19 We have seen already a number of announcements
20 by some of the oil and gas companies of moving their rigs from
21 the Gulf of Mexico to points overseas, whether it be Brazil or
22 West Africa or someplace else. That's the fundamental piece.
23 That's the first domino that causes everything to go down.
24 This morning on NPR they talked about, in fact, it's an
25 ecosystem of businesses that are being harmed every day by this

1 moratorium.

2 So the suggestion that there are a lot of rigs
3 out in the Gulf that are producing rigs, firstoff, we would
4 suggest that those producing rigs have much less manpower.
5 Once you have a well up and going and producing, the safety
6 concerns are very different. In fact, the infrastructure that
7 serves a producing rig versus a drilling rig is very different.
8 That's why this moratorium that attacks the deepwater drilling
9 industry is so problematic.

10 **THE COURT:** I know you're going to take up later the
11 question of irreparable harm. Since you've brought up the
12 economic effect of the government's order, I just want you to
13 know I am at some point going to ask you about Hornbeck's SEC
14 filings, which basically say things are pretty good
15 economically for the company.

16 **MR. ROSENBLUM:** Let me go right there now, Judge, if
17 you would like. There is no question, Judge, that what
18 Hornbeck is going to need to do and what is indicated in that
19 8-K filing is they are going to have to move some of their
20 infrastructure, some of their vessels to other locations.
21 That's just another domino, Judge. The fact that they can go
22 someplace else -- we are not talking about a breach of contract
23 here as the irreparable harm, Judge. I understand that. The
24 Court understands that. I'm not sure that the government
25 understands that.

1 **THE COURT:** They have had notice that some of these
2 rigs are going to be moved.

3 **MR. ROSENBLUM:** Absolutely, Judge. You have seen
4 that in the newspaper, and it's referred to in Mr. Hornbeck's
5 affidavit in a number of paragraphs, where I believe it's
6 Anadarko and at least one other company are in the process of
7 moving some of their rigs from the Gulf of Mexico. In fact, we
8 would direct the Court's attention to paragraph 25, 29, and 35
9 of Todd Hornbeck's affidavit.

10 That sets forth these dominos, Judge. That's
11 exactly why under the injunction requirement -- we are not
12 talking about something that can be calculated. Yes, you can
13 put a dollar amount on a breach of contract, Judge, but this
14 case is about a lot more than a breach of contract.

15 The State of Louisiana is in this case. They
16 cite in their amicus brief that there's over 140,000 signatures
17 on a petition to overturn this moratorium. At the bottom line,
18 Your Honor --

19 **THE COURT:** There are about, what, 19 or 20 companies
20 with rigs out in the Gulf now that have already been permitted.
21 There are about 30-something rigs, but there's some 19 or 20
22 different companies --

23 **MR. ROSENBLUM:** Oil and gas companies, I think --

24 **THE COURT:** -- other than BP --

25 **MR. ROSENBLUM:** That's exactly right, Judge.

1 **THE COURT:** -- that are out there, that have been
2 permitted, who would also be affected by this moratorium.

3 **MR. ROSENBLUM:** Absolutely, Judge. This moratorium,
4 with the stroke of a pen, without any rule-making, and actually
5 without any notice to the State of Louisiana -- which the state
6 talks about in their brief -- shut down, for all practical
7 purposes, the deepwater drilling industry.

8 The representations of Hornbeck in the 8-K are
9 accurate, obviously, Judge. Hornbeck itself is moving the
10 pieces around while they watch these dominos fall. We urge you
11 to stop that domino. Once that toothpaste, as I said, is out
12 of the tube, you can't put it back in.

13 Professor Smith in his affidavit -- and we are
14 talking about irreparable harm -- talks about the fact that
15 once these rigs, the best and most highly technical rigs, move
16 overseas, they enter into long-term contracts. They are not
17 just going to come back on six months and one day. That's the
18 problem, Judge. That's why we are here.

19 Your Honor, let me go back to a couple of things
20 I just want the Court to understand. Number one, we would like
21 to move to file into the court record -- and we have a motion
22 pending and it's record document 26 -- into the administrative
23 record, actually, Judge, an inspection report. It's the
24 post-incident inspection report that was done by the MMS
25 itself.

1 It is attached to one of the affidavits of the
2 experts, which is a second motion that we have pending that we
3 would like to put into the record, which is record document 27,
4 which contains the affidavits of Mr. Arnold, Mr. Baugh, the
5 declaration of Mr. Brett, the affidavit of Dr. Hans
6 Juvkam-Wold, the affidavit of Mr. Williams, and then the
7 affidavits on behalf of my clients Dionne Chouest Austin,
8 Andrew St. Germain, and Mr. Todd Hornbeck, as well as the
9 affidavit of Professor Smith.

10 We have the original affidavits here, Judge,
11 that we would like to file into the court record. I will point
12 out to you, Your Honor, the declaration of Mr. Brett is a faxed
13 copy. I have not received the original. Mr. Brett signed this
14 affidavit last week, I believe, when he was in Kuala Lumpur,
15 and I have not yet received the original.

16 **THE COURT:** What's the government's position?

17 **MR. MONTERO:** Your Honor, as to the motion to include
18 the inspection report in the record, we do not oppose that.
19 The inspection report was clearly considered. It is
20 appropriately part of the administrative record.

21 As to the various declarations, to the extent
22 they go to the equities, obviously that is not limited to the
23 administrative record. To the extent they go to the likelihood
24 of success on the merits, obviously the scope of the record is
25 limited to what was considered directly or indirectly by the

1 agency up to the point of the decision. If they are
2 post-decisional, then they would not be appropriately included
3 in the record.

4 **MR. ROSENBLUM:** Judge, one clarification. The one
5 declaration that we have a copy of and the remaining
6 affidavits --

7 **THE COURT:** Declaration by?

8 **MR. ROSENBLUM:** By Mr. Brett.

9 **THE COURT:** Brett. Okay.

10 **MR. ROSENBLUM:** All right. And then the other
11 affidavits of the experts, of the representatives of the
12 plaintiffs, and of Professor Smith from the Tulane Energy
13 Institute, those affidavits we are trying to put into the court
14 record, not the administrative record.

15 **THE COURT:** Not the administrative record. All
16 right. That wasn't clear to me. Is that now clear to the
17 government?

18 **MR. MONTERO:** It is clear, Your Honor. Yes.

19 **THE COURT:** Okay. With the understanding that the
20 inspection report, with no objection from either side, will be
21 deemed to be a part of the administrative record as
22 supplemented. The affidavits are being submitted to the Court
23 for whatever effect they have for the court record, not for the
24 administrative record.

25 **MR. ROSENBLUM:** That's exactly right.

1 **THE COURT:** The motions are granted.

2 **MR. ROSENBLUM:** Thank you, Your Honor. Just for the
3 record, Judge, those are record documents 26 and 27.

4 Judge, before you today, I have 38 plaintiffs.

5 **THE COURT:** You understand, of course, since you have
6 emphasized so much the Administrative Procedure Act, that I may
7 or may not even consider the declarations or the affidavits?

8 **MR. ROSENBLUM:** Absolutely, Your Honor.

9 The plaintiffs are representatives of the
10 thousands of companies which serve the Gulf of Mexico deepwater
11 drilling industry. There's 38 of them. Each of these
12 plaintiffs, Judge, plays a key role in the --

13 **THE COURT:** One second.

14 Go ahead. I'm sorry.

15 **MR. ROSENBLUM:** Each one of these 38 plaintiffs,
16 Judge, plays a key role in the Gulf of Mexico deepwater
17 drilling enterprise. Each of them on themselves interact with
18 a whole host of other businesses. Indeed, it's an intricate
19 network that's necessary for the support of the deepwater
20 drilling industry.

21 Hornbeck is an offshore service vessel provider,
22 and it owns and operates a fleet of technologically
23 sophisticated state-of-the-art vessels. These vessels on
24 Hornbeck's business plan were particularly designed to satisfy
25 the Gulf of Mexico Jones Act requirements.

1 The Bollinger entities are composed of shipyard
2 companies which own and operate 10 shipyards in the Louisiana
3 Gulf region for the construction and repair of those deepwater
4 vessels.

5 The Bee Mar deepwater vessel companies, in turn,
6 own these various vessels.

7 As for the Chouest entities, they comprise three
8 groups, Your Honor: The Chouest shoreside companies that
9 provide various support services to the deepwater industry; the
10 Chouest vessel companies that provide vessels to support that
11 industry; and, finally, the Chouest shipyard companies which
12 construct these vessels.

13 Now, Judge, you're very familiar with the four
14 requirements for a preliminary injunction.

15 **THE COURT:** Yes. You don't need to repeat them.

16 **MR. ROSENBLUM:** All right. The only thing --

17 **THE COURT:** That's why I rarely have oral argument.
18 I don't really need to find out every Wednesday what a seaman
19 is either.

20 **MR. ROSENBLUM:** The only thing I want to stress,
21 Your Honor --

22 **THE COURT:** Some lawyers here think they can educate
23 me.

24 **MR. ROSENBLUM:** Judge, the only thing I want to
25 stress is that the first two elements talk about a substantial

1 likelihood or a substantial threat --

2 **THE COURT:** I hate to interrupt, but you have given
3 me the declarations and affidavits. Do I have the inspection
4 report?

5 **MR. ROSENBLUM:** It is attached to --

6 **THE COURT:** Which one?

7 **MR. ROSENBLUM:** Hans Juvkam-Wold, if I'm pronouncing
8 that halfway correct, Judge.

9 **THE COURT:** You're talking about an inspection report
10 on the other 30-some-odd rigs?

11 **MR. ROSENBLUM:** The post-incident inspection.

12 **THE COURT:** Right. Which, as I understand it, some
13 27 of them passed.

14 **MR. ROSENBLUM:** Absolutely, Judge.

15 **THE COURT:** A couple, two or three, had some
16 infractions, but they have not been characterized as major or
17 serious infractions.

18 **MR. ROSENBLUM:** That's exactly right. In fact, the
19 government itself called the other two minor problems that were
20 promptly corrected. In fact, one of the issues, Judge, was on
21 a rig that is now drilling one of the relief wells, and the
22 alternation of checking the blowout preventer from a manual or
23 an automatic location was not being done.

24 So we have situations post-incident -- and we
25 have a terrible incident, Judge, we all recognize that -- but

1 that is what the government did right after the incident. They
2 sent the MMS out there, as they should have, to go out and make
3 sure that the current drilling rigs were not having problems.
4 They found two of them with minor problems that were corrected.

5 **THE COURT:** Now, I think it's fair to say that the
6 Sierra Club and their associates, four or five other
7 organizations, would probably respond, "Well, the MMS have been
8 too cozy with the oil industry and, therefore, those
9 inspections maybe have no probity."

10 How would you respond to that?

11 **MR. ROSENBLUM:** Very simply, Judge. The law that is
12 on the books allows the Secretary or the Minerals Management
13 Service, on an individual lease or unit basis, to go ahead and
14 suspend operations if there is any concern, as Your Honor
15 pointed out, about safety. That's why the MMS went out there
16 and did these inspections.

17 What the law does not allow is what the
18 government did, which is this blanket six-month moratorium,
19 without any rational basis under the *Bowen* case or the *VoIpe*
20 case -- and Mr. Cooney is going to get there, if we can, but
21 without any rational basis in terms --

22 **THE COURT:** We'll get there.

23 **MR. ROSENBLUM:** All right, Judge. Without any
24 rational basis of what was done in this safety report. You
25 know, the safety report, Judge -- not the executive summary

1 that was attached onto it afterwards, but the safety report
2 itself that the government's own experts looked at doesn't talk
3 about a blanket six-month moratorium. It does talk about
4 certain short-term and longer-term safety measures. Those are
5 fine.

6 **THE COURT:** It doesn't talk about 500 feet either,
7 does it?

8 **MR. ROSENBLUM:** That's exactly right, Judge. That's
9 a good point, Judge. Number one, the memorandum from the --

10 **THE COURT:** A lawyer who has finally admitted that I
11 have made a good point without citing my friend Justice Scalia.

12 **MR. ROSENBLUM:** We are going to get to Justice
13 Scalia, Your Honor.

14 **THE COURT:** I knew somebody would.

15 **MR. ROSENBLUM:** The Secretary of the Department of
16 the Interior's memorandum to the MMS doesn't have a depth issue
17 in it. The safety report has a conclusion in it that safety
18 concerns are different beyond 1,000 feet. Then we see the MMS
19 Notice to Lessees (NTL) that talks about 500 feet.

20 With all due respect, Judge -- and I was trying
21 not to say that today. With the utmost respect, the difference
22 in depth is not really what we want you to focus on. What we
23 want you to focus on is what the government did under the law
24 is not supported. That's why, under the arbitrary and
25 capricious standards of the Administrative Procedure Act, it

1 simply can't stand.

2 At this point, Judge, with the Court's
3 indulgence, I would like to turn it over to Mr. Cooney to
4 address the first prong, which is the substantial likelihood of
5 success on the merits. Thank you, Your Honor.

6 **THE COURT:** Are you from D.C. too, sir? Where are
7 you from?

8 **MR. COONEY:** I'm with the Venable law firm in
9 Washington, D.C.

10 **THE COURT:** You live in Washington?

11 **MR. COONEY:** I do, Your Honor. I'm here to address
12 the probability of success on the merits element, and we submit
13 the plaintiffs have a high probability of success under the
14 applicable standards of the Administrative Procedure Act which
15 govern in this case.

16 There are three aspects of the APA that I think
17 are particularly pertinent. The first is that the agency must
18 articulate a rational connection between the facts found and
19 the decision that it made.

20 Second, the decision must be defended based
21 solely on the rationale that the Secretary of the Interior
22 articulated when he made that decision, and it cannot be
23 rescued or defended on the ground of post hoc argument by the
24 department or by counsel. The governing case in this circuit
25 is *U.S. v. Garner* on that point, cited in our briefs.

1 Third, an action is arbitrary and capricious if
2 the agency fails to take into account a factor that Congress
3 mandated that it must consider. In this case, the agency
4 failed to consider a number of mandatory criteria, including
5 consultation with the State of Louisiana. The one that I will
6 emphasize the most because it emphasizes our particular harm is
7 that the government failed to consider the human environment
8 that would be affected by its decision.

9 Now, it is not enough for the agency head to
10 simply parrot the language of the statute and say he considered
11 everything. The requirement of the APA is that the agency must
12 demonstrate that it did that, and there is no basis in this
13 record for finding the agency did that. The key case in this
14 area, as in most aspects of the APA, is the *Motor Vehicle*
15 *Manufacturers Association v. State Farm* case from 1983.

16 Now, on the merits, we ask the Court to consider
17 whether a blanket moratorium on all deepwater drilling imposed
18 without regard to the facts concerning the safety circumstances
19 at each individual well is lawful under the governing statute,
20 OCSLA.

21 **THE COURT:** The government claims that individualized
22 decisions aren't mandated by the law.

23 **MR. COONEY:** It depends upon the circumstances,
24 Your Honor. We can envision circumstances in which a blanket
25 rule might be appropriate: If the government were to discover

1 that all the drilling sites are based on a fault that was not
2 noticed before; if the government had concluded that all of the
3 blowout protectors that are on the market today have an
4 engineering defect in them.

5 **THE COURT:** So it would have to be what I guess is
6 called systemic?

7 **MR. COONEY:** A systemic or global problem, that's
8 correct, Your Honor. Our position is: Absent a systemic
9 finding -- and the government made no such finding -- there is
10 no rationale for a systemic moratorium here. Case-by-case
11 consideration is necessary.

12 Now, there are three grounds in which we submit
13 that the Court should find that the Secretary acted in a manner
14 that was arbitrary, capricious, or contrary to law. The first
15 is that there was no rational connection between the facts
16 found by the Secretary, as shown in the administrative record,
17 and the justifications that the Secretary offered for his
18 decision. In fact, the key document in the case, the Interior
19 department's safety measures report, contains absolutely no
20 facts that support a drilling moratorium. It has no facts, no
21 risk analysis, no analysis of the facts. It is simply quiet on
22 that point.

23 As Mr. Rosenblum pointed out, the text of the
24 document does not mention the moratorium. The moratorium
25 apparently was inserted into the summary, the executive

1 recommendation section, very late in the game, but the report
2 was not modified and contains no facts to support the
3 Secretary's decision.

4 Continuing that point, the government also has
5 attempted to defend the moratorium on the basis that the
6 Secretary did not articulate. In particular, it says that our
7 response capability is stretched so thin now by responding to
8 the Deepwater Horizon incident that we cannot afford a second
9 major incident in the Gulf.

10 The short answer to that question is that was
11 not set forth in any of the departments that the Secretary made
12 his decision or in the safety measures report and, therefore,
13 it certainly is not a basis under *State Farm* under which the
14 government can defend its decision.

15 The second point that we want to make is that
16 the government erred by prohibiting deepwater drilling on an
17 industry-wide basis without proceeding on a case-by-case basis,
18 as we believe is required, and is required by its own
19 regulations, which say that it should consider an individual
20 lease or unit basis for imposing any kind of restriction.

21 Third, the Secretary simply failed to observe
22 some of the mandatory criteria required by Congress, including
23 the effect on the human environment in the Gulf.

24 Now, those are the three grounds --

25 **THE COURT:** *Human environment* is defined by you how?

1 **MR. COONEY:** *Human environment* is defined by
2 § 1331(i). If I may quote, it says:

3 "The *human environment* means the physical,
4 social, and economic components, conditions, and factors which
5 interactively determine the state, condition, and quality of
6 living conditions, employment, and health of those affected,
7 directly or indirectly, by activities occurring on the
8 Outer Continental Shelf."

9 So it provides essentially open-ended directions
10 to the Secretary to consider the economic effects of his
11 activity, including on the people who will be most directly
12 affected, those who will work in industries that work on the
13 Outer Continental Shelf.

14 **THE COURT:** I don't want to mischaracterize anything.
15 This is in the form of a question and not a comment. I guess
16 they would respond that the Deepwater Horizon explosion was of
17 such magnitude and tragedy that the order of the Secretary of
18 the Interior obviously took into account the criteria that you
19 have just been talking about and seeks to protect that.

20 **MR. COONEY:** The answer to that question comes back
21 to the comment I made before, Your Honor, that it's not
22 sufficient for the agency to simply parrot the language of the
23 statute and say, "We complied with it and, of course, we took
24 this into account."

25 Under the statute, they were required to

1 consider the human environment. The statute under which they
2 are proceeding says that the Secretary may impose an emergency
3 suspension if there is a threat of harm to the -- or actually
4 it says serious, irreparable, or imminent harm to the coastal,
5 marine, or human environment. So in making the emergency
6 suspension decision, the Secretary is required to consider the
7 human environment and all aspects of the human environment, and
8 the decision documents are absolutely silent on that question.
9 The Secretary simply did not take that into account.

10 On a proper record, conceivably the Secretary
11 could have made such a finding. The problem is the Secretary
12 did not consider a factor required by Congress, and it
13 certainly is not displayed in the papers that form the final
14 agency actions here that the agency did make that
15 determination.

16 Let me take you through what we think are the
17 key documents in the administrative record. There are
18 basically three documents on which the decision is based. The
19 first is the moratorium itself, which imposes a six-month ban
20 on all deepwater drilling.

21 The moratorium document does not contain any
22 separate findings of fact but relies on the findings in the
23 safety measures report. In particular, the moratorium contains
24 no findings or assertion of a systemic risk. That moratorium
25 document also does not mention the post-incident investigation

1 that discussed that 29 of the rigs were investigated and there
2 were only the most minor problems found. The moratorium
3 document does not discuss the human environment.

4 Instead, the Secretary articulated two
5 rationales only for his decision. First, he invoked the
6 explicit statutory basis for an emergency suspension, imminent
7 threat to -- and actually that's the interesting thing. He did
8 not rely on the imminent criteria. He said that there is a
9 serious and irreparable harm, but he does not assert an
10 imminent harm in the decision-making document.

11 **THE COURT:** Well, it's all anchored to the
12 Deepwater Horizon tragedy.

13 **MR. COONEY:** That is correct, Your Honor. This is
14 all in response to the Deepwater Horizon, but he does not say
15 that there is an imminent threat now.

16 Second, the Secretary invoked a separate
17 provision in the Secretary's own rules which say that
18 installation of additional safety equipment may be required if
19 necessary to prevent injury or loss of life, damage to
20 property, damage to the environment.

21 We suggest that that provision is pure
22 bootstrapping in this case and it has no independent action,
23 although that is basically the heart of the government's
24 defense here, which is to say it relied on two criteria and "If
25 you don't accept the emergency suspension, then we have a

1 backup plan." I'll explain why we don't think that works.

2 The Notice to Lessees is essentially the same as
3 the moratorium document. It refers to the safety measures
4 report and does not make its own separate findings.

5 Let me turn to the key document in the case.

6 **THE COURT:** The report.

7 **MR. COONEY:** The safety measures report. The
8 executive summary contains two recommendations: First, it
9 steps immediately into improve the safety of offshore drilling;
10 and, second, a six-month moratorium on new permits and all
11 deepwater drilling until the safety measures that are
12 recommended in the report can be implemented.

13 In discussing the rationale for this, the
14 Secretary essentially says that we need to wait for
15 implementation of the measures proposed in this report and,
16 also, we need to wait for findings that may come back one of
17 these days from all of the investigations that are going on.
18 Those are the only two rationales offered. That's an important
19 point because the government has strayed well beyond that to
20 cite the risk of hurricanes and to cite the strain on our
21 response capacity to try to salvage its conclusion.

22 The report also says that all of its
23 recommendations were peer-reviewed and approved, and that
24 assertion turns out not to be correct. Why that is inaccurate
25 is important to understand why the report does not support the

1 moratorium.

2 The executive summary itself then closes by
3 saying that the review was intended to recommend immediate
4 measures to improve the safety of offshore drilling, and it
5 states that these were going to be interim recommendations.
6 The suggestion of "interim" is that, once they are satisfied,
7 drilling may resume. There's no discussion of a moratorium.
8 In fact, the report drives in a totally different direction:
9 For interim immediate changes and then a resumption of
10 drilling.

11 Nothing in the text of the safety measures
12 report itself -- now I'm switching from the executive summary
13 to the text. Nothing in the text discusses the imposition of a
14 drilling moratorium, and nothing in the text supports the
15 imposition of a drilling moratorium. As I mentioned, it speaks
16 in many places in the report about a temporary pause in
17 drilling to permit some immediate safety measures to be
18 reinstated. Presumably, after an individual entity comes
19 into compliance with the new provisions, then that entity may
20 resume drilling.

21 Page 18, the report talks about certain measures
22 are recommended here that are intended for "immediate
23 implementation within the next 30 days."

24 Page 29, the report states the department's
25 approach to implementing the recommendations will have some

1 near-term solutions, some longer-term solutions. Quote on page
2 29:

3 "The majority of the specific recommendations
4 contained in the report fall within the category of near-term
5 prescriptive actions to increase offshore energy production
6 safety immediately."

7 Nothing in this report speaks about a long-term
8 moratorium or has facts that would support it. It addresses
9 this totally different approach, taking measures that could be
10 implemented immediately, mostly within 30 days on an interim
11 basis, and then drilling may resume.

12 Now, this point is confirmed by the affidavits
13 that have been submitted by the experts, some of the experts
14 who peer-reviewed this document. The affidavits concern
15 statements that have been made publicly, but they did not
16 review the moratorium recommendation. In fact, the moratorium
17 was not in the document when they reviewed it, and the scope of
18 the recommendations changed after they saw it. When they saw
19 the document, as their affidavits say, it addressed the
20 temporary pause in drilling and --

21 **THE COURT:** It referred to a limited moratorium.

22 **MR. COONEY:** A limited time period suspension, after
23 which drilling would resume, but presumably when the individual
24 rig involved came into compliance and not on a blanket-like
25 basis, where nobody can proceed with any drilling regardless of

1 the degree of actual compliance with the requirements that they
2 may have.

3 So this point about the intended nature and the
4 affidavit supporting the recommendation for a moratorium was
5 inserted later gets me to something I foreshadowed a bit
6 earlier, which is to say we think that the government's
7 reliance in the second alternative, its own regulations, is
8 pure bootstrapping in this case.

9 The government does have the authority to impose
10 safety equipment rules and require that entities that are
11 drilling apply them before they can drill, but the safety
12 equipment rules as described in the report do not themselves
13 reach the level of a serious, irreparable, and imminent harm
14 for a worker or environmental safety. The report itself
15 discusses that these are important on page 18 but makes no
16 finding that they would rise to the level of serious,
17 irreparable, or imminent.

18 So that's the first point. The report doesn't
19 claim that they fall within the emergency suspension
20 requirement. It relies on a different trek. The safety
21 equipment --

22 **THE COURT:** Is there anything in the administrative
23 record that speaks to the reason for six months, not twelve
24 months or not two months? Is there anything in the report that
25 attempts to measure the reasonableness of the six-month period?

1 **MR. COONEY:** There is nothing, Your Honor. It is
2 simply stated six months. To the extent that there is any
3 articulated rationale, it's that "Well, this would allow time
4 to permit the reports that are underway to come back in."

5 Now, the safety measures report articulated that
6 consideration itself and said: We have a series of interim
7 steps to improve drilling we want to suggest, and perhaps when
8 all these reports come back in they may suggest "refinements"
9 to the measures that the government wants to suggest.

10 The clear thrust of the safety measures report
11 is: The government has studied this carefully over a number of
12 years. Here are the interim improvements to safety that we
13 think should be implemented. Coming back in the reports may be
14 refinements, but it does not put significant weight on that
15 fact.

16 Now, this comes to the point, Your Honor, that
17 the problem with the equipment rationale that the government
18 has relied on is that the equipment rationale can't justify a
19 moratorium. An equipment rationale could justify an individual
20 rig being required to come into compliance with those
21 provisions; but once that rig is in compliance, the equipment
22 regulation doesn't govern anymore.

23 We have no problem with the safety measures that
24 the government has proposed. Our problem is exclusively with
25 the moratorium aspect that was overlaid on the equipment

1 rationale. The problem is the moratorium is completely without
2 regard to the degree of compliance on an individualized rig
3 basis. The industry leader is treated the same way as the
4 industry laggard. They are both prohibited from doing any
5 drilling for an extended period of time, with no inquiry to see
6 if any of those entities have satisfied it and to tell them
7 when to go ahead. So, for that reason, the moratorium aspect
8 of this order can only be justified based on the emergency
9 suspension position, and the government simply cannot find
10 anything in the safety measures report to support the
11 moratorium.

12 What is not permitted under the statute, under
13 the emergency suspension provision, is what has happened here,
14 where the government has shut down the entire drilling industry
15 and said: Some day in the future we may have other
16 recommendations to make, but for the interim period of six
17 months everybody is shut down, without regard to whether you
18 satisfied the existing rules or not or whether you would be
19 able to satisfy some rule we might put in effect some day.

20 So that basically is our attack on the no
21 connection between the facts found in the report and the
22 agency's decision. I would like to add just a couple of other
23 points quickly.

24 As I mentioned in passing, the government has
25 tried to introduce new rationales based on the need to get

1 through the hurricane season and the limited capacity to
2 respond to a second spill. The answer in APA terms is that
3 those are not properly before the Court. In addition, remember
4 there's no finding of a systemic risk. There's no finding that
5 anybody is out --

6 **THE COURT:** We are only going to have 28 hurricanes
7 this season.

8 **MR. COONEY:** That's true. As Your Honor knows,
9 drilling operations are already modified for hurricane season.

10 **THE COURT:** I understand.

11 **MR. COONEY:** In any event, this is not part of the
12 report.

13 **THE COURT:** For the benefit of my friend who is here
14 from Channel 8.

15 **MR. COONEY:** Finally, Your Honor, I would just like
16 to close with a point I have mentioned a couple times and you
17 asked about earlier. The government simply did not take the
18 *human environment* term into account. Under the *Motor Vehicle*
19 case, that's a plain violation of its APA requirements. So for
20 these reasons, plaintiffs submit that the motion papers show
21 that we have a strong likelihood of success on the merits.

22 **THE COURT:** Thank you very much. Thanks for being
23 here.

24 If you want 10 minutes, Mr. Rosenblum, you have
25 about five minutes for irreparable harm.

1 **MR. ROSENBLUM:** Okay, Judge. Thank you.

2 **THE COURT:** If you want to take some more time, fine,
3 but your hour is almost up. You can have five minutes for
4 rebuttal if you want, instead of 10, but that's up to you.

5 **MR. ROSENBLUM:** Judge, I would be remiss if I did not
6 direct the Court to the attention of the *Bennett* case, which is
7 an opinion by Judge Scalia.

8 **THE COURT:** I was waiting for someone to --

9 **MR. ROSENBLUM:** Once you said my time is running,
10 Judge, I wanted to make sure I made that reference. That case,
11 we would suggest, is very important.

12 Let me go, Your Honor, to the irreparable injury
13 issue. Number one, as I said earlier, Judge, today, on a
14 preliminary injunction, we only have the burden of showing a
15 substantial threat of irreparable injury. We do not have to
16 prove irreparable threat.

17 Now, we would suggest, Judge, that the
18 affidavits in front of you -- the affidavit from Professor
19 Smith, the affidavits on behalf of my three groups of
20 clients -- they all show you that there has already been
21 irreparable harm. It's way beyond the threat, Judge. It is
22 way beyond the threat.

23 I would only point out, Judge, the loss of the
24 invaluable experience and skill of the mariners that work in
25 the Gulf of Mexico. That is not subject to quantification.

1 There is no way that the government can put a dollar amount on
2 a mariner that has worked on the Hornbeck vessels, the Chouest
3 vessels --

4 **THE COURT:** Plaintiffs have something like, what,
5 10,000 or 11,000 employees out there?

6 **MR. ROSENBLUM:** Thousands of them, that's correct,
7 Your Honor.

8 **THE COURT:** That's right.

9 **MR. ROSENBLUM:** Thousands of employees. In fact, the
10 statistics are set forth in those affidavits. Then you have
11 Professor Smith, who goes through a whole host of other
12 statistics and the ripple effect. That's why these dominos,
13 Judge, are very important.

14 I said it earlier, Judge. We are not here on a
15 breach of contract issue. It's in the context of a complete
16 shutdown of the offshore deepwater drilling industry. That's
17 the irreparable harm.

18 Judge, I guess I need to get there with my clock
19 running. The *CSX* case out of the District of Columbia, the
20 D.C. Circuit, faced a somewhat analogous situation, and that
21 was whether to enforce a post-9/11 act that sought to prevent a
22 terrorist attack on the nation's Capitol building caused by a
23 railroad car containing hazardous materials. The court
24 ultimately determined that the issuance of a preliminary
25 injunction was proper and that the rail carrier, *CSX*,

1 demonstrated irreparable harm based on that impact on a complex
2 interdependent rail industry.

3 What we suggest here what this blanket
4 moratorium does, its impact on the interrelated, interdependent
5 Gulf of Mexico deepwater drilling industry is even more
6 pronounced than the Court had in the *CSX* case. The judge in
7 that case, Your Honor -- well, actually the three-judge panel
8 in that case was confronted with the question of an
9 industry-wide impact being suffered by simply the CSX Railroad
10 and concluded that irreparable harm was there because it was
11 not subject to being calculated.

12 This case before you, with all due respect,
13 Judge, or with the utmost respect, Your Honor, is more
14 egregious than just one. Indeed, thousands of businesses will
15 be affected. You merely need to look at the amicus brief of
16 the State of Louisiana. It sets it out page after page. I
17 read it last night when it was filed, Judge.

18 So we respectfully suggest and urge you that the
19 immediate damage to these businesses -- these dominos are
20 falling as we speak, Judge. We urge you to find that that is a
21 substantial threat. In fact, we suggest it's more than a
22 threat. It's actually irreparable injury that we have here.

23 Now, Judge, I would like to go to the other two
24 factors of the four-part preliminary injunction test. The
25 balance of whether you do or don't enter a preliminary

1 injunction and which way it goes, we suggest that the
2 defendants have failed to show -- as Mr. Cooney talked about,
3 that there was no systemic problem. That's why that
4 post-incident inspection report is so important, Judge, and
5 they run away from it. That was the MMS people themselves.

6 Secondly, Judge, it is very important for you to
7 understand --

8 **THE COURT:** There haven't been a lot of nice things
9 said about MMS in this case.

10 **MR. ROSENBLUM:** I understand that, Your Honor. What
11 we suggest is that there are already rules on the books. They
12 need to be enforced. In fact, that's why we are here. I told
13 you we are here simply asking you to enforce the existing
14 rules.

15 It's very important also, Judge, for you to
16 recognize we are not taking any authority away from the
17 government. As Mr. Cooney suggested, if they find a particular
18 problem -- that's why that post-incident inspection report was
19 done properly. If they found a problem -- they found some
20 minor problems on two -- they can suspend it. The support just
21 does not exist, not only in the administrative record but under
22 the law, to do what they have done. We suggest that's why it's
23 illegal, Judge.

24 **THE COURT:** I'm just reminding you of the time you
25 have left. You have about eight minutes.

1 **MR. ROSENBLUM:** The final point, Judge, we would ask
2 you to recognize, the final element on the public interest,
3 just go to the state's amicus brief.

4 Finally, Your Honor, the affidavits that the
5 government submitted themselves, we would ask you to look at
6 Mr. Black's affidavit at paragraph 9, which talks about best
7 practices. There's a recognition that one size fits all is not
8 proper here. Paragraphs 10 through 15 of Mr. Black's affidavit
9 talk about what documents he believes are relevant to this
10 case. Not one of those documents talk about a blanket
11 six-month moratorium.

12 Mr. Hayes' affidavit, the deputy secretary of
13 the DOI, at paragraph 9, he oversaw the preparation of the
14 report. All right. He pointed out that there have been
15 historically very, very few problems. The Deepwater Horizon
16 problem is a real issue, Judge. There is no question. But if
17 you look historically, even the government's own witnesses
18 recognize that not all of the 33 rigs are similarly situated.

19 Finally, Mr. LaBelle, the deputy associate
20 director, at paragraph 3 talks about this second spill and the
21 concerns of stressing the resources. Mr. Cooney has addressed
22 that. It's not in the administrative record. They can't go
23 beyond it.

24 I will save the balance of my time, Judge.

25 **THE COURT:** Thank you.

1 **MR. MONTERO:** Good morning, Your Honor.

2 **THE COURT:** Good morning.

3 **MR. MONTERO:** Just for the record, again, I am
4 Guillermo Montero with the Department of Justice. Mr. Collins,
5 my colleague, will be addressing the balancing of the equities
6 and the injury. I will be addressing the United States'
7 jurisdictional argument first, and then I'll turn to the
8 merits.

9 Just first as a matter of context, the BP oil
10 spill is possibly the worst environmental disaster this country
11 has ever known. It's evident now that the safeguards and
12 regulations that were in place on April 20 did not create a
13 sufficient margin of safety.

14 **THE COURT:** Well, if they weren't sufficient, why did
15 you-all conduct a post-incident inspection?

16 **MR. MONTERO:** There was a post-incident inspection.
17 It was one of the various measures that the department took
18 immediately. It's one of the many responses that are taking
19 place. Many of those are regulatory upgrades, equipment
20 upgrades, and the like. The Department of the Interior --

21 **THE COURT:** Did that answer my question?

22 **MR. MONTERO:** Why was there inspection?

23 **THE COURT:** If you didn't trust the process of
24 inspection, as you just inferred, why would you have a
25 post-incident inspection at all?

1 **MR. MONTERO:** What I'm saying, Your Honor, is
2 certainly if --

3 **THE COURT:** Wouldn't it be to find out if anything
4 else was a threat out there?

5 **MR. MONTERO:** Understood, Your Honor. Certainly, if
6 there is a violation of then existing regulations or permit
7 terms, those things are in place for the purpose of providing
8 for safety. If there's a breach of those --

9 **THE COURT:** There were none.

10 **MR. MONTERO:** Pardon me? Yes, exactly. If there's a
11 breach of those, then that would show that there is a higher
12 risk of safety. In this case, there were none, at least as to
13 27, and the other two were minor.

14 **THE COURT:** Right.

15 **MR. MONTERO:** So that's fine. That means under the
16 existing regulations, which provided for a margin of safety,
17 everything is good.

18 **THE COURT:** There have been, as I understand it -- I
19 mean, you-all are splitting up your time, so I don't want to
20 ask a question that is unfair to you if you haven't prepared
21 for this part. Let me ask you. If it's your colleague who is
22 going to respond, that's fine too.

23 As I understand it from the report, there have
24 been some three or four blowouts since 1969, all in other parts
25 of the world. Except for this tragic incident, the Deepwater

1 Horizon, they have not been in the Gulf. The report states
2 that the rates of blowouts per well -- even though drilling
3 activity has increased, the rates of blowouts have not
4 increased. What is the government's response to that sort of
5 observation in its own report, and how is that connected with
6 the choice that the Secretary of the Interior made to impose a
7 general moratorium?

8 **MR. MONTERO:** Your Honor, a few points. *Moratorium*
9 is sort of a term for public consumption. It's an amalgamation
10 of suspensions of these leases.

11 **THE COURT:** Well, I know. We can dance on the head
12 of a pin all day long, but it won't do you any good.

13 **MR. MONTERO:** No, no. That's fine. That's fine. I
14 was just getting my terminology straight. When I say
15 *suspension*, that's what it means.

16 **THE COURT:** Well, let's use my terminology because
17 that's the terminology that's in your own papers.

18 **MR. MONTERO:** Okay. It's not in our briefing papers,
19 but that's --

20 **THE COURT:** I know it's not in your briefing papers.
21 It's in the administrative record.

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

23 **THE COURT:** Did you understand my question?

24 **MR. MONTERO:** I did, and there were a few parts.
25 Your Honor observed that the amount of blowouts and amount of

1 petroleum spilled per barrel produced has dropped over the
2 course of the years and that there haven't been blowouts in the
3 Gulf.

4 **THE COURT:** Except for this terrible thing.

5 **MR. MONTERO:** Except for this, right. There are two
6 things there. One is just, you know, as a strictly factual
7 thing, the safety has improved. The record has improved over
8 the course of the years. Actually, the last decade was not a
9 good one. In terms of thousands of barrels produced per barrel
10 spilled in the 1990s, that was up to 1,592 barrels produced per
11 barrel spilled. That dropped quite a bit in 2010 to
12 296 barrels produced per barrel spilled.

13 **THE COURT:** Maybe I wasn't clear. As I understand
14 it, to put it in simple, primitive terms, the Court has to
15 decide whether or not there is a rational basis for the choice
16 that the government has made with the facts that the government
17 was confronted with. I believe that's essentially what my
18 scope of review is and so that's why I asked the question.

19 The report itself observes as a matter of fact
20 that there have been either three or four blowouts in the world
21 since 1969: None of them in the Gulf before this one; one near
22 Australia and other parts of the world. There have been three
23 or four blowouts before this tragic incident since '69. The
24 rate of blowouts -- which, of course, has brought us to this
25 sad story -- has not increased since 1969. There was a

1 post-incident inspection which essentially cleared all of the
2 rigs under the government's own regulations that are in place.
3 They found some infractions on a couple of the rigs.

4 So my question to you simply is: Given the
5 comments in the government's report -- which, of course, is
6 central to this whole controversy -- what comments do you make
7 about the choice that the Secretary made when confronted with
8 some of these facts which are in your report? Maybe I haven't
9 asked it well, but try to answer it well.

10 **MR. MONTERO:** Understood, Your Honor. Thank you. In
11 terms of the number of blowouts, there are very few and --

12 **THE COURT:** And none in the Gulf until --

13 **MR. MONTERO:** And none in the Gulf --

14 **THE COURT:** -- this awful thing.

15 **MR. MONTERO:** That's correct. The Department of the
16 Interior is not comfortable extrapolating from that data set,
17 number of occurrences, because that same data set predicted
18 that the Deepwater Horizon blowout would not have occurred.
19 The Deepwater Horizon blowout was a game-changer. It really
20 illustrates the risks that are inherent in drilling. That's
21 what the department had to react to very quickly in its 30-day
22 review.

23 By the way, I'm going to skip the jurisdictional
24 arguments for now. I think the merits, everybody wants to hear
25 about them, and I'll come back to the jurisdictional argument.

1 **THE COURT:** Thank you.

2 **MR. MONTERO:** The inspection report, the plaintiffs
3 are saying that the department is not entitled to any deference
4 because it ignored, apparently, the result of its inspection
5 report. We absolutely concur that there are 27 rigs that had
6 absolutely no infractions. The other two of the 29 inspected
7 had very minor fractions.

8 It's worth noting here that the company that
9 owned the Deepwater Horizon had a stellar, stellar inspection
10 record, way above industry average.

11 **THE COURT:** That's TransOcean?

12 **MR. MONTERO:** Yes, correct, and that's the problem,
13 Your Honor. The department found that existing regulations and
14 permit terms do not provide a sufficient margin of safety --
15 and that's what the safety report was all about -- so they have
16 to be updated.

17 The department also found that new inspection
18 protocols are necessary, and that's actually explained in the
19 safety report at page 22. So these MMS inspectors went out --
20 and I'm sure they did a very thorough and a good job. I'm sure
21 that their finding that there were no violations of then
22 existing regulation and permit terms is accurate. But now the
23 department has found out that the inspection protocols that
24 they were operating under have to be updated to increase the
25 margin of safety, and the permit terms and regulations that

1 they were found to be in compliance with also have to be
2 upgraded to increase the margin of safety.

3 I think what I will do is I'll just go back
4 to -- I'll address the merits. The standard for issuing a
5 suspension here is in 30 C.F.R. 250.172.

6 Now, in order to issue a suspension, as the
7 Court just recently heard, the department needs to find that
8 activities pose a threat of serious or irreparable harm to
9 life, property, or the environment. I just want to make this
10 clear. It says serious or irreparable or imminent. It's
11 stated in the disjunctive. You don't have to find all three.
12 Alternatively, the Secretary could issue a suspension if it
13 finds that time is needed to install new safety or
14 environmental protection equipment.

15 Now, we already know what a blowout and oil
16 spill can do. We have seen it. We are witnessing it every
17 day. The department has witnessed not just a threat of harm
18 but actual harm under the first element in 250.172.

19 So plaintiffs aren't arguing that the threat of
20 a second oil spill somehow doesn't rise to this standard.
21 Instead, what they are saying is the department's decision to
22 suspend deepwater drilling operations temporarily is arbitrary
23 and capricious because it was reached without any analysis,
24 fact-finding, or explanation.

25 That's incorrect. The department has submitted

1 declarations, and those declarations describe various documents
2 that were considered in the course of the department's
3 decision-making process. Some of those documents are actually
4 attached.

5 What this does is it explains that the
6 administrative record -- plaintiffs are fond of saying "the
7 three main documents in the record." Whether they are the main
8 documents or not, the administrative record itself is quite
9 broad and encompasses a lot of investigation.

10 **THE COURT:** Well, the process that the government
11 would justify, I assume you would agree, must have probity. Do
12 you agree with that?

13 **MR. MONTERO:** That there must be documents in the
14 record supporting that --

15 **THE COURT:** No, it must have probity. It must be
16 trustworthy.

17 **MR. MONTERO:** Yes.

18 **THE COURT:** It must be faithful to the charge that
19 public officials are tasked with by law. You would agree with
20 that?

21 **MR. MONTERO:** 100 percent, Your Honor.

22 **THE COURT:** Right. That prompts my next question.
23 Exhibit F: "The primary recommendation in the May 27, 2010
24 report, increased safety measures for energy development on the
25 Outer Continental Shelf, given by Secretary Salazar to the

1 President, misrepresents our position." This statement, which
2 I find -- to put it diplomatically -- interesting, makes
3 several of the following comments:

4 "The report states, 'The recommendations
5 contained in this report have been peer-reviewed by seven
6 experts,'" etc. "We broadly agree with the detailed
7 recommendations in the report and compliment the Department of
8 the Interior for its efforts. However, we do not agree with
9 the six-month blanket moratorium on floating drilling. The
10 moratorium was added after the final review and was never
11 agreed to by the contributors."

12 How do you tell the public and the plaintiffs
13 and the intervenors on either side, in view of the comments of
14 these scientists and engineers and experts in the field, that
15 the process that was followed by the Secretary of the Interior
16 has probity?

17 **MR. MONTERO:** Very simply, Your Honor, by providing
18 context. There was never any implication that the peer
19 reviewers, the dissenting peer reviewers, reviewed the
20 executive summary and the proposal for a six-month
21 suspension/moratorium, Your Honor. These peer reviewers, I'm
22 sure they were concerned to have their name attached to that
23 sort of action, which obviously has dire consequences for the
24 relevant industry segment. They reached out to the Secretary.
25 The deputy secretary reassured them that their names were not

1 intended to be in any way correlated to that recommendation.

2 Now, let me explain the process by which --

3 **THE COURT:** I wonder why they didn't say that in
4 their statement? That's pretty harsh. "The report given by
5 Secretary Salazar to the President misrepresents our position."

6 **MR. MONTERO:** That's a post-decisional document,
7 Your Honor. That's why. Now, we're not able to --

8 **THE COURT:** Well, *peer review*, in common terms, means
9 that these people have reviewed and approved this stuff.

10 **MR. MONTERO:** It's the "this stuff" that is at issue
11 here. The department did not ask those engineers to review the
12 executive summary. There are two different documents here.
13 There's the safety report. That is the data the -- not the
14 data but a summary of the data, the explanation, and 22
15 recommendations for safety measures and regulatory updates.
16 Then there's an executive summary. The Secretary and his staff
17 read the safety report and then prepare something to go to the
18 President saying, "Here's how we view this. Here's our
19 recommendation."

20 The department asked the engineers to review the
21 recommendations in the safety report, the description of risks
22 and those 22 safety measures that were being proposed, and
23 asked those people to ensure the accuracy of the data in that
24 report. These people are very well qualified to do that, and
25 they did, and they ensured the accuracy of that data.

1 A decision to suspend operations is different.
2 The OCSLA grants this discretion to the Secretary alone.

3 **THE COURT:** Let me apologize for interrupting. I
4 understand your response. It would make a lot of sense to me
5 if your response was consistent with the text of the document
6 that I'm talking about.

7 The document doesn't say that "We were asked to
8 peer-review data," that "We were asked to look at charts," that
9 "We were asked to take into account scientific issues within
10 our expertise." These people are saying "the recommendations
11 contained in this report have been peer-reviewed" is simply
12 untrue. That's what these folks are saying.

13 When the Secretary says, "The recommendations
14 contained in this report have been peer-reviewed by seven
15 experts identified by the National Academy of Engineering.
16 Those experts who volunteered their time and expertise are
17 identified in Appendix 1. The department also consulted with a
18 wide range of experts from government, academia, and industry,"
19 they're saying that that's not true.

20 They're not saying, "Oh, we weren't asked about
21 our recommendations." They're saying that the comment that the
22 recommendations have been peer-reviewed by this impressive
23 group of national experts is a misrepresentation.

24 Now, I could understand if they were asked and
25 if the report said, "We have got a lot of charts here" -- and

1 you do. "We have got lots of data on spills and on the
2 industry and on these companies that are out there, and all
3 this data has been looked at by this group of engineers and
4 they have approved it." That's different than saying the
5 recommendations have been peer-reviewed --

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

7 **THE COURT:** -- in my mind. Maybe I'm wrong.

8 **MR. MONTERO:** I understand the concern.

9 **THE COURT:** But you understand that in order for a
10 report of these implications and this magnitude -- that
11 admittedly is struggling with a horrible event in the Gulf. It
12 nevertheless has to be faithful to the law. It must have some
13 probity before it can be accepted by the public or by anyone
14 else.

15 **MR. MONTERO:** Again, Your Honor, I agree 100 percent.
16 The statement Your Honor was reading I find in page 1 of the
17 safety report. This is at the bottom of the page.

18 **THE COURT:** Wait. Let me find the report. Page 1?

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

20 **THE COURT:** All right. You're talking about the
21 executive summary?

22 **MR. MONTERO:** No. The safety report, Your Honor, if
23 you flip a few pages forward.

24 **THE COURT:** Oh, not the executive summary but the
25 report itself.

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

2 **THE COURT:** Okay.

3 **MR. MONTERO:** At the bottom of the last paragraph,
4 two sentences in: "In particular, seven members of the
5 National Academy of Engineering peer-reviewed the
6 recommendations in this report. The department received ideas
7 from the" -- well, anyway -- "Appendix 1 lists expert
8 consultations from this report." It's talking about the safety
9 report. Again, that's why I draw a distinction between the two
10 documents.

11 Now, I think there is a fair reading of the
12 executive summary that obviously after the fact, with 20/20
13 hindsight vision, does not dispel the notion or potential
14 argument or the implication that these peer reviewers reviewed
15 the recommendation for a six-month suspension.

16 **THE COURT:** So you're basically arguing that this
17 group of distinguished scientists, when they charged that the
18 statement that the recommendations were peer-reviewed is a
19 misrepresentation, are just wacky.

20 **MR. MONTERO:** No. They absolutely peer-reviewed the
21 recommendations which are contained in the safety report.

22 **THE COURT:** And not the executive summary.

23 **MR. MONTERO:** That's correct. The executive summary
24 is a document that is prepared for the benefit of the
25 President.

1 **THE COURT:** I understand your argument. I didn't
2 mean to take up too much time.

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

4 **THE COURT:** Go ahead.

5 **MR. MONTERO:** So let me just go back to the bread and
6 butter here in terms of the APA issues.

7 **THE COURT:** Is it correct that some 80 percent of the
8 oil that is produced in the Gulf is produced by deepwater
9 drilling?

10 **MR. MONTERO:** That's correct, Your Honor. 45 percent
11 of natural gas.

12 **THE COURT:** 45 percent of the natural gas in the Gulf
13 is produced by deepwater drilling?

14 **MR. MONTERO:** That's absolutely correct. That's why
15 this decision was a very serious one and one with very grave
16 implications and one the department took very seriously.

17 We have mentioned the two elements for invoking
18 250.172, the suspension authority. We have submitted
19 declarations describing documents in lieu of the administrative
20 record.

21 I should say as an aside: MMS and the
22 department are working very hard to put together the
23 administrative record. These proceedings and litigation
24 support have sidetracked that effort somewhat, as has their
25 response efforts day-to-day to what's going on, but we expect

1 to have that record in 30 days. We are working very quickly to
2 do that, and we will lodge it with the Court as soon as it is
3 ready. So, in lieu of that, we have described documents that
4 were considered --

5 **THE COURT:** Are you asking for a continuance of 30
6 days for the Court's decision?

7 **MR. MONTERO:** No, no, no, no, Your Honor. Eventually
8 there will be a proceeding on the merits and on summary
9 judgment, so that's what I'm saying.

10 **THE COURT:** All right.

11 **MR. MONTERO:** So the documents that will --

12 **THE COURT:** I was confused because you-all had asked
13 for a continuance.

14 **MR. MONTERO:** No. We understand that was denied.

15 **THE COURT:** All right. Go ahead.

16 **MR. MONTERO:** So the documents that will ultimately
17 form part of this administrative record -- and which we have
18 described and some of which we have submitted -- show that the
19 department had a robust factual basis for issuing the
20 suspensions, for finding that the two elements of 250.172 were,
21 in fact, met. I will just highlight a few of those.

22 I'm referencing here the declaration of
23 Mr. Steven Black, paragraph 13 and the subparagraphs therein
24 and the exhibits as well. These exhibits identify shortcomings
25 in the quality and effectiveness of blowout preventers. Also,

1 they demonstrate shortcomings in the secondary intervention
2 equipment that's used to operate them when the blowout
3 preventer's primary equipment fails.

4 **THE COURT:** You're talking about deepwater blowout
5 preventers and not shallow-water preventers; right?

6 **MR. MONTERO:** That's correct, Your Honor. Now, the
7 question is: Why is this relevant? Well, it's directly
8 relevant because blowout preventer failure was one of the two
9 factors suspected to have played a primary role in the
10 Deepwater Horizon disaster.

11 **THE COURT:** Do we know that?

12 **MR. MONTERO:** No, we do not. There are two factors
13 that are suspected to play a role. Let me just say there's a
14 lot the department does not know, and that's precisely why it's
15 important to conduct these studies and to learn more. The
16 plaintiffs argued that the department had done an extensive
17 study over the course of many years. This was a 30-day review.
18 This was an emergency action to get something in place quickly
19 and then allow time for a more thorough and considered
20 response.

21 Let me point out the second reference to the
22 declaration of Mr. Steven Black. This is paragraph 14 and the
23 subparagraphs therein. These documents point out shortcomings
24 in the current regulation of wells and identify recommendations
25 to promote well integrity and to enhance well control. Again,

1 why is this relevant? Well, here again well control is the
2 second factor most suspected to have caused the Deepwater
3 Horizon disaster.

4 The last thing I would just point out is the
5 safety report that's at page 25. That concludes that the
6 federal government needs to increase its capability to stop
7 uncontrolled wells on the ocean floor. The relevance here,
8 Your Honor, is next time -- God forbid should there be a next
9 time -- it won't be 62 days and counting before it's fixed.

10 **THE COURT:** Is the administrative record going to be
11 implemented by these engineers who made the comments in
12 Exhibit F?

13 **MR. MONTERO:** Implemented?

14 **THE COURT:** You're talking about compiling the
15 administrative record.

16 **MR. MONTERO:** Oh, no. Well, the administrative
17 record, the compilation process is a process of historical
18 fact. The record custodian finds out who considered what in
19 the course of this decision-making process, and all of that
20 stuff goes into the administrative record.

21 **THE COURT:** If these guys said, "We agreed with a
22 limited moratorium but not a blanket moratorium," should that
23 be a part of the administrative record?

24 **MR. MONTERO:** Well, this exhibit, I think, is
25 post-decisional. So, no, it shouldn't be, but there's the

1 obvious inference from the record that -- an inference I'm
2 certainly supporting today -- they never supported or were
3 asked to comment on a suspension.

4 **THE COURT:** Well, if I find the result under OCSLA
5 and the notice requirement, citizen provision suit, or the
6 Administrative Procedure Act would all be the same, then it
7 wouldn't make any difference what the administrative record
8 said, would it?

9 **MR. MONTERO:** No, that's incorrect, Your Honor.
10 OCSLA provides a private right of action, a citizen suit
11 provision; but where a statute provides an entry into court and
12 doesn't provide standards of review, the APA fills that gap.

13 **THE COURT:** So I would still be bound by the APA?

14 **MR. MONTERO:** That's correct. That's true for all
15 these statutes: The ESA, the OCSLA, etc.

16 **THE COURT:** All right.

17 **MR. MONTERO:** So the evidence I have just mentioned,
18 it's just a fraction of what will be included in the
19 administrative record, but it strongly supports the
20 department's findings that allowing drilling to continue would
21 cause a serious threat to life, property, and the environment
22 and that new and better safety equipment needs to be installed.
23 Now, plaintiffs don't challenge this conclusion directly, or at
24 least not until today, not in their briefs.

25 **THE COURT:** Why would things like that not be in the

1 safety measures report itself?

2 **MR. MONTERO:** They are, Your Honor.

3 **THE COURT:** They are?

4 **MR. MONTERO:** Absolutely.

5 **THE COURT:** All right. It's got the names of those
6 people.

7 **MR. MONTERO:** There are 10 pages towards the end of
8 the safety report that lists a bunch of recommendations. They
9 are very technical, so I don't fully understand them. There's
10 a handy table in the executive summary, the last page of that
11 summary, and it points out all the 22 measures. It says how
12 they are going to be implemented, some immediately and some by
13 longer term rule-making actions.

14 **THE COURT:** Okay.

15 **MR. MONTERO:** So let me just address some of the
16 challenges that plaintiffs do make to try to undermine the
17 department's reasoning:

18 They say there are no findings of fact. Well,
19 no formal findings of fact are required, and we have briefed
20 that. It's in page 13 of our brief. This isn't the
21 rule-making. This isn't a formal adjudication. Those formal
22 actions do have certain paperwork requirements or certain
23 explanation requirements.

24 Second, the government has tried to introduce
25 new rationales for the decision in a post-decisional document.

1 Here they are talking about hurricanes or the fact that the
2 department has limited resources and that it's expending all
3 that in response efforts to the Deepwater Horizon spill. We
4 didn't reference any of that in our merits arguments.

5 **THE COURT:** I'm sorry to interrupt you again.

6 **MR. MONTERO:** Certainly.

7 **THE COURT:** Tell me where these -- like this Black
8 person, his affidavit -- I know there are lots of
9 recommendations at the end of the report and there is a list of
10 other experts who were consulted, but I don't see these
11 affidavits that you have referred to.

12 **MR. MONTERO:** They were submitted, and I understand
13 that your clerk did receive and examine them.

14 **THE COURT:** Are they a part of the report?

15 **MR. MONTERO:** No. Oh, no, no, no. No, sir.

16 **THE COURT:** That was my question.

17 **MR. MONTERO:** No, Your Honor. No. The report stands
18 on its own. The only thing --

19 **THE COURT:** All right. Well, then I have clarified
20 that.

21 **MR. MONTERO:** Okay. The only thing the declarations
22 are for is there was a lot of argument saying: Where's the
23 data? Where's the analysis? Where's the explanation? There
24 are three documents in the administrative record, and they
25 don't contain that stuff.

1 Our answer was: There was a lot of data. There
2 was a lot of consideration.

3 **THE COURT:** That's not in the report.

4 **MR. MONTERO:** Exactly. It's in the administrative
5 record, and that's how APA cases proceed. The court examines
6 the administrative records. We have provided some of those
7 documents.

8 **THE COURT:** Okay.

9 **MR. MONTERO:** So as to hurricanes and limited
10 resources due to response efforts, we have never made those
11 arguments. That is not the basis for the suspension as far as
12 we are arguing. The basis is in the administrative record, and
13 we are not relying on post-decisional documents.

14 I have already spoken about the 27 rigs that
15 passed inspections. There's this argument about 500 feet.
16 Plaintiffs argue that the decision to impose sanctions starting
17 at 500 feet instead of 1,000 was arbitrary. I see that we
18 don't have an ELMO, but I do have sufficient copies of this.
19 This is Exhibit C to the declaration of Deputy Secretary David
20 Hayes, and I will pass these around.

21 **THE COURT:** Thank you.

22 **MR. MONTERO:** Okay. So, Your Honor, unfortunately
23 the image on the left is not the greatest image, but that line
24 that transects the image around the middle on the left, that's
25 the waterline.

1 So the image on the left is what is known as the
2 jack-up rig. The platform is above the water. It is anchored.
3 It is anchored on the ocean floor.

4 The image on the right is the floating rig, and
5 these float and then -- well, anyway, they are used in deeper
6 water.

7 There's a circle on the image to the left,
8 towards the middle of the image. That's where the blowout
9 protector is located. It's above the surface of the water.
10 It's easily accessible for inspections, for maintenance, for
11 repairs. God forbid should there be a blowout, it's easily
12 accessible to be able to fix that.

13 If you look at the image on the left, the
14 circles on the bottom, that's where the blowout preventer
15 usually goes on these floating rigs. Very hard to access.
16 Very hard to inspect, to repair. It's subject to extreme
17 temperatures, water currents. It can't be accessed by human
18 divers. It can only be accessed by remotely operated vehicles.
19 It is more difficult to operate. In the event of a blowout,
20 you have to get to the bottom to plug it, and you can only use
21 remotely operated vehicles. So it's much more difficult.
22 That's why it's taken 62 days and counting.

23 Now, if you look at the left image again, it
24 says up to a maximum of 500 feet. That is a technical
25 limitation of jack-up drills. The floating ones have a much

1 higher risk factor. Those are the ones that are targeted.
2 That is the source of the 500-foot limitation.

3 Let me just explain one more thing. There are
4 some drilling rigs that float, and they have a blowout
5 preventer on the surface. A minority, but there are some.
6 Those aren't as safe as jack-up rigs. Even though they have
7 them at the surface and they are more accessible, they rely on
8 what's known as a marine riser, and that is this long line
9 that's going from the drill to the surface.

10 **THE COURT:** Right.

11 **MR. MONTERO:** That marine riser is a tube that the
12 drill bits go down in. It's not nearly as reinforced as the
13 concentrically placed steel pipes that are called casing and
14 that are reinforced with concrete that is what's in the ground.

15 So on the left side, you have a blowout
16 preventer that's on the ground and is connected directly to
17 this steel and concrete reinforced well liner. On the right
18 side, even if the BOP is on the surface, it's connected only to
19 a marine riser, and that's that relatively flimsy-looking pipe
20 that right now is on the ocean floor and that up until recently
21 we saw spewing oil until BP cut it at the top of the BOP.

22 So that is the basis. That will be in the
23 administrative record because that was considered --

24 **THE COURT:** Well, that's also in the report. The
25 distinction between shallow-water drilling and deepwater

1 drilling is in the report.

2 **MR. MONTERO:** Absolutely. The only thing that's not
3 in the report is there isn't an explanation of 500 feet. It
4 says that drilling gets more technically challenging and
5 dangerous as you move into deeper waters. The plaintiffs are
6 saying: Why 500? That's why.

7 Plaintiffs suggest that the six-month duration
8 of the suspension is not adequately explained. Well, if
9 Your Honor looks at the executive summary, it clearly says the
10 six-month suspension "would allow for implementation of the
11 measures proposed in the safety report and for consideration of
12 findings from ongoing investigations." That's an adequate
13 explanation and makes perfect sense.

14 Once again, going to this table that's the
15 executive summary table, it lists all the --

16 **THE COURT:** Wait. What page? Where is that?

17 **MR. MONTERO:** This is the executive summary.

18 **THE COURT:** Where are you?

19 **MR. MONTERO:** Page 4 of the executive summary,
20 there's a table.

21 **THE COURT:** Right.

22 **MR. MONTERO:** In this table, each of those bullet
23 points are 22 safety measures.

24 **THE COURT:** It summarizes the recommendations that
25 are made at the end of the report.

1 **MR. MONTERO:** Exactly. Some of those, in parens next
2 to them, it says "immediately." They can be implemented
3 immediately.

4 Some of them say "emergency rule-making." They
5 can be implemented through rule-making without notice and
6 comment by exercising certain exemptions in the APA.

7 Some of them say "notice and comment
8 rule-making." Those have to go through notice and comment, and
9 it will take longer. That's why it's going to take six months
10 to implement these 22 safety measures which were deemed
11 necessary.

12 **THE COURT:** I thought the Secretary said it was just
13 a pause and it might not take six months? Was that incorrectly
14 reported?

15 **MR. MONTERO:** I don't recall seeing that in the
16 administrative record, but it is important to note this is an
17 iterative process. It was an emergency decision. The
18 Secretary has authority under 250.170 --

19 **THE COURT:** For emergency ruling.

20 **MR. MONTERO:** No, but he has authority under .170 to
21 lift the suspension if it finds that the basis for it has gone
22 away.

23 So that leads me to the next point. These
24 ongoing studies, they are feeding information -- not just the
25 national commission but other task forces and investigations,

1 they are feeding information into the department incrementally.
2 The department is using that on an ongoing basis to refine its
3 approach and to refine these conclusions from the safety
4 report. If it finds that maybe it overshot, maybe it was
5 overzealous, it has the authority to cut back the suspension.

6 **THE COURT:** Your side has about 20 minutes left, and
7 I don't know how much time your colleague wants to take.

8 **MR. MONTERO:** Your Honor, let me cut the rest of the
9 merits argument short. We will rest on our brief. Given that
10 we didn't respond to the OCSLA jurisdictional arguments that
11 were submitted at 3:00 p.m. on Friday, let me just make my
12 record on that.

13 The Court is obviously familiar with the citizen
14 suit provision, and plaintiffs don't dispute that they
15 specifically failed to provide notice. They offer a few
16 arguments instead. First, they say --

17 **THE COURT:** There was a letter June 2, I think, the
18 two senators and the governor.

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

20 **THE COURT:** There, of course, has been an
21 excruciating amount of deserved attention because of the
22 tragedy itself and because of the claimed implications of the
23 moratorium.

24 Go ahead. There's a distinction in the two
25 statutes between *notice* and *notification*. I think that's where

1 the argument comes down. The D.C. Court of Appeals case that
2 you-all rely on seems to apply only to the notice subsection
3 and not the notification subsection.

4 Unfortunately, for the poor people in the public
5 here, I'm now beginning to sound like a lawyer, which I don't
6 ever like to do, so I apologize.

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

8 **THE COURT:** I think that's essentially where the
9 argument comes down.

10 **MR. MONTERO:** I'll just address that very quickly so
11 as to reserve time for my colleague.

12 **THE COURT:** Right.

13 **MR. MONTERO:** The United States, the Department of
14 the Interior, which is charged with the authority and
15 obligation to implement OCSLA and is given deference in its
16 interpretation of OCSLA, does not accept this argument that
17 *notice* and *notification* are somehow two different things. They
18 are, in fact, synonyms. Moving beyond that, we do not agree --

19 **THE COURT:** Hopefully members of Congress know the
20 meaning of *synonym*.

21 **MR. MONTERO:** Hopefully a lot of things, Your Honor.

22 We do not concede the plaintiffs' argument that
23 they don't have to comply with the 60-day notice provision. We
24 don't think that's a judicially noticeable fact or some -- we
25 do not see the argument, but we have briefed it and will rest

1 on that here.

2 **THE COURT:** I understand.

3 **MR. MONTERO:** What I do want to address is this
4 notion that Congress somehow intended for the notice
5 requirement in § 1349(a)(3) to be satisfied whenever the
6 department has reason to believe that someone might sue it.
7 OCSLA does not contemplate inquiry notice. It doesn't
8 contemplate constructive notice. It requires actual notice.

9 It requires actual notice for good reason. As
10 plaintiffs explained in their brief, they said the reason for
11 the notice provision is so that parties can confer informally
12 and see if there isn't some way to avoid litigation by
13 correcting the error.

14 Plaintiffs' arguments in this case are based on
15 the speculative conclusion that the department conducted no
16 factual analysis. Why? Because they haven't seen the
17 administrative record. That's fair enough.

18 If they had conferred with the department, the
19 department would have been perfectly happy to say, "Here are
20 the reams of data on which we based our decision. If you do
21 challenge us, this is what we will lodge with the Court as the
22 basis for our decision." So they should have given the
23 department the opportunity to correct that misimpression.
24 Failure to give the department that opportunity requires
25 dismissal of this case as a jurisdictional matter.

1 Addressing that this is an APA case, not an
2 OCSLA case -- I'm speaking fast. I'm just trying to get it
3 in -- the problem with the argument is the APA only provides
4 the right of action for claims where there is no other adequate
5 remedy in court. That's Section 704, also *Bowen v.*
6 *Massachusetts*, 487 U.S., and the jump cite is 903.

7 **THE COURT:** Is that in your brief?

8 **MR. MONTERO:** No, Your Honor. This is in response to
9 the arguments we saw for the first time Friday at 3:00 p.m.

10 **THE COURT:** 487 U.S. what?

11 **MR. MONTERO:** 487 U.S., and the jump cite is 903.

12 **THE COURT:** Is that by Justice Scalia?

13 **MR. MONTERO:** I hope so. In this case, there is
14 another adequate remedy because the citizen suit provision in
15 OCSLA expressly provides jurisdiction for -- and I'm quoting
16 here -- "cases and controversies arising out of or in
17 connection with the suspension of a lease or permit." That
18 § 1349(b)(1).

19 Despite the plaintiffs' arguments that "Well,
20 citizen suit provisions aren't typically directed at violations
21 by the United States," this jurisdiction does, in fact, extend
22 to cases against the United States, and that is made clear in
23 § 1349(a)(1). So while the plaintiffs may argue that citizen
24 suit provisions don't usually apply to the United States, this
25 one clearly does.

1 Plaintiffs rely on *OXY USA v. Babbitt*. That
2 case has been expressly limited to its facts. It's not
3 authoritative. Even if it were authoritative, it's
4 distinguishable because in that case the plaintiffs were
5 saying, "Oh, we are going to proceed under an OCSLA claim and,
6 therefore, we can take discovery. We can avoid this ban to
7 challenges on nonfinal agency actions because the APA doesn't
8 even apply," and the court said, "No, it does apply." That is
9 well-settled principle that when one substantive statute
10 provides the right of action and no standards of review, the
11 APA will fill that gap.

12 Plaintiffs rely on *Bennett v. Spear*. That's
13 also misplaced. The citizen suit provision in the ESA provides
14 a list of actions that a plaintiff can challenge. The
15 Supreme Court merely held that if a certain action isn't on
16 that list, then it can be challenged under the APA.

17 Our situation is different because, as I have
18 already explained, suspensions and actions relating to
19 suspensions are expressly on that list, so the OCSLA is the
20 only way to bring those claims.

21 Here I will just read, and this is last thing I
22 will say: "It would require the suspension of disbelief to
23 ascribe to Congress the design to allow its careful and
24 thorough remedial scheme to be circumvented by artful
25 pleading," which is what the plaintiffs are trying to do in

1 this case, plead their case under the APA. The cite there is
2 *Brown v. GSA*. That's 425 U.S. The jump cite is 833.

3 So just in concluding, Your Honor, we have made
4 our points on the jurisdictional arguments as to the merits.
5 There is an enormous factual basis. It supports the
6 determination that the Secretary has made. It provides facts
7 that the Secretary considered. The Secretary, on that basis,
8 said there is, in fact, a threat of serious or irreparable harm
9 and injury to persons, property, and the environment and there
10 is, in fact, a need to install safety equipment.

11 Having established those two elements, the
12 decision to impose suspensions cannot be overturned. It cannot
13 be called arbitrary and capricious. The plaintiffs have no
14 likelihood of success on the merits. Thank you, Your Honor.

15 **THE COURT:** Thank you.

16 You have about 10 minutes. Tell me your name
17 again.

18 **MR. COLLINS:** I'm Brian Collins, Your Honor, on
19 behalf of the defendants.

20 **THE COURT:** You're going to speak about irreparable
21 harm?

22 **MR. COLLINS:** I'll cover the remaining three prongs
23 of the preliminary injunction analysis, Your Honor. I was
24 going to start, Your Honor, with the Court's permission, with
25 the public interest and balancing the equities, and then I will

1 speak to the irreparable harm, if that's all right.

2 In this case, Your Honor, the question as to the
3 public interest is: Would an injunction undermine the public's
4 interest in this case? In answering that question, I think
5 it's important -- we have kind of touched on it here today, but
6 it's important to remember how we got here and sort of what
7 exactly is at stake. The key point here is that for the first
8 time in our nation's history, we have become witness to the
9 truly risk and unprecedented danger of losing control of a
10 deepwater drilling operation.

11 Now, the cost of the incident in human lives is
12 already well known, but the social, economic, and environmental
13 costs are things that cannot yet be calculated and likely won't
14 be able to be calculated for some time to come.

15 What we do know for certain is this, Your Honor:
16 Neither the long-term economy nor the long-term environment in
17 the Gulf region is likely to be able to rebound from a second
18 incident like this. It's a very serious incident that's taken
19 place.

20 Now, the Secretary's targeted temporary
21 suspension of these 33 deepwater drilling wells is a measured
22 response to give the agency time to assess that risk and figure
23 out what we can do to raise the margin of safety as quickly as
24 possible. The Secretary wants to make sure that deepwater
25 drilling is as safe as we all thought it was on the day before

1 April 20. So the suspension in this case serves the public's
2 numerous interests by ensuring the department has time to
3 address these important questions surrounding the safety of
4 deepwater drilling. I think, given what is at stake, it's
5 crucial for the department to take this time because the
6 failure to do so now would be to gamble with the long-term
7 future of the region.

8 **THE COURT:** Would the department want to keep tankers
9 out of Alaska because of the *Exxon Valdez*?

10 **MR. COLLINS:** Well, I think the *Exxon Valdez* did show
11 us how serious and how long-term the effects of an incident
12 like this could be.

13 **THE COURT:** Well, we know now how serious it was.
14 Why wouldn't the department ban tankers in the -- where is it,
15 the Gulf of Alaska?

16 **MR. COLLINS:** Well, I'm not exactly familiar with
17 exactly what happened in the regulatory structure with the
18 Gulf, but I imagine there was a review of some kind.

19 **THE COURT:** But you understand the thrust of my
20 question. The government is basically arguing that
21 notwithstanding admitted safety records, many, many other
22 companies that are in the same business of deepwater drilling
23 as British Petroleum should be reached and encompassed by a
24 fear of safety for deepwater drilling because the BP experience
25 has been so awful.

1 My question is simply: The *Exxon Valdez*
2 situation was awful. Fortunately, human lives weren't lost,
3 but the damage to the environment, to working people, to
4 businesses was, indeed, awful. Couldn't the government justify
5 saying no tankers are going to go to -- whatever it's called --
6 the Gulf of Alaska to get oil from pipelines because the *Exxon*
7 *Valdez* was so terrible?

8 MR. COLLINS: Well, Your Honor, in that case, I think
9 if there was a suspicion or a risk that something about the
10 tankers was potentially at issue in causing the *Exxon Valdez* --
11 I think in that case it became pretty clear pretty quickly that
12 it was a drunken captain.

13 THE COURT: We just had a horrible train wreck in
14 this area where several kids were killed at a crossing. Train
15 crossings are dangerous. Why shouldn't the railroad industry
16 be stopped until the government can look at safety crossings
17 for all railroads as a part of the government's responsibility
18 to regulate interstate commerce?

19 MR. COLLINS: Well, Your Honor, I think part of the
20 issue -- your point is well taken, Your Honor. It's not
21 something that should be done lightly, and I don't think it is
22 something that's being done lightly in this case. It's not
23 that you can eliminate all risks, but we do want to make
24 sure -- given the unknown surrounding exactly what the causes
25 were of this incident, we want to just take the time to make

1 sure that we can be sure it's as safe as we thought it was the
2 day before this happened.

3 So in certain other contexts, you're right, I
4 don't think it would be justified, Your Honor. I think, given
5 what we have seen here, it is justified, and it's a cautious
6 approach to make sure that we are doing what we can.

7 **THE COURT:** But it wouldn't be just as cautious to
8 prohibit tankers off of Alaska to go out and get oil from the
9 pipelines?

10 **MR. COLLINS:** Well, I think it would be if there was
11 a question as to -- for example, I know for a long time there
12 was a controversy of single-hull versus double-hull tankers.
13 So if there was a question that a single-hull tanker was
14 exceedingly dangerous in that area because it was rocky or
15 something like that, then yes, Your Honor, I think there would
16 be justification for saying, "Okay. You have to have some
17 additional safety precaution because we know this is an
18 additional risk here to try and mitigate." So I think in that
19 kind of a situation is where the review and the time to make
20 sure that we understand exactly what happened --

21 **THE COURT:** I asked the question because the argument
22 has been made that all the Secretary of the Interior has done
23 is simply mimic and mouth the words of the statute and that
24 there is no incident-specific or fact-specific rationale to
25 support the breadth of the moratorium which, of course, reaches

1 not only new deepwater wells but currently permitted deepwater
2 wells.

3 If that argument has any resonance, then I'm
4 just wondering: Couldn't the Secretary just cut and paste and
5 find an incident like *Exxon Valdez* and make the same findings?

6 **MR. COLLINS:** Well, I think, Your Honor, that
7 argument is premised, at least in part, on the incorrect
8 notion, as Mr. Montero pointed out, that there was no
9 fact-finding, there was no investigation done, there was no
10 analysis done prior to issuing the report. I think the key
11 distinction is that there was, and we are putting together the
12 administrative record to show that that analysis has been done.

13 **THE COURT:** All right. You have got four minutes. I
14 am familiar with the intervenors' briefs from the Sierra Club
15 and from related -- well, I don't know whether they are related
16 organizations, but certainly organizations that agree with the
17 position that was taken in the papers. I don't know if you
18 want your colleagues -- they don't really add anything beyond
19 some comments about the Minerals Management Service that hadn't
20 already been brought up. As far as the state is concerned,
21 again, like I've said, if any intervenor wants time, they are
22 going to have to share it with their respective sides.

23 **MR. COLLINS:** Understood, Your Honor.

24 **THE COURT:** You have four minutes.

25 **MR. COLLINS:** We have spoken with them, and we warned

1 them that this might be an issue.

2 I'll just talk briefly about the balancing
3 because I think it draws into the harm's discussion a little
4 bit, as well, the injury.

5 It's plaintiffs' burden to demonstrate that the
6 balance tips in their favor in this case. I think the harm
7 that plaintiffs are focused on here is economic harm at its
8 base. You know, at most, I think the discrepancy in our
9 positions relates to sort of how long that economic harm may or
10 may not last, but I think we all agree it's temporary economic
11 harm. So to counterbalance that on the other side of the
12 scale, in balancing the equities, we are talking about the
13 public's interest in the safety of deepwater drilling.

14 Your Honor mentioned briefly, on the harm piece,
15 these companies -- in plaintiffs' own words in their affidavits
16 and in their filings, they state that the companies involved in
17 deepwater drilling are acting quickly to adapt and mitigate the
18 economic harm that's taking place here. There is no indication
19 and you can't simply just assume that if the moratorium or when
20 the moratorium is lifted that the same companies won't take the
21 same quick action to get back to doing exactly what they were
22 doing before. Now, it may take some time, but it's not a
23 question of taking toothpaste out of the tube; it's a question
24 of shifting the balance from one area to another.

25 **THE COURT:** I prefer Irish whiskey being out of the

1 bottle.

2 Well, let me see if I understand what you're
3 saying. Essentially, what you're arguing is that they will
4 take care of themselves. They will find ways to restructure
5 and to resurrect whatever business they fear that they are
6 losing now.

7 **MR. COLLINS:** Well, I mean, it's --

8 **THE COURT:** What about the 10,000 employees that
9 these companies employ?

10 **MR. COLLINS:** Exactly, Your Honor. We do not want to
11 minimize that at all, Your Honor. I think that is a key piece.
12 It's a piece of information that was considered in the context
13 of this decision. You know, in putting together the
14 administrative record, it is something that was thought about.

15 In balancing the equities in this case,
16 Your Honor, we are also having to look, at the department, at
17 all of the livelihoods that were affected by the spill itself
18 and the fishing industries that have been impacted and the
19 travel and tourism industries that are going to be impacted.

20 Those are all also parts of the equation that
21 balance on the other side. We have to minimize this risk or
22 else this is -- the other broader risks that are at issue here.
23 So there has to be that sort of looking at it in that way in
24 the context of asking for the extraordinary relief of a
25 preliminary injunction.

1 **THE COURT:** What about the wetlands, the coast? This
2 is an ignorant question. Does the spill itself cause a
3 depletion in the wetlands and the coastline?

4 **MR. COLLINS:** A depletion?

5 **THE COURT:** Yes. We are losing football fields every
6 day. Of course, that involves the wildlife and marine life as
7 well.

8 **MR. COLLINS:** Yes, it does. Your Honor, we do have a
9 little bit of information about that in our filing with the
10 declaration of Mr. LaBelle. His declaration is intended to
11 discuss some of those sorts of issues. He talks about the
12 impact to primarily marine mammals, benthic organisms, that
13 sort of thing, in wetlands. I don't know if there's anything
14 in the affidavit specifically about the loss of wetlands, but I
15 think that's a fair inference.

16 **THE COURT:** You have about 12 seconds.

17 **MR. COLLINS:** Okay. Just one last piece.

18 **THE COURT:** Once during a Supreme Court argument when
19 Rehnquist was Chief Justice, Justice O'Connor asked counsel a
20 question and then the red light went on.

21 Counsel looked at the Chief and said, "May I
22 respond to the question, Your Honor?"

23 Chief Justice Rehnquist said, "No."

24 **MR. COLLINS:** All right. With that in mind,
25 Your Honor, just one second.

1 Even if this is a case where plaintiffs could
2 show irreparable injury for the purposes of a preliminary
3 injunction test -- again, we're not disputing that there is
4 going to be economic harm here. In the context of the public
5 interest, the Supreme Court has noted -- and I'll quote. It's
6 from *Weinberger v. Romero-Barcelo*.

7 **THE COURT:** By Justice Scalia, no doubt.

8 **MR. COLLINS:** Again, I'm hoping so, Your Honor.

9 "Where an injunction is asked which will
10 adversely affect the public interest for whose impairment, even
11 temporarily, an injunction bond cannot compensate, the court
12 may, in the public interest, withhold relief until a final
13 determination of the rights of the parties, though the
14 postponement may be burdensome to the plaintiff."

15 So that's, I think, one of the weighing this
16 Court --

17 **THE COURT:** Who was the plaintiff? That was Caspar
18 Weinberger?

19 **MR. COLLINS:** Yes, Weinberger. This was an issue
20 with the Department of the Navy and the Vieques bombing on the
21 island. I guess the plaintiffs in this case were the citizens
22 that were being -- it was a Clean Water Act issue, a water
23 pollution issue.

24 **THE COURT:** Okay. Thank you very much.

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

1 **THE COURT:** Mr. Rosenblum, you have about six or
2 seven minutes.

3 **MR. ROSENBLUM:** I calculated about seven, Judge, but
4 whenever you say.

5 Your Honor, a couple of quick things. The issue
6 that Mr. Montero implied that suggested to the Court that the
7 executive summary is separate and apart from the body of the
8 safety report and that somehow the experts did not peer-review
9 the executive summary, Judge, here's the executive summary. On
10 the top of the third page of the executive summary -- again,
11 that's not numbered, Judge -- it indicates, "The
12 recommendations contained in this report have been
13 peer-reviewed by seven experts . . ." and it goes on.

14 So the suggestion that the executive summary and
15 the substance of the safety report are two separate documents
16 and they weren't peer-reviewed, it is certainly belied by the
17 executive summary itself.

18 **THE COURT:** Have you had an opportunity to look at
19 *Brown v. GSA* regarding jurisdiction, the two Supreme Court
20 cases that they have mentioned?

21 **MR. ROSENBLUM:** Your Honor, candidly, the government
22 did not file the brief on that issue by the 3:00 deadline. I
23 have looked at a lot of cases. I don't recall whether I have
24 looked at those cases.

25 I would suggest, on the notification issue, that

1 you would go to the *Bennett* case, which is a Justice Scalia
2 opinion. If you go to that case, Judge --

3 **THE COURT:** I sat on an abortion case once.
4 Everybody was throwing my friend in my face, and I looked at
5 counsel and I cited from Justice Stevens.

6 **MR. ROSENBLUM:** In that *Bennett* case, Judge --

7 **THE COURT:** I guess I should disclose that I am going
8 to England to teach with Justice Breyer just so that, again, my
9 associations are fair and balanced.

10 **MR. ROSENBLUM:** Here's the point, Judge, very
11 quickly. Justice Scalia in the *Bennett* case stated, "No one
12 contends (and it would not be maintainable) that the causes of
13 action against the Secretary set forth in ESA citizen suit
14 provisions" -- so we have a different statute with a citizen
15 suit provision -- "are exclusive, supplanting those provided by
16 the APA."

17 There it is, Judge. Even if -- even if -- you
18 accept the reading of the notice and notification procedure as
19 synonymous that the government suggests for the first time
20 today, we would suggest it wasn't necessary under *Bennett*
21 because it's not required under the APA.

22 Secondly, alternatively, that June 2 letter is
23 very important. The suggestion that the government did not
24 have notice, we suggest, Judge, is just not credible.

25 **THE COURT:** That was the letter to the two senators

1 and to the governor, I believe. I know it was to the two
2 senators.

3 **MR. ROSENBLUM:** It is attached to document 49, Judge,
4 and it was the letter from Governor Jindal to the President and
5 to the Secretary --

6 **THE COURT:** It's to the governor and to both
7 senators.

8 **MR. ROSENBLUM:** We attached it, actually, to our
9 brief, Judge. It's a letter from the Governor of Louisiana to
10 the President of the United States and to Secretary Salazar.

11 **THE COURT:** Oh, I'm looking at -- let's see. I
12 looked at it just a minute ago. There's a June 2, 2010 letter.
13 Is that the letter you're referring to?

14 **MR. ROSENBLUM:** Yes, sir.

15 **THE COURT:** Okay. I just wanted to be sure that we
16 were talking about the same document.

17 **MR. ROSENBLUM:** Judge, as the Court is probably
18 aware, the *Exxon Valdez* was because of a tanker spill. It was
19 not a spill during drilling. In fact, a result of the --

20 **THE COURT:** I understand that, but it was a horrible
21 tragedy. I'm just curious as to whether there would be similar
22 reasons, as given by the government in this horrible incident,
23 for doing something similar to the tanker industry or to the
24 railroad industry when something terrible happens, as happened
25 in the area here not long ago.

1 **MR. ROSENBLUM:** Or the airline industry when you have
2 an accident.

3 **THE COURT:** Exactly.

4 **MR. ROSENBLUM:** Or the car industry when Toyota's
5 accelerators are a problem. That's exactly our point, Judge.
6 Never before has the government, with a stroke of a pen,
7 inconsistent with the requirements of the APA, shut down an
8 entire industry for six months. That's the problem, Judge.

9 Even 9/11, when you had that, the airline
10 industry was shut down for three days. It wasn't a six-month
11 moratorium. We would suggest you can make, unfortunately, some
12 other analogies, but what we have here, Judge, is lack of
13 support -- lack of support -- in the administrative record to
14 support what was done.

15 Judge, because I think my clock is running
16 quickly, I want to leave you with three things:

17 The government's unchecked authority enacting
18 the six-month moratorium has, in effect, shut down this entire
19 industry. We ask you to look -- and they are in the back of
20 the book -- at the pictures of the Port Fourchon port circa
21 1985 to what was done last week. The implications are
22 dramatic. My clients are intimately involved in that intricate
23 network.

24 **THE COURT:** I'm familiar with it.

25 **MR. ROSENBLUM:** That's what's going to happen with

1 this moratorium, Judge. In fact, it's already happening.

2 Secondly, the government's safety objective,
3 which we all applaud, can be achieved without this moratorium.
4 In fact, the experts in their affidavits that are now in the
5 court record -- not the administrative record but the court
6 record -- suggest that this six-month moratorium is
7 counterproductive because if you stop these wells, when they
8 are drilling down, to temporarily abandon them -- that's what
9 happened to the Deepwater Horizon well. They were temporarily
10 abandoning. We would suggest that that is more counter to
11 safety than what is suggested, and that's what those experts
12 have suggested.

13 Finally, Judge, let me leave you with this: The
14 government ignored its own investigators from the MMS; it
15 ignored its own experts, as we have suggested; and it ignored
16 its own rules and regulations.

17 We respectfully request that a preliminary
18 injunction be granted. It's more than appropriate in this
19 extraordinary situation. In fact, this is an extraordinary
20 time for the history of the Gulf Coast. It calls out, Judge,
21 for an extraordinary remedy. We ask you to grant the
22 injunction. Thank you.

23 **MR. MONTERO:** Your Honor, I ask leave for 20 seconds
24 to clear up -- thank you, Your Honor.

25 Judge, with respect to the executive summary,

1 there's this language on page 3 that says, "The recommendations
2 contained in this" --

3 **THE COURT:** Wait, wait, wait. If you-all are going
4 to spar about it, let me take a look at it. The pages of the
5 executive summary are unnumbered.

6 **MR. MONTERO:** That is correct.

7 **THE COURT:** You're talking about the third page of
8 the summary?

9 **MR. MONTERO:** That's correct, Your Honor. It's the
10 one that's only partially --

11 **THE COURT:** Relationship to ongoing investigations?

12 **MR. MONTERO:** Yes. Just above that, the first
13 paragraph: "The recommendations contained in this report have
14 been peer-reviewed by seven experts identified by the National
15 Academy of Engineering," and the plaintiffs are interpreting
16 that -- and I don't think unfairly -- as suggesting that these
17 people peer-reviewed the recommendation that was only in the
18 executive summary concerning suspensions.

19 That's why I distinguished between the two
20 documents. This executive summary is a cover letter from the
21 Secretary to the President explaining the safety report that is
22 attached. The summary is not a report. The safety report is a
23 report. So when it says "the recommendations contained in this
24 report," it refers to the safety report. Could that have been
25 more clear? In 20/20 hindsight, absolutely.

1 **THE COURT:** Well, it certainly angered the people who
2 were involved.

3 **MR. MONTERO:** They all got apology letters. They are
4 all reaching out to the Department of the Interior, and they
5 are all offering their thoughts as to safety, and the
6 department is hearing that and --

7 **THE COURT:** Well, I guess they didn't disagree. My
8 goodness. I don't think anybody disagrees that the most
9 pivotal issue that arises out of this terrible thing is safety.
10 I just want to take a look again at -- I want to measure your
11 argument against some of the paper, but I appreciate it.

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

13 **THE COURT:** Mr. Rosenblum, you want another 20
14 seconds?

15 **MR. ROSENBLUM:** No, Judge. I think I may have saved
16 two or three minutes of my seven --

17 **THE COURT:** No, you didn't.

18 **MR. ROSENBLUM:** -- because I was going to yield to
19 the state, but thank you very much.

20 **THE COURT:** Well, I'll tell you what. If I yield to
21 the state, I'm going to yield to the Sierra Club and their
22 colleagues as well. So I'll hear from the state for two
23 minutes and then from the intervenors on the other side for two
24 minutes.

25 Why are you bringing all those books up here?

1 **MR. DART:** Thank you, Your Honor. Henry Dart for the
2 State of Louisiana.

3 **THE COURT:** I know you, Mr. Dart.

4 **MR. DART:** Yes, sir. The underlying justification
5 for this moratorium, as espoused by the federal government, is
6 the protection of the public interest. I'm here to speak for
7 the very public who the federal government purports to protect.

8 One reason that I am here is that the Department
9 of Justice has not seen fit to consent with the State of
10 Louisiana in spite of communications from the governor, in
11 spite of requests from state agencies to be consulted on the
12 effects of this moratorium on the State of Louisiana. The
13 Outer Continental Shelf Lands Act, § 3324(c) says that states
14 are entitled to an opportunity to participate in the policy and
15 planning decisions made by the federal government relating to
16 the exploration for and development and production of minerals
17 of the Outer Continental Shelf.

18 In view of that stated policy, § 1334(a) of that
19 same statute says that in the enforcement of safety,
20 environmental, and conservation laws and regulations, the
21 Secretary shall cooperate with the affected states. That has
22 not been done. The law has been violated, and any
23 administrative actions taken pursuant to that law are null and
24 void because of that failure.

25 The Small Business Regulatory Enforcement

1 Fairness Act of 1996 requires that every agency conduct a
2 regulatory flexibility analysis before taking any government
3 action that might affect small businesses. As far as the
4 administrative record of this case goes, it does not appear
5 that they have done so. Had they done so, it would be very
6 clear that thousands upon thousands of businesses would be
7 adversely affected by this moratorium, and the decision could
8 have been and should have been made that the moratorium not be
9 put in effect.

10 **THE COURT:** Is it your position that the governor or
11 any of his departments were never consulted about any of this?

12 **MR. DART:** That's absolutely correct. The federal
13 government did not come to the State of Louisiana and say,
14 "Guess what we are getting ready to do, fellas. Do you have a
15 problem with it?" No, they did not. It just happened.

16 **THE COURT:** All right. I understand your argument,
17 Mr. Dart.

18 **MR. DART:** Yes, sir. On the arbitrary and capricious
19 part of the plaintiffs' argument, I would like to add also
20 that --

21 **THE COURT:** I don't want any repetition.

22 **MR. DART:** No, this is not repetitious. It's a
23 risk/benefit analysis that they should have conducted, and what
24 the government talks about is the potential harm. In
25 addressing that potential harm, they should have addressed the

1 potential risks of imposing the moratorium, and they did not do
2 so as per the requirements of consultation.

3 **THE COURT:** I understand.

4 **MR. DART:** Yes, sir. The economic impact of this
5 moratorium on the state and its citizens is enormous, and it
6 keeps compounding every day. We ask the Court to lift this
7 moratorium or at least not let it be extended for six months.
8 As argued, there's no rationale for a six-month period, and the
9 government has up to five years to extend it. We have no
10 assurances from the government --

11 **THE COURT:** You're asking me to be an executive or a
12 legislator right now, and I'm not going to do that.

13 **MR. DART:** I appreciate that.

14 **THE COURT:** Unless you have something else to add --

15 **MR. DART:** No. We ask the preliminary injunction be
16 granted so that this environmental disaster does not be turned
17 into an economic catastrophe for the state. Thank you, sir.

18 **THE COURT:** The Sierra Club.

19 **MS. WANNAMAKER:** Yes, Your Honor. Catherine
20 Wannamaker for defendant intervenors. I will just make three
21 points to put some of this in a broader context.

22 As you noted at one point in the questioning, we
23 are dealing with a system where there have been huge regulatory
24 failures. It's been all over the newspapers. There's an
25 Inspector General's report talking about the failures of MMS.

1 We have cited that at pages 21 to 22 of our brief.

2 One thing that I think is distinguishable here
3 from the *Exxon Valdez* incident is we knew there that there were
4 risks from tankers, and unfortunately we had a situation there
5 where we now know there was a drunk captain.

6 The risks here are new. These are risks from
7 deepwater drilling that we perhaps didn't realize exist in the
8 magnitude that they exist before this Deepwater Horizon
9 accident. Because of that and because it's a very complicated
10 thing to regulate, it takes time. Six months is not an
11 unwarranted amount of time to take a full, thorough look at a
12 complicated regulatory system and review it and make
13 recommendations and to pause things during that time.

14 **THE COURT:** Why not a year?

15 **MS. WANNAMAKER:** We would defer to the government on
16 that. The government has said six months is an adequate amount
17 of time for them to do this review --

18 **THE COURT:** Why not three months?

19 **MS. WANNAMAKER:** They noted that, you know, they
20 could shorten the suspension if they can do what they need to
21 do in that time. They have said they need six months.

22 **THE COURT:** Or lengthen it.

23 **MS. WANNAMAKER:** Correct. Finally, Your Honor, we
24 would note that, under the APA, the Court's job is to not
25 substitute its judgment for the judgment of the agency.

1 **THE COURT:** No, it's not.

2 **MS. WANNAMAKER:** We believe that many of these
3 questions are policy questions and that the Court should
4 exercise its role in reviewing the action under the APA and not
5 substitute its judgment for the policy judgment of MMS. Thank
6 you.

7 **THE COURT:** Well, I want to thank everyone,
8 especially counsel, for your cooperation. I want to thank
9 those members of the public who are here for your attention and
10 the way you have conducted yourselves. I know that these
11 issues trigger deep emotions on both sides.

12 I am going to take a look at everything again.
13 The Court will issue a decision no later than noon on
14 Wednesday. I will do my best to try to get a decision out no
15 later than noon tomorrow so as to not delay either side in
16 knowing whatever it is that they wish to do next. I appreciate
17 the lieutenant governor being here. With that, unless there's
18 anything else, Court stands adjourned.

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

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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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