UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

HORNBECK OFFSHORE SERVICES, L.L.C.,	*	**CIVIL ACTION NO. 10-1663**
Plaintiff	*	
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,	*	**MAGISTRATE "2"**
	*	
Defendants	*	

PLAINTIFFS' BRIEF ADDRESSING OCSLA'S CITIZEN SUIT PROVISION

NOW INTO COURT, through undersigned counsel, come Plaintiffs Hornbeck Offshore Services, L.L.C. ("Hornbeck"), the Bollinger Entities and the Chouest Entities, which, pursuant to the request of the Court, respectfully submit this brief to address the provision of the Outer Continental Shelf Lands Act ("OCSLA") for citizen suits, 43 U.S.C. § 1349, and, more specifically, the notification provision set forth in Section 1349(a)(3).

In a footnote contained in their Opposition to Plaintiffs' Motion for Preliminary Injunction (Rec. Doc. 33), Defendants assert that, "While in certain cases OCSLA permit plaintiffs to bring suit without the 60-day waiting period [as required under 43 U.S.C. § 1349(a)(2)(A)], that exception itself is subject to the mandatory requirement that plaintiffs provide 'notification of the alleged violation.' Defendants' Opposition at p. 9, n. 3 (referencing 43 U.S.C. § 1349(a)(3) as providing that "a party may file suit immediately after notice when 'the alleged violation constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff.'") Defendants claim: "In this case, Plaintiffs could not establish either exception to the 60-day waiting period" because they "do not even claim there is an imminent threat to public health or safety, and, as explained more fully in Section D, below,[1] the suspension orders do not threaten any immediate effects to Plaintiffs' legal interests." *Id.*

I. Plaintiffs Have Asserted an Administrative Procedure Act Claim, Not a Citizen Suit under OCSLA, and, Therefore, the Notice and Notification Provisions in OCSLA's Citizen Suit Provision Are Inapplicable.

The simple answer to the issue raised by Defendants regarding OCSLA's citizen suit "notification" provision under Section 1349(a)(3) is that Plaintiffs have brought a case under the Administrative Procedure Act ("APA"), not a citizen suit under OCSLA. Accordingly, neither OSCLA's citizen suit 60-day notice requirement under Section 1349(a)(2)(A), which, of course, would be inapplicable in any event under the exigent circumstances here, nor its citizen suit "notification" provision in Section 1349(a)(3) applies to this case.[2]

As the Fifth Circuit has concluded with respect to Section 1349(a) OCSLA citizen suits,

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[1] Section D of Defendants' Opposition is their argument that an injunction would not be in the public's interest.

[2] Plaintiffs acknowledge that, in their First Supplemental and Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint") (Rec. Doc. 5), they cited Section 1349(a). *See* Amended Complaint at ¶ 13. The mere citation of that provision, however, does not render this case an OCSLA citizen suit.

the "provision permits a private citizen to bring suit to enforce the OCSLA and any regulations promulgated pursuant to it, and to seek civil penalties." *Wentz v. Kerr-McGee Corp.*, 784 F.2d 699, 701 (5th Cir. 1986). As further articulated by the Fifth Circuit, under OCSLA's citizen suit provision, a "citizen thus may become a 'private attorney general' with regard to OCSLA enforcement." *Id.* Emphasizing that a citizen suit under OCSLA is "an enforcement action," the Court also noted that Section "1349(a) then goes on to set out a required procedure of notification of public officials before such a citizen suit can be brought." *Id.* at 701 n 4.

Here, Plaintiffs are not bringing an "enforcement action" as "private" attorneys general, much less are they seeking to recover any "civil penalties" or attorney's fees as permitted under Section 1349(5). Instead, the cause of action here is one for review under the APA. Plaintiffs challenge final agency action under the APA, asserting that Defendants exceeded their statutory and regulatory authority under OCSLA in contravention of the APA's arbitrary and capricious standard. *See, e.g.*, Amended Complaint at ¶¶ 72-100 (alleging Plaintiffs' claim, which is brought under the APA standards based on Defendants' exceeding their authority under OCSLA); ¶ 68 ("The Moratorium and NTL, issued pursuant to OCSLA, are subject to review under [the APA's] provisions for compliance with the APA and with OCSLA and its implementing regulations."); Amended Complaint at Wherefore Clause (seeking a declaration that "Defendants have violated and continue to violate OCSLA and its implementing regulations, and, accordingly, that Defendants have violated the APA.")

The Fifth Circuit, in *OXY USA, Inc. v. Babbitt*, 122 F.3d 251, 258 (5th Cir. 1997), rejected the argument of a group of mineral lessees that their suit, in which they challenged a series of the Department of the Interior's decisions ("both final and nonfinal"), properly fell "within the meaning" of OCSLA's "citizen suit provision." To oppose the lessees' argument in

OXY, the government asserted exactly the opposite of what they contend here. Specifically, in *OXY* the government contended that "the citizen suit provision may not be used to challenge the Secretary's interpretation of [a] lease form because the act of interpreting" the lease form "is a necessary duty undertaken in the Secretary's administration of the OCSLA and cannot constitute a 'violation' as contemplated by the citizen suit provision." *Id.* at 256. The court agreed, stating: "We do not think Congress intended for the citizen suit provision to operate either as a means of obtaining 'umbrella' review for a series of agency decisions that were or will be otherwise subject to judicial review under the APA . . . ." *Id.* at 258. Accepting the Fifth Circuit's conclusion in *OXY*, the Tenth Circuit, in *Amerada Hess Corp. v. Dep't of Interior*, 170 F.3d 1032, 1034 (10th Cir. 1999), agreed with the government's contention there that the "citizen suit provision cannot support an action challenging a decision of the Secretary rendered in fulfillment of his duties under the Act" and accepted *OXY*'s holding that "the citizen suit provision is not available to challenge agency decisions that 'were or will be subject to judicial review under the APA.'" (quoting *OXY* at 258).

Based on a review of the authorities addressing the types of suits that are properly subject to OCSLA's Section 1349 citizen suit provision, plainly, Plaintiffs' challenge to Defendants' action as exceeding their authority under the APA's arbitrary and capricious standard does not fall within OCSLA's citizen suit provision. Because Plaintiffs properly brought their suit as a challenge to agency action subject to judicial review under the APA, neither the 60-day notice requirement nor the immediate "notification" provision in the citizen suit provision of OCSLA has any applicability here.[3]

[3] To the extent that this Court disagrees with Plaintiffs' assertion that OCSLA's citizen suit provision has no applicability here and thus finds that the citizen suit provision's "notification" requirement applies, then Plaintiffs alternatively request that the Court dismiss their assertion of an OCSLA "citizen suit" and maintain this action in accordance with the APA.

The Supreme Court looked to a similar citizen suit provision in the Endangered Species Act, in *Bennett v. Spear*, 520 U.S. 154, 175 (1997), and observed "No one contends (and it would not be maintainable) that the causes of action against the Secretary set forth in the ESA's citizen-suit provision are exclusive, supplanting those provided by the APA." Instead, the Court concluded that "The APA, by its terms provides a right to judicial review of all 'final agency action for which there is no other adequate remedy in a court,' § 704, and applies universally 'except to the extent that (1) the statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id.* Consistent with the ESA and its citizen suit provision, OCSLA's citizen suit provision does not "supplant" Plaintiffs' right to assert a challenge to the agency action of Defendants under the APA.

II. Even Assuming Section 1349(a)(3)'s "Notification" Provision Applied, Which Is Denied, Plaintiffs Provided "Notification" to Defendants Within the Meaning of Section 1349(a)(3).

In their Opposition, Defendants do not contest that they had "notification" under Section 1349(a)(3) and instead contest only Plaintiffs' ability to assert that Section 1349(a)(3) applies on the purported basis that their actions have not "immediately" affected Plaintiffs' legal interests, as required to take advantage of Section 1349(a)(3). Plaintiffs respectfully submit that that question is for this Court to resolve on the merits of Plaintiffs' request for a preliminary injunction.

Regardless of Defendants' failure to contest that they received appropriate "notification," Plaintiffs point out that "notification" as set forth in Section 1349(a)(3) has in fact been provided. This is evident from a review of the statutory language. Subsection 1349(a)(2)(A), the 60-day "notice" requirement, specifies that "no action may be commenced" without 60-days "notice" in "writing under oath, to the Secretary." By contrast, Section 1349(a)(3) uses the term

"notification," rather than "notice." It also provides no specification as to the form of "notification" required, no requirement that the "notification" be in writing, no requirement that the "notification" be under oath and no requirement with respect to whom the "notification" must be directed.[4] Section 1349(a)(3) in fact is unique among the environmental statutes in affirmatively authorizing an adverse party to file suit against the agency immediately if its legal interests are being harmed based only on the most rudimentary notification to the agency of an alleged legal violation.

It is incredible for Defendants to suggest that they were surprised by the filing of litigation challenging the Moratorium. Notification of the kind addressed in Section 1349(a)(3) is to allow a would-be defendant an opportunity to reconsider its actions. In fact, direct appeals to lift the Moratorium were repeatedly made on behalf of all Louisiana citizens, including Plaintiffs, to President Obama and Secretary Salazar in advance of the filing of this lawsuit on June 7, 2010.

Specifically, a meeting was held between President Obama and Senator Vitter on the Friday preceding the filing of this suit concerning the Moratorium. A meeting was also held on the prior Thursday between Senator Landrieu and Secretary Salazar concerning the Moratorium. As is evidenced by the attached letter from Governor Jindal to Secretary Salazar and President Obama, dated June 2, 2010, a written appeal was made almost a week before this suit was filed. This letter outlines many of the issues that Plaintiffs assert cause the Moratorium to be unlawful. Indeed, the statistics addressed in Governor Jindal's letter include the harms Plaintiffs are

[4] In further contrast to Section 1349(a)(2), which provides that "no action may be commenced" without the required 60-days notice, Section 1349(a)(3) provides that "An action may be brought . . . immediately." (emphasis added). The difference between the language used in the two subsections is important. *See, e.g., Avocados Plus, Inc. v. Veneman*, 370 F.3d 1243, 1249 (D.C. Cir. 2004) (courts presume that exhaustion requirements are nonjurisdictional "unless Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision.")

suffering as a result of the Moratorium. Under these circumstances, "notification" of this matter of "national significance" is something that rightly should have been given – and in fact was so given – by the senior-most elected officials from the State of Louisiana to the President and the Secretary of the Interior directly. It clearly was. Accordingly, if Section 1349(a)(3)'s notification provision applies, which is denied, then Plaintiffs submit that they satisfied it.

Conclusion

For the reasons set forth above, Plaintiffs respectfully submit that OCSLA's citizen suit provision, 43 U.S.C. § 1349, and, specifically, its procedures for notification, do not apply to their action challenging Defendants' agency action under the APA. Further, Plaintiffs submit that, even if they were required to provide Defendants with "notification" as set forth in Section 1349(a)(3), they did.

Respectfully submitted,

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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 18th day of June, 2010.

s/Carl Rosenblum