Hornbeck Offshore Services, L.L.C. v. Salazar et al Doc. 27

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

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

* * * * * * * *

PLAINTIFFS' PRE-HEARING BRIEF

Pursuant to this Court's Orders dated June 11, 2010 and June 14, 2010,[1] Plaintiffs, Hornbeck Offshore Services, L.L.C. ("Hornbeck"), the Bollinger Entities and the Chouest Entities (collectively, "Plaintiffs"), respectfully submit this Pre-Hearing Brief. Plaintiffs file this brief in further support of their request for preliminary injunctive relief, the grounds for which

[1] (Rec. Docs. 10, 23).

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are more fully set forth in their previous motions and memoranda in support filed with the Court, which set forth Plaintiffs' arguments in support of their satisfaction of the four-factor preliminary injunction test. *See* Rec. Docs. 7, 7-1, 9, 9-1 & 12.

This Pre-hearing Brief seeks to address issues that Plaintiffs anticipate Defendants might raise at the preliminary injunction stage and on which Plaintiffs believe it would be useful for the Court to have their views in advance. As set forth below: (a) Plaintiffs have standing to bring this lawsuit; (b) the Court's scope of review is under the Administrative Procedure Act's arbitrary and capricious standard, requiring this Court's review of the Administrative Record as it existed before Defendants at the time they made the challenged decision, and; (c) in the event of the entry of a preliminary injunction against the Moratorium, Plaintiffs should not be required to post additional security.

I. PLAINTIFFS HAVE STANDING TO BRING THIS LAWSUIT.

Plaintiffs challenge two decisions by Defendants: the Moratorium issued by the Secretary of the Interior on May 28, 2010,[2] and the Notice to Lessees (the "NTL") issued by the Minerals Management Service ("MMS") effective May 30, 2010.[3] Both of these decisions constitute "final" agency action within the meaning of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704, because they satisfy the two criteria established by the Supreme Court:

> First, the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

Bennett v. Spear, 520 U.S. 154, 177-78 (1997). Both the Moratorium and the NTL satisfy these

[2] *See* Exhibit 1 to Rec. Doc. 5-1 (Secretary Salazar's May 28, 2010 one-page Memorandum entitled "Suspension of Outer Continental Shelf (OCS) Drilling of New Deepwater Wells.")

[3] *See* Exhibit 2 to Rec. Doc. 5-1 (MMS's NTL No. 2010-N104, entitled a "Notice to Lessees and Operators of Federal Oil and Gas Leases in the Outer Continental Shelf Regions of the Gulf of Mexico and the Pacific to

criteria. The government's decision making process is complete, and the rights and obligations of entities conducting deepwater drilling have been determined.

Plaintiffs satisfy both the statutory and constitutional requirements for standing to bring this lawsuit. Plaintiffs are authorized to seek judicial review of the Secretary's Moratorium and the NTL by the citizen suit provision of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349(a) and the APA. Moreover, Plaintiffs squarely fall within the "zone of interests" that OCSLA seeks to protect because of their important role in furthering the explicit statutory interest in protecting the "human environment" of the Outer Continental Shelf ("OCS") in its economic dimensions.

With respect to the constitutional requirements, Plaintiffs have alleged "injury in fact" that is concrete and particularized, in that their customers – entities that have permits for deepwater drilling – have in some cases sought to cancel and in other cases have notified Plaintiffs of their imminent intent to cancel their support contracts because the Moratorium prevents them from drilling and thus ends any further need for Plaintiffs' services. Plaintiffs' injuries are fairly traceable to Defendants' actions because the Moratorium and NTL have coerced Plaintiffs' customers into suspending their drilling operations, which directly produced the injuries suffered by Plaintiffs. These injuries are redressable by the relief Plaintiffs seek because an order declaring the Moratorium and NTL invalid and unenforceable would allow the lessees to resume drilling and thus restore their need for the support services Plaintiffs provide under contract.

In sum, Plaintiffs squarely have standing under cases such as *Bennett v. Spear*, 520 U.S. 154 (1997), and *Center for Biological Diversity v. U.S. Department of the Interior*, 563 F.3d 466,

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Implement the Directive to Impose a Moratorium on All Drilling of Deepwater Wells.")

479 (D.C. Cir. 2009) (finding that public interest groups have standing under the OCSLA and the National Environmental Protection Act on a procedural theory of standing, based on claims that Interior failed to consider the economic costs of greenhouse gas emissions and the effects of climate change on the OCSLA and a showing that it is substantially probable that the procedural breach will cause the essential injury Plaintiffs claim to their own interests.).

1. Governing Statutory Provisions and Allegations of the Complaint, as Amended.

The applicable statute, 43 U.S.C. § 1334(a), provides that the Secretary of the Interior shall issue regulations to administer the leasing provisions of the OCSLA. Subsection 1334(a)(1) provides that the regulations issued by the Secretary shall include provisions:

> (1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit . . .
>
> (B) if there is a threat of serious, irreparable, or immediate harm or damage to life . . ., to property, to any mineral deposits (in the areas leased or not leased), or to the marine, coastal or human environment, ...

(Emphasis added). The definitional provision, 43 U.S.C. § 1331(i), further provides:

> The term "human environment" means the physical, social, and economic components, conditions, and factors which interactively determine the state, condition, and quality of living conditions, employment, and health of those affected, directly or indirectly, by activities occurring on the outer Continental Shelf; . . . .

(Emphasis added).

The Verified First Supplemental and Amended Complaint (Rec. Doc. 5) ("Amended Complaint") alleges that the Secretary and the MMS violated Section 1334(a)(1) because they imposed the Moratorium and NTL that suspended all drilling activities on the OCS in water depths beyond 500 feet for which permits had previously been issued and suspended the processing of all new applications for drilling permits at water depths beyond 500 feet for a

minimum period of six months, without having made the findings required by Section 1334(a)(1) and without having adequate information in the Administrative Record to support that decision. (Amended Complaint, ¶¶ 79-88). The Amended Complaint further alleges that Defendants' actions were arbitrary, capricious, an abuse of discretion or otherwise contrary to law, in violation of the APA. (Amended Complaint, ¶¶ 76, 84, 89). Finally, the Amended Complaint alleges that the Defendants' actions substantially harm Plaintiffs' state, condition and quality of living conditions and employment and that they are affected directly or indirectly by this suspension of activity on the deepwater of the OCS. (Amended Complaint, ¶¶ 93-100).

The citizen suit provision of the OCSLA, 43 U.S.C. § 1349(a)(1), provides:

> (1) Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States, and any other government instrumentality or agency . . . of any alleged violation of any provision of this subchapter or any regulation promulgated under this subchapter . . . .

Subsection 1349(a)(3) further provides:

> (3) An action may be brought under this subsection immediately after notification of the alleged violation in any case in which the alleged violation constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff.

Here, the Amended Complaint alleges that the illegal Moratorium and NTL issued by the Defendants would have immediate adverse effects on Plaintiffs' legal interests established by Section 1344(a)(1)(B) and Section 1332(3), which requires a balancing of orderly resource development with protection of the human, marine and coastal environments. The Moratorium and NTL also have affected and will continue to affect Plaintiffs' legal interest in contracts to support existing permitted drilling operations and future operations that would have gone forward absent Defendants' action.

2. Plaintiffs Satisfy the Statutory Requirements for Standing.

Plaintiffs are entitled to bring suit against the Department of the Interior under the citizen suit provision because they have "a valid legal interest" – their contractual and economic interests – that have been adversely affected by the Moratorium and NTL. Further, the interests that have been harmed are among those that Congress clearly intended to be protected under the OCSLA.

The Supreme Court has suggested that in considering standing challenges, lower courts should first look at what interests are within the "zone of interests" that Congress arguably intended to be protected by the statute, and then inquire whether a plaintiffs' interests are among them. *See National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 492 (1998). For a plaintiff's interests to be within the "zone," there does not have to be an express "indication of congressional purpose to benefit the would-be plaintiff." *Id.* at 492 (citations omitted). But, "[i]n cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399-400 (1987).

Plaintiffs' interests squarely fall within the "zone of interests" intended to be protected by the OCSLA. They have been injured, directly and indirectly, by the adverse effects of the Moratorium and NTL on the "human environment," as defined by Congress to include the economic components, conditions and other factors that determine the state, condition, and quality of living conditions, employment and health of those affected. The relevant verified assertions in the Amended Complaint and the supporting Affidavits are set forth in the

constitutional standing section below and will not be repeated here. The statements in the Affidavits are plainly sufficient to demonstrate standing, especially at this stage of the case, in light of the Supreme Court's observation that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . . ." because the courts will presume that the general allegations include the specific facts necessary to support the claim. *Bennett*, 520 U.S. at 168.

3. Plaintiffs Satisfy the Constitutional Requirements for Standing.

Under Article III, to satisfy the constitutional minimum standards for standing, Plaintiffs must allege and demonstrate that they have suffered "injury in fact;" that the injury is "fairly traceable" to the actions of Defendants; and that the injury likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). As set forth in the verified Amended Complaint and supporting Affidavits of Todd M. Hornbeck, Andrew St. Germain, and Dionne Chouest Austin,[4] Plaintiffs satisfy all the required constitutional elements.

a. Plaintiffs Have Suffered Injury in Fact.

The verified Amended Complaint and Affidavits show that the Plaintiffs have suffered an invasion of a legally protected interest that is "concrete and particularized" and "actual or imminent," and not "conjectural or hypothetical." *Lujan*, 504 U.S. at 560. The harm is concrete and specific to Plaintiffs – cancellation of their service contracts by Defendants' illegal act in suspending all deepwater drilling. Moreover, the harm is actual or imminent.

As set forth in the Affidavit of Todd Hornbeck, Chairman of the Board, President and Chief Executive Officer of Hornbeck Offshore Services, Inc. and all its subsidiaries, including Plaintiff Hornbeck, at least one of Hornbeck's customers has already sought to terminate its

[4] The Affidavits of Todd Hornbeck, Andrew St. Germain, and Dionne Chouest Austin are attached to Plaintiffs' Motion to File Affidavits and Declaration filed contemporaneously herewith.

supply contract with Hornbeck because of the Moratorium and NTL, by placing a Hornbeck vessel "off-hire" – that is, no longer utilizing its services. Todd Hornbeck Affidavit at ¶ 18. Further, as set forth at ¶¶ 17 & 19-26 of Mr. Hornbeck's Affidavit, several additional Hornbeck customers have started the process of placing its vessels "off-hire" and ceasing to use their services because of the Moratorium and NTL. With respect to the Bollinger Entities Plaintiffs: (a) BEE STING and BAYOU BEE, two vessels owned and operated by Plaintiffs, Bee Mar – Bee Sting LLC and Bee Mar – Bayou Bee LLC, have been released and placed "off hire" this week by their deepwater customer in the Gulf of Mexico as a result of the Moratorium; and (b) two of their other vessels, BUMBLE BEE and QUEEN BEE, owned and operated by Plaintiffs, Bee Mar – Bumble Bee LLC and Bee Mar – Queen Bee LLC, were recently delivered and, as a result of the Moratorium, have only been able to obtain day-to-day contracts, rather than long-term time charter contracts as is typical for these sophisticated, "high-spec" modern DP2 platform supply vessels. Affidavit of Andrew St. Germain, Vice-President and Chief Financial Officer of Bollinger Shipyards, Inc., at ¶¶ 14-17. Finally, with respect to the Chouest Entities Plaintiffs, at least one Chouest Shipyard Company has already delayed construction of a platform supply vessel as a result of the Moratorium. Affidavit of Dionne Chouest Austin, General Counsel of the Chouest Entities, at ¶ 14. Collectively, Plaintiffs have invested many hundreds of millions of dollars into developing the economic assets necessary to provide support services to deepwater drilling operations, but they have now been barred from using those assets by Defendants' imposition of an industry-wide Moratorium. *See Mosdo Chofetz Chaim, Inc. v. Village of Wesley Hills*, 2010 WL 1270211 at *8 (S.D.N.Y. 2010).

The harms suffered by Plaintiffs therefore are concrete; they have already happened and are continuing to mount up as new incidents of harm occur. Plaintiffs are not bringing a general

challenge to Defendants' policy on oil drilling that is shared to the same degree with all members of the public. To the contrary, Plaintiffs have been directly injured, in a manner that harms their specific economic interests, by the imposition of the Moratorium and NTL. This injury is "particularized" to Plaintiffs within the meaning of *Lujan* and its progeny notwithstanding that many other persons and companies in the Gulf region may be suffering similar injuries.[5]

b. Plaintiffs' Harm is "Fairly Traceable" to Defendants' Conduct.

The application of the "fairly traceable" element varies depending upon whether the plaintiff is the direct object of the government's regulatory action. Where, as here, the Plaintiffs' injuries result from the government's unlawful action against another entity (in this case, the lessees), the courts examine the matter more carefully because the causation element of standing may depend upon choices made by independent parties who are not before the court. In such cases, standing is not precluded, but it is admittedly more difficult to establish. The plaintiff must "adduce facts showing" that the choices made by the other parties "have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562.

In applying this test, the courts have found standing in those cases in which plaintiffs have shown that there is a tight chain of causation between government actions and the harm complained of, notwithstanding the presence of an independent party in the chain of causation. In particular, the Supreme Court addressed this issue in *Bennett v. Spear*, 520 U.S. 154, where in a unanimous opinion it upheld the plaintiff's standing notwithstanding that there was an

[5] Moreover, Defendants clearly understand the critical role that support vessels and supply boats play in deepwater offshore drilling. For example, 30 C.F.R. § 250.224 requires that in submitting their Exploration Plan, the company must submit:

> (a) *General*. A description of the crew boats, supply boats, anchor handling vessels, other vessels, offshore vehicles, and aircraft you will use to support your exploration activities.

independent party (there, a government agency) between the government action that was challenged (issuance of a Biological Opinion by another federal agency, the Bureau of Reclamation) and the harms to plaintiffs' economic interests by allocations of water that would be made based on that Opinion. In addressing the "fairly traceable" element, the Court rejected the government's argument that the plaintiffs lacked standing because the proximate cause of their harm was not the Biological Opinion but an independent decision by the Bureau. The Court stated that the government's argument:

> wrongly equates injury "fairly traceable" to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation. While, as we have said, it does not suffice if the injury complained of is "'th[e] result [of] the *independent* action of some third party not before the court,'" . . that does not preclude injury produced by determinative or coercive effect upon the action of someone else. . . .
>
> By the Government's own account, while the Services' Biological Opinion theoretically serves an "advisory function," . . . in reality it has a powerful coercive effect on the agency action . . . .
>
> The Service itself is, to put it mildly, keenly aware of the virtually determinative effect of its biological opinions.

Id. at 169, 170 (emphasis added; internal citations omitted).

Here, the allegations of the Amended Complaint fall squarely within the circumstances identified in *Bennett* in which the causation element is satisfied. Plaintiffs' injuries were caused by the "determinative or coercive" effect of Defendants' actions on the permit holders. The Moratorium and the NTL directed the lessees to cease deepwater drilling operations immediately at the first available safe moment and stated that Defendants would approve no new deepwater permits while the Moratorium is in place. As alleged in the Amended Complaint, these agency actions imposed an industry-wide shutdown on all new deepwater activity in the OCS. (Amended Complaint, ¶¶ 79, 99).

Moreover, Defendants were "keenly aware of the virtually determinative effect" of their actions. Their explicit intent was to shut down all operations by the entire deepwater drilling industry. The consequences of that action also are obvious and foreseeable. The lessees no longer would have any need or use for the services that previously were being provided by Plaintiffs and other supply contractors (and many other specialized economic industries that have developed in the Gulf region to service deepwater drilling), and they inevitably would start cancelling contracts.

The actions of the lessees in repudiating some of Plaintiffs' contracts as a result of the Moratorium and threatening to take imminent and similar action to cancel or suspend others, therefore was not an *independent* action, within the meaning of *Lujan* and *Bennett*. 504 U.S. at 560-61. Rather, the lessees' actions towards Plaintiffs were and are the direct consequence of the "determinative or coercive" industry-wide suspension of all deepwater drilling. The chain of causation here is at least as tight as the chain in *Bennett* and perhaps is as direct as could be imagined in a situation in which a third party is involved, because the third party here literally has no discretion – it must cease precisely those operations that Plaintiffs' business operations depend on and were designed to serve.

c. Plaintiffs' Injuries Are Redressable by an Order Overturning the Moratorium.

Plaintiffs' injuries are plainly redressable by the relief sought in this case, a declaratory order providing that the Moratorium and NTL are illegal and an injunction prohibiting Defendants from enforcing them. Invalidation of the industry-wide shutdown of deepwater drilling activity in the OCS would allow the lessees to resume drilling operations, and the lessees would again have the immediate need for support services for

their operations that Plaintiffs fulfilled until the imposition of the Moratorium.

In sum, the OCSLA authorizes "any person having a valid legal interest which is or may be adversely affected" to challenge Defendants' actions. 43 U.S. C. § 1349(a)(a). Plaintiffs clearly satisfy the statutory standard. The statute also informs the prudential and constitutional standing principles. Plaintiffs are within the "zone of interests" protected by the OCSLA, as defined by Congress because they have a valid legal interest based on the adverse effects of the Moratorium upon the "human environment," including its "economic components, conditions, and factors which interactively determine the state, condition, and quality of living conditions, employment, and health of those affected, directly or indirectly, by activities occurring on the outer Continental Shelf." 43 U.S.C. § 1331(i). Further, Plaintiffs meet the constitutional minimum requirements of injury in fact (demonstrated adverse economic impact), causation (the Moratorium caused cancellation and threats of cancellation of contracts and otherwise had an adverse economic impact on Plaintiffs), and redressability (setting aside the Moratorium would relieve this adverse economic impact). Plaintiffs need make no other showing of their standing to bring this suit.

II. THE COURT'S SCOPE OF REVIEW IS UNDER THE APA's ARBITRARY AND CAPRICIOUS STANDARD.

The scope of a court's review with respect to a challenged agency action is set forth in the APA, which requires the court to determine if the action fails under the "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Specifically, the APA directs that the reviewing court "shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*

"[W]hile the arbitrary and capricious standard of review is highly deferential, it is by no means a rubber stamp." *U.S. v. Garner*, 767 F.2d 104, 116 (5th Cir. 1985). The "high degree of

deference"[6] accorded to agency action reflects a recognition of the agency's ability to call upon expertise related to the specific field covered by its regulatory authority. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency rule arbitrary and capricious if it "is so implausible that it could not be ascribed to . . . the product of agency expertise.") This deference, therefore, necessarily presumes that the agency will avail itself of, rather than ignore, the specialized and expert guidance to which it has access. With the Moratorium and NTL, however, Defendants did the opposite; they called upon experts from the National Academy of Engineering and other consulting experts to prepare and review the Secretary's safety Report and then ignored those experts. *See, e.g.*, Plaintiffs' Motion to File Affidavits and Declaration and Memorandum of Law in Support of same, filed contemporaneously herewith. They further called upon their own internal experts to inspect the permitted and active deepwater rigs, yet disregarded their own experts' findings as well. *See, e.g.*, Plaintiffs' Motion to Supplement Administrative Record and Memorandum of Law in Support of same, filed contemporaneously herewith.

Judicial review of agency action is not a mere "rubber stamp" because, to avoid having the reviewing court set aside its action under the "arbitrary and capricious" standard, an agency must have examined the relevant data and articulated a satisfactory explanation for its decision that shows a "rational connection between the facts found and the choice made." *Id.* (citations and internal quotations omitted). "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs.*, 463 U.S. at 50. Further, the "focal point" of judicial review in applying the arbitrary and capricious standard "should be the administrative record already in existence, not some new record made initially in

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[6] *Milena Ship Mgmt. Co. v. Newcomb*, 804 F. Supp. 859, 861 (E.D. La. 1992).

the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1576-1577 (10th Cir. 1994) (stating that arbitrary and capricious review "requires a plenary review of the record as it existed before the agency" and cautioning that the district court "may not make up for deficiencies" in the Administrative Record "by supplying [a] reasoned basis for agency action") (citations omitted); *Department of Banking & Consumer Finance of Mississippi v. Clarke*, 809 F.2d 266, 271 (5th Cir. 1987) ("Our determination must be made on the basis of the administrative record.") (citation omitted).

"Post hoc explanations – especially those offered by appellate counsel – are simply an inadequate basis for the exercise of substantive review of an administrative decision." *Garner*, at 117 (citations omitted). For example, in *Garner*, the Fifth Circuit rejected the government's after-the-fact explanation that its action sought to conserve public resources even though the court acknowledged that that a concern over "where public money can best be spent is often a legitimate basis for the exercise of administrative discretion." *Id.* at 122 (citation omitted). In rejecting the agency's belated explanation, the Fifth Circuit concluded that "[t]he need to conserve resources . . . is not an administrative panacea that can be asserted post hoc" because "'[s]peculations about what might have been good reasons had the agency thought of them do not suffice.'" *Id.* (quoting *Global Van Lines, Inc. v. ICC*, 714 F.2d 1290, 1298 (5th Cir. 1983)); *see also, e.g., Sierra Club v. Unites States Army Corps of Eng'rs*, 771 F.2d 409, 413 (8th Cir. 1985) (observing that, while the administrative record may be supplemented if necessary by additional explanatory proof, any "new materials submitted should . . . be merely explanatory of the original record and should contain no new rationalizations for the agency's decision.")[7]

[7] 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 the agency lawyers for the purpose of defending the final result. *See Citizens to Protect Overton Park v. Volpe*, 401 U.S. 402, 419 (1971). Accordingly, a court may grant a motion to supplement the Administrative Record to require an administrative agency to submit information already

The factual findings, rational basis and support for an explanation that demonstrates a rational connection between the facts found and the choice made, therefore, must exist in the Administrative Record that was before the agency at the time the decision was made. And, although post hoc rationalizations may provide "good reasons" for the challenged agency action, they will "not suffice." *Garner*, 767 F.2d at 122. Despite these controlling principles of arbitrary and capricious review, Defendants in this matter are already attempting to assert impermissible after-the-fact rationalizations for the Moratorium and the NTL. For instance, in a Notice to Lessees issued on June 8, 2010, entitled "National Notice to Lessees and Operators of Federal Oil and Gas Leases, Outer Continental Shelf (OCS) – Increased Safety Measures for Energy Development on the OCS," MMS states at footnote 1:

> The six month suspension under the Moratorium NTL was directed toward operations in water depths greater than 500 feet in the Gulf of Mexico and the Pacific Regions. The 500 feet specification was based on the fact that jack-up rigs and human diver capability does not exist beyond this depth, and therefore there are significantly greater challenges in containing a blowout in deep water. The six month suspension period coincides with the hurricane season and the timeline for the Presidential Commission to examine the root causes of the BP Oil Spill and develop options for guarding against and mitigating the impacts of oil spills. The suspension also provides the time necessary to develop regulations to address additional safety concerns described in the Safety Measures Report.

Contrary to the June 8th NTL (which was issued well over a week after Defendants ordered the Moratorium), the Moratorium, the NTL and the Report contain no facts, analysis, empirical data or risk assessment related to the "500 foot specification," much less to the use of jack-up rigs at any water depth or to human diver capability at any given water depth. Rather, the only reference to any specific water depth in connection with "risk" appears in the Report,

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in its possession that was part of its decision-making process but that was initially omitted from the record. *See Pacific Shores 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 action is not adequately explained in the record before the court or "when an agency considered evidence which it failed to include in the record . . . ." *Esch v. Yeuter*, 876 F.2d 976, 991 (D.C. Cir. 1987).

which says nothing about 500 feet and instead inconsistently states that "the risks associated with operating in water depths in excess of 1,000 feet are significantly more complex than in shallow water." Report at p. 2.

Similarly, neither the Moratorium, the NTL nor the Report contains any facts, analysis, empirical data or risk assessment to support imposing the Moratorium for a six-month period nor to support a ban on all drilling in water depths greater than 500 feet during the hurricane season.[8] Moreover, Defendants' after-the-fact rationalization that the six-month period "coincides with the timeline for the Presidential Commission to examine the root causes of the BP Oil Spill" is, in fact, inconsistent with the true timing of the Commission's work. The President established the Commission by Executive Order, dated May 21, 2010, pursuant to which a Commission of 7 members "who shall be appointed by the President" shall examine "the root causes of the Deepwater Horizon oil disaster" and further shall "submit a final report to the President with its findings and options for consideration <u>within 6 months of the date of the Commission's first meeting</u>." Exec. Order No. 13543, 75 Fed. Reg. 29397 (May 26, 2010) (emphasis added).

There are several reasons why the Commission's timeline cannot provide a rational basis for Defendants' actions. First, the deadline for submission for a report is not legally binding, and can be modified unilaterally by the government or ignored. Moreover, under the Executive Order, the six-month period for examination of the root causes of the spill and deadline for submission of the Commission's report will not begin to run until the Commission holds its first meeting, which may put the deadline for the Commission's report months beyond the currently

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[8] The Report does make several references to hurricanes, but not to "hurricane season" nor to any facts to show a risk associated with drilling at depths of water greater than 500 feet during it. *See, e.g.,* Report at pp. 5; 6 (referring to historical blowouts some of which the Report notes "related to external forces, such as hurricanes and ship collisions" or resulted from "hurricane damage," all without any specification as to the water depth for the wells that suffered hurricane-related blowouts).

scheduled end of the Moratorium on November 30, 2010. For another, while the President appointed 2 of the 7 members of the Commission immediately upon establishing it, the remaining 5 were appointed just days ago and over 3 weeks after the President's Executive Order established the Commission, thus further delaying its "first meeting." Accordingly, putting aside that Defendants' rationalization is impermissibly post hoc, their explanation that they ordered the six-month Moratorium to "coincide" with the time it would take for the President's Commission to examine and report on the spill fails the test that the agency must articulate a "rational" explanation for its action. In short, just as the agency's post hoc reliance on "conservation of public resources" in *Garner* was unsuccessful, any effort by Defendants to provide post hoc explanations for their decision here is not permissible under arbitrary and capricious review. If Defendants offer such post hoc rationalizations, the Court should not consider them.

III. IN THE EVENT OF A PRELIMINARY INJUNCTION AGAINST THE MORATORIUM, PLAINTIFFS SHOULD NOT BE REQUIRED TO POST ADDITIONAL SECURITY.

To obtain a preliminary injunction, one of the requirements under Rule 65 of the Federal Rules of Civil Procedure is that the movant give "security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." With respect to this requirement, the Fifth Circuit has held: "Under this court's interpretation of Rule 65(c), the amount of security required by the rule is a matter within the discretion of the trial court" and that the trial court therefore "'may elect to require no security at all.'" *Atlanta v. Metropolitan Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981) (quoting *Corrigan Dispatch Co. v. Casa Guzman, F.A.*, 569 F.2d 300, 303 (5th Cir. 1978)); *see also Rudney v. International Offshore Servs., L.L.C.*, 2007 WL 2900230 *5 (E.D. La. Oct. 1, 2007) (quoting *Corrigan Dispatch* and holding that no security was required before injunctive relief could be granted).

By statute and regulation, several levels of security are already in place to "pay any costs and damages sustained" if this Court preliminarily enjoins enforcement of the Moratorium. Both when they took their leases and when they filed their Exploration Plans with the MMS, the lessees who are the subject of this Moratorium – in particular, the operators of the thirty-three deepwater wells whose activities the Moratorium has enjoined – provided the required bonds and other forms of security for their offshore operations and for the possibility of any future oil spills. Accordingly, because sufficient levels of security are already in place, this matter falls squarely within circumstances under which this Court should exercise its discretion to require no additional security at all.

First, the MMS requires all lessees to provide certain levels of bonding, depending on the leasehold activities that a lessee proposes. The purpose of these bonds, according to NTL No. 2000-G16, effective September 7, 2000 (the "Bonding NTL"), is to "ensure that (the lessee) fully compl(ies) with regulatory and lease requirements...includ(ing) rents, royalties, environmental damage and clean up activities not related to oil spills, abandonment and site clearance, and other lease obligations." A lessee must provide a series of bonds, in increasing amounts, as it develops a lease. At the outset, when there are no operations on a lease, the lessee must provide a $50,000 lease-specific bond - or, if the lessee has several leases in the Gulf of Mexico, it may opt for a $300,000 area-wide bond, which would cover all leases that it holds in the Gulf of Mexico. At the next stage, when the lessee proposes an exploration plan, the bond requirement increases to $200,000 on an individual lease basis or to $1 million for an area-wide bond covering all of the lessee's Gulf of Mexico leases. Finally, when the lessee proposes a development plan, the bond requirement increases again, to $500,000 on an individual lease basis or to $3 million for an area-wide bond covering all of the lessee's Gulf of Mexico leases. *See* Bonding NTL.

A lessee's responsibility for oil spills is treated separately, in accordance with the provisions of the Oil Pollution Act of 1990, 33 U.S.C. § 2701, *et seq*. (the "OPA"). The OPA requires a lessee to provide additional security as protection from damages caused by an oil spill. The amount of security that the lessee provides is tied to its estimate of the worst case oil spill amounts from the facility or facilities that it proposes to construct on the OCS. The required security ranges from $35 million for a worst case estimate of a spill (a "Worst Case Estimate") in an amount of up to 35,000 barrels, to $70 million for a Worst Case Estimate in an amount from 35,000 barrels to 70,0000 barrels, to $105 million for a Worst Case Estimate in an amount from 70,000 barrels to 105,000 barrels, to $150 million for a Worst Case Estimate in an amount of over 105,000 barrels. 30 C.F.R. § 253.13; *see also* NTL No. 2008-N05, effective August 26, 2008 (the "OSFR NTL"). The OPA further authorizes the President to increase the required level of security to $150 million for any level of Worst Case Estimate if he determines that the increase is justified "based on the relative operational, environmental, human health, and other risks posed by the quantity or quality of oil that is explored for, drilled for, produced, or transported by the responsible party . . ." 33 U.S.C. § 2716(c)(1)(C). Reinforcing this level of security, under the OPA the U.S. Coast Guard imposes additional financial requirements upon the operators of vessels and mobile offshore drilling units - again, as security for oil spills. 33 C.F.R. § 138, *et seq*.

Most importantly, before a lessee may begin operations, the MMS requires it to submit an Exploration Plan which must demonstrate that the lessee will comply with OPA coverage requirements for any facilities that it identifies and proposes to construct. 30 C.F.R. § 250.213(2). In fact, the MMS will not approve an application for a drilling permit until the lessee has demonstrated compliance with the OPA security requirements. (*See* the OSFR NTL).

All of the lessees that are subject to this Moratorium – from Shell to Anadarko to Marathon to Hess to all of the rest – provided the required bonds and demonstrated compliance with the OPA security requirements before they drilled any of the wells that are the subject of this Moratorium. As a result, in the event of a preliminary injunction against the Moratorium, Defendants are protected, fully in accordance with the rules and requirements that it has prescribed, and there is no necessity to require Plaintiffs to post any additional security.

IV. CONCLUSION

Should Defendants raise these issues in opposition to the Motion for Preliminary Injunction, for the foregoing reasons: (a) Plaintiffs have standing to bring this lawsuit; (b) the Court's scope of review is under the APA's arbitrary and capricious standard, requiring this Court's review of the Administrative Record as it existed before Defendants at the time they made the challenged decision, and; (c) in the event a preliminary injunction is issued against the Moratorium, Plaintiffs should not be required to post additional security.

Respectfully submitted,

s/ Carl D. Rosenblum

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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