

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HORNBECK OFFSHORE SERVICES, L.L.C.,	*	CIVIL ACTION NO. 10-1663(F)(2)
Plaintiff	*	
VERSUS	*	SECTION F
	*	
KENNETH LEE “KEN” SALAZAR, IN HIS OFFICIAL CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES DEPARTMENT OF THE INTERIOR; ROBERT “BOB” ABBEY, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR, MINERALS MANAGEMENT SERVICE; AND MINERALS MANAGEMENT SERVICE,	*	JUDGE FELDMAN
	*	
	*	MAGISTRATE 2 MAGISTRATE WILKINSON
	*	
Defendants	*	
* * * * *	*	

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’ MOTION TO
SUPPLEMENT ADMINISTRATIVE RECORD**

Plaintiffs, Hornbeck Offshore Services, L.L.C. (“Hornbeck”), the Bollinger Entities and the Chouest Entities (collectively, “Plaintiffs”), respectfully submit this memorandum of law in support of their Motion to Supplement Administrative Record (“Motion”), filed pursuant to the Court’s orders dated June 11, 2010 (Rec. Doc. 10) and June 14, 2010 (Rec. Doc. 23). The Administrative Record, on which Plaintiffs’ pending Motion for Preliminary Injunction will be

decided, should include, if it does not already, the May 11, 2010 MMS Deepwater Drilling Rig Inspection Report (the “Post-Incident Inspection Report”).¹

Plaintiffs submit their Motion and this memorandum in support out of an abundance of caution. In the event that Defendants properly include the Post-Incident Inspection Report in the Administrative Record they submit, then the Court need not consider Plaintiffs’ Motion. If, however, Defendants fail to include the Post-Incident Inspection Report in the Administrative Record, then Plaintiffs’ Motion should be granted and an order should be entered requiring Defendants to supplement the Administrative Record with the Post-Incident Inspection Report.

Without the Post-Incident Inspection Report, the Administrative Record is missing a document critical to the Court’s consideration of Plaintiffs’ Motion for Preliminary Injunction. Defendant Minerals Management Service (“MMS”) issued the Post-Incident Inspection Report on May 11, 2010, just three weeks after the Deepwater Horizon Incident (the “Incident”) on April 20 and less than two weeks after President Obama directed Defendant Secretary Salazar, on April 30, to review the Incident and report on the safety of oil and gas exploration and production operations on the Outer Continental Shelf (“OCS”).

The Post-Incident Inspection Report summarizes the findings of MMS inspectors who inspected twenty-nine deepwater drilling rigs between April 27 and May 4. According to the Post-Incident Inspection Report, MMS found no violations of governing regulations or existing

¹ The Post-Incident Inspection Report was attached as Exhibit 4 to the Verified First Supplemental and Amended Complaint for Declaratory and Injunctive Relief (Rec. Doc. 5) (“Supplemental and Amended Complaint”). *See* Rec. Doc. 5-1. It was also attached as Exhibit E to Hornbeck’s Memorandum of Law in Support of Its Motion for Preliminary Injunction (Rec. Doc. 7-1). *See* Rec. Doc. 7-2. A copy of the Post-Incident Inspection Report is also attached to the Affidavit of Hans Juvkam-Wold as Exhibit “C.” A copy of Dr. Juvkam-Wold’s Affidavit is attached hereto as Exhibit “1.”

permit terms on 27 of the 29 drilling rigs inspected. On the other two drilling rigs, MMS found only minor violations.

Because MMS issued it on May 11, the Post-Incident Inspection Report was necessarily before Defendants prior to May 27, when Secretary Salazar issued his Report, entitled “Increased Safety Measures for Energy Development on the Outer Continental Shelf” (the “Report”).² In fact, one of the seven experts who the Report states was identified by the National Academy of Engineering to peer-review the Report’s recommendations, Dr. Hans Juvkam-Wold, has attested that he “considered” the Post-Incident Inspection Report when reviewing the safety Report in draft form. Affidavit of Hans Juvkam-Wold at ¶ 12 (a copy of Dr. Juvkam-Wold’s Affidavit is attached hereto as Exhibit “1”). The Report recommended “a six-month moratorium on permits for new wells being drilled using floating rigs” and further “an immediate halt to drilling operations on the 33 permitted wells . . . that are currently being drilled using floating rigs in the Gulf of Mexico.” Report’s Executive Summary at p. 2. Because the Post-Incident Inspection Report details the results of the post-April 20 inspections of 29 of the “33 permitted wells” for which the Report recommends that all operations must halt and given that the Post-Incident Inspection Report shows that 27 of those wells were in full compliance with all regulatory conditions and requirements, with the other 2 having only “minor” violations, it is a critical part of the Administrative Record in this case. Further, the Post-Incident Inspection Report was likewise before Defendants in advance of May 28, when Secretary Salazar issued a one-page Memorandum entitled “Suspension of Outer Continental Shelf (OCS) Drilling of New Deepwater Wells” (the “Moratorium”), imposing the six-month Moratorium on deepwater

² The Report was attached as Exhibit 3 to the Supplemental and Amended Complaint. *See* Rec. Doc. 5-1. It was also attached as Exhibit A to Hornbeck’s Memorandum of Law in Support of Its Motion for Preliminary Injunction. *See* Rec. Doc. 7-2.

drilling on the OCS and halting drilling on currently permitted deepwater wells.³ It was similarly before the Defendants in the weeks preceding the MMS's decision to issue, on May 30, NTL No. 2010-N04, which implemented Secretary Salazar's Moratorium.⁴

It is evident that the Post-Incident Inspection Report will play a key role in the resolution of Plaintiffs' Motion for Preliminary Injunction. Specifically, the Post-Incident Inspection Report should be before the Court when it considers the probability of success on the merits factor of the four-part test for preliminary injunctive relief. Accordingly, the Court should order Defendants to include the Post-Incident Inspection Report in the Administrative Record if they omitted to do so.

Law and Argument

A court reviewing an agency action must base its decision on "the whole record" that was actually before the agency, as opposed to a selective record compiled by agency lawyers for the purpose of defending the final result. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971). In fact, "the 'whole record,' if it is incomplete, must be viewed as a 'fictional account of the actual decision-making process.'" *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (quoting *Home Box Office, Inc. v. Federal Communications Comm'n*, 567 F.2d 9, 54 (D.C. Cir. 1977)).

A court may grant a motion to supplement the administrative record to require an administrative agency to submit information already in its possession that was part of its decisionmaking process but was initially omitted from the record. *See Pacific Shores*

³ The Moratorium was attached as Exhibit 1 to the Supplemental and Amended Complaint. *See* Rec. Doc. 5-1. It was also attached as Exhibit G to Hornbeck's Memorandum of Law in Support of Its Motion for Preliminary Injunction. *See* Rec. Doc. 7-2.

⁴ NTL No. 2010-N04 was attached as Exhibit 2 to the Supplemental and Amended Complaint. *See* Rec. Doc. 5-1. It was also attached as Exhibit H to Hornbeck's Memorandum of Law in Support of Its Motion for Preliminary Injunction. *See* Rec. Doc. 7-2.

Subdivision v. U.S. Army Corps of Eng'rs, 448 F. Supp. 2d 1, 5-6 (D.D.C. 2006). Granting a motion to supplement is appropriate when, among other things: “the agency deliberately or negligently excluded documents that may have been adverse to its decision” *Medina County Environmental Action Assoc. v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010) (quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)); see also *Esch v. Yeuter*, 876 F.2d 976, 991 (D.C. Cir. 1987) (observing that it is proper to supplement the administrative record “when an agency considered evidence which it failed to include in the record”) For example, in *Environmental Defense Fund v. Blum*, 458 F. Supp. 650 (D.D.C. 1978), the court held that “[t]he agency may not . . . skew the ‘record’ for review in its favor by excluding from that ‘record’ information in its own files which has great pertinence to the proceeding in question” *Id.* at 661.

Here, if Defendants were to decline to submit the Post-Incident Inspection Report to the Court, then they will have attempted to shape the record to suit their purposes. By omitting the Post-Incident Inspection Report, Defendants would have “deliberately or negligently excluded documents that may have been adverse to [their] decision” to enter the Moratorium, particularly under circumstances in which one of the “peer-review” National Academy of Engineering experts has attested that he considered the Post-Incident Inspection Report in his review of the draft Report. *Medina County Environmental Action Assoc.*, 602 F.3d at 706. The Post-Incident Inspection Report, specifically its findings of no violations of governing regulations or existing permit terms on 27 of the 29 drilling rigs inspected, is directly contrary to Secretary Salazar’s decision to halt deepwater drilling on 33 currently permitted wells. Further, the six-month blanket Moratorium on deepwater drilling activities is adverse to the Post-Incident Inspection Report’s finding of only “minor” violations on just 2 of the 29 rigs inspected. Despite these

findings, Secretary Salazar issued the Moratorium less than three weeks after MMS issued the Post-Incident Inspection Report.

In the event that Defendants fail to include the Post-Incident Inspection Report in the Administrative Record submitted to the Court, then they will have attempted to “skew the ‘record’ for review” in their “favor by excluding from that ‘record’ information in” their “own files which has great pertinence to the proceeding in question” *Environmental Defense Fund.*, 458 F. Supp. at 661. The Post-Incident Inspection Report should be before the Court when it considers Plaintiffs’ Motion for Preliminary Injunction and decides whether Plaintiffs have satisfied their burden to show a likelihood of success on the merits. Therefore, it is entirely appropriate for the Court to grant Plaintiffs’ Motion to Supplement Administrative Record.

Conclusion

For the foregoing reasons, this Court should grant Plaintiffs’ Motion to Supplement Administrative Record and order Defendants to supplement the Administrative Record with the Post-Incident Inspection Report in the event they have omitted to include it.

Respectfully submitted,

s/ Carl D. Rosenblum

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**Attorneys for Plaintiffs,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon all parties by email or by using the CM/ECF system which will send a Notice of Electronic filing to all counsel of record, this 16th day of June 2010.

s/ Carl D. Rosenblum
