IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

HORNBECK OFFSHORE SERVICES, LLC, Plaintiff, v. KENNETH LEE "KEN" SALAZAR, in his official capacity as Secretary, United States Department of the Interior; ROBERT "BOB" ABBEY, in his official capacity as Acting Director, Mineral Management Service; and MINERALS MANAGEMENT SERVICE, Defendants, and DEFENDERS OF WILDLIFE; SIERRA CLUB; FLORIDA WILDLIFE FEDERATION; CENTER FOR BIOLOGICAL DIVERSITY; AND NATURAL RESOURCES DEFENSE COUNCIL Defendant-Intervenors	Civil Action No. 10-1663(F)(2) Section F Judge Feldman Magistrate 2 Magistrate Wilkinson

DEFENDANT-INTERVENORS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

In their motion for a preliminary injunction, Plaintiffs ask this Court to disregard the Secretary of Interior's discretion to respond in an appropriate and conscientious manner to the largest environmental disaster that has ever occurred in the United States – the spilling of

approximately 35,000 to 60,000 barrels per day of oil into the Gulf Coast's fragile ecosystem. Plaintiffs seek to invalidate the Secretary's prudent and finite moratorium on deepwater drilling in the Gulf of Mexico, a moratorium enacted only after the Secretary concluded that, in light of the continuing environmental harm resulting from the Deepwater Horizon spill, deepwater drilling operations "pose[] an unacceptable threat of serious and irreparable harm to wildlife and the marine, coastal, and human environment" and that "the installation of additional safety or environmental protection equipment is necessary to prevent injury or loss of life and damage to property and the environment." See 30 C.F.R. § 250.172(b), (c).

Plaintiffs have failed to satisfy the requirements for injunctive relief. First, Plaintiffs' claims are not likely to succeed on the merits, as the Government has broad discretion to suspend operations and production in emergency circumstances such as this, where it is clear from the events at the Deepwater Horizon site that deepwater drilling operations may pose a serious and irreparable threat to the marine and coastal environment. In any event, Plaintiffs have alleged only speculative, calculable, and short-term economic injuries resulting from the moratorium, and have made statements to their own investors claiming that the company will survive the moratorium with minimal economic losses. Plaintiffs' claims of harm are not only contradicted by their own out-of-court representations, but they also fail to outweigh the harm to the Government and the environment presented by allowing further improperly regulated and reviewed deepwater drilling operations to continue. The public interest clearly favors a continuation of the moratorium until the Administration concludes its review of the factors which caused the Deepwater Horizon spill and enacts appropriate regulatory and environmental safeguards to ensure that a disaster of this proportion never occurs again.

BACKGROUND

A. Factual Background

On April 20, 2010, the Deepwater Horizon exploded, killing 11 workers and unleashing a catastrophic oil spill that has wreaked havoc on the Gulf of Mexico. The oil slick created by this spill is estimated to cover at least 9,400 square miles of surface and has reached the shores of Louisiana, Alabama, and Florida. Experts now state that sea currents may have picked up parts of the spill and transported into the Loop Current, which will carry the spill around the Florida panhandle, through the Florida Keys, and up the Atlantic seaboard. Nearly one-third of the Gulf of Mexico – 78,000 square miles – is closed to commercial and recreational fishing. Scientists also report large plumes of oil below the sea's surface. Researchers from the National Institute for Undersea Science and Technology have discovered oil plumes as big as ten miles long, three miles wide, and 300 feet thick. Plumes of this sort may drastically reduce oxygen levels in the Gulf, which will result in the loss of marine wildlife at all trophic levels. The Deepwater Horizon containment and recovery efforts are overtaxing the response capabilities that currently exist, resulting in a situation where there is no margin for error and no response capacity to spare.

Following the explosion, President Obama asked the Department of Interior to conduct a 30-day safety review to determine what additional precautions should be required to improve the safety of offshore oil and gas exploration and production. On May 27, 2010, Secretary of Interior Ken Salazar presented to President Obama the safety report, which recommended putting a halt to new wells being drilled using floating rigs and to new deepwater drilling permits for six months to allow implementation of the measures recommended in the safety report. See Mot. for PI at Ex. A ("the Report"). The Secretary recommended this moratorium in light of the findings in the Report, as well as to allow for the consideration of the recommendations that will

be made by a bipartisan National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling ("the Commission") currently investigating the spill and issues related to offshore drilling in the Gulf. The Commission, co-chaired by former Florida Governor and Senator Bob Graham and former Administrator of the Environmental Protection Agency William K. Reilly, is tasked with recommending "how we can prevent – and mitigate the impact of – any future spills that result from offshore drilling" and, in particular, what "necessary environmental and safety precautions we must build into our regulatory framework in order to ensure an accident like this never happens again, taking into account the other investigations concerning the causes of the spill." President Obama's Weekly Radio Address (May 22, 2010), available at http://www.whitehouse.gov/briefing-room/weekly-address.

On May 28, 2010, Secretary Salazar imposed a six-month moratorium on drilling new deepwater wells in the Gulf, except for necessary emergency operations, such as drilling relief wells for the BP oil spill. Based on the safety recommendations and his further evaluation of the issue, Secretary Salazar found that, "under current conditions, offshore drilling of new deepwater wells poses an unacceptable threat of serious and irreparable harm to wildlife and the marine, coastal, and human environment" and that "the installation of additional safety or environmental protection equipment is necessary to prevent injury or loss of life and damage to property and the environment." The moratorium prohibits the Minerals Management Service ("MMS") from processing new applications for deepwater drilling operations. On May 30, 2010, MMS notified lessees of the terms of the moratorium.

B. Legal Background

In 1953, Congress enacted the Outer Continental Shelf Lands Act ("OCSLA") to authorize federal leasing of the outer continental shelf ("OCS") for oil and gas development in

federal waters. 43 U.S.C. § 1331 *et seq*. OCSLA includes a congressional declaration of policy, which recognizes that "the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, **subject to environmental safeguards**." Id. § 1332(3) (emphasis added). Congress further declared that "operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health." Id. § 1332(6).

OCSLA requires the MMS to manage the OCS "in a manner which considers economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf, and the potential impact of oil and gas exploration on other resource values of the outer Continental Shelf and the marine, coastal, and human environments." Id. § 1344(a)(1). Throughout OCSLA, Congress mandated accommodation of other uses of the outer continental shelf, including environmental values. At the lease program stage, OCSLA requires the consideration of marine and costal environments, "the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf," and "the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone." Id. § 1344 (a)(1)-(3).

OCSLA regulations, including the regulations governing suspension of operations and production, further provide that environmental values must be considered. The MMS Director must "regulate all operations under a lease," to, among other considerations, "[p]revent injury or loss of life" and "[p]revent damage to or waste of any natural resource, property, or the

environment." 30 C.F.R. § 250.106(b)-(c). With respect to suspensions, the Regional Supervisor "may grant or direct an S[uspension] O[f] O[perations] or S[uspension] O[f] P[roduction]" under a number of circumstances, including any of the following:

> (b) When activities pose a threat of serious, irreparable, or immediate harm or damage. This would include a threat to life (including fish and other aquatic life), property, any mineral deposit, or the marine, coastal, or human environment. MMS may require you to do a site-specific study. (See § 250.177(a).)
>
> (c) When necessary for the installation of safety or environmental protection equipment;
>
> (d) When necessary to carry out the requirements of NEPA or to conduct an environmental analysis; …

30 C.F.R. § 250.172(b)-(d).

ARGUMENT

Injunctive relief "is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." Black Fire Fighters Ass'n of Dallas v. City of Dallas, Tex., 905 F.2d 63, 65 (5th Cir. 1990) (quotation omitted); see also PCI Transport., Inc. v. Ft. Worth & Western R.R. Co., 418 F.3d 535, 545 (5th Cir. 2005). A temporary restraining order or preliminary injunction may be granted only if plaintiffs show: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunctive relief is denied; (3) the threatened injury to the movant outweighs the harm the injunction will cause the opponent; and (4) the injunctive relief will not disserve the public interest. See Lakedreams v. Taylor, 932 F.2d 1103, 1107 (5th Cir. 1991). As explained herein, Plaintiffs are not entitled to injunctive relief because they have failed to demonstrate that they are likely to succeed on the merits of their claims under OCSLA and the APA, and because any purported short-term economic harm they allege is outweighed by the

potential for harm to the environment and communities of the Gulf posed by the risks from improperly regulated deepwater drilling operations.

A. Plaintiffs Are Not Likely to Succeed on the Merits Because OCSLA Grants the Secretary Discretion to Suspend Operations When Serious and Irreparable Threats to the Environment Are Present, and Because Safety and Environmental Concerns Justify the Moratorium Here.

Plaintiffs argue that they are likely to succeed on their claims brought pursuant to OCSLA and the APA because the Government has suspended drilling at 33 deepwater wells "without engaging in any fact-finding or rational factual inquiry to show that they posed a threat of serious, irreparable, or immediate harm or damage." Mot. for PI at 13-14. Plaintiffs are unlikely to succeed on the merits of this claim as their argument misconstrues the governing requirements of OCSLA and its implementing regulations in two important ways. First, under Plaintiffs' interpretation of the statute and regulations, the Government would be required to make individualized findings of the risk posed by each drilling operation before such operations could be suspended, findings not contemplated by OCSLA or its regulations and which would impose an unattainable burden of proof upon the Government. Second, Plaintiffs' arguments suggest that OCSLA requires a balancing of environmental safeguards with economic harm to the oil industry, a balance that is not contemplated by OCSLA's plainly stated policy that orderly development of the OCS resources can proceed only "subject to environmental safeguards." 43 U.S.C. §1332(3). Plaintiffs also cannot prevail on the merits of their claim that the Government has acted arbitrarily in issuing the moratorium because the deepwater wells at issue have undergone rigorous environmental reviews. As explained more fully below, this could not be further from the truth, as discussed repeatedly in Administration documents noting a host of regulatory failures in Gulf drilling operations. In short, significant safety and environmental concerns justify the moratorium here based on the ongoing environmental damage to the Gulf

from the Deepwater Horizon incident. Thus Plaintiffs are unlikely to prevail on the merits of their claims that the moratorium is arbitrary and capricious and thus are not entitled to preliminary relief.

1. Plaintiffs Cannot Prevail on Their Claims That Individualized Findings of Fact Are Required Before the Issuance of a Suspension.

OCSLA and its implementing regulations do not require individualized findings of the risks posed from each drilling operation before MMS can order a suspension. OCSLA regulations require the MMS Director to "regulate all operations under a lease" to, among other considerations, "[p]revent injury or loss of life" and "[p]revent damage to or waste of any natural resource, property, or the environment." 30 C.F.R. § 250.106(b)-(c). MMS has broad discretion to suspend operations when the agency concludes that activities "pose[] an unacceptable threat of serious and irreparable harm to wildlife and the marine, coastal, and human environment" or that "the installation of additional safety or environmental protection equipment is necessary to prevent injury or loss of life and damage to property and the environment." See id. § 250.172(b), (c).

This is precisely the finding that was made here. The Administration rationally concluded that in light of events at the Deepwater Horizon, the largest spill that has ever occurred in this country and which remains ongoing almost 60 days after the blowout, (1) deepwater drilling activities pose a serious and irreparable threat to the environment and (2) additional safety and environmental safeguards may be necessary to prevent further damage to the environment from these operations. Plaintiffs' contention that the Government must make individualized findings with respect to each deepwater drilling operation would impose a heightened requirement on the Government that is not contemplated by OCSLA regulations and which is impracticable. Under Plaintiffs' logic, the Government would have to expend

significant time and effort to inspect each and every deepwater operation and individually analyze the risk from each, when it is clear that the category of risks that the Government is concerned about – the ability to prevent and control a spill that occurs in deepwater – are shared for all of these operations. MMS's own website explains that deepwater drilling poses heightened risks of catastrophic blowouts due to a higher likelihood of equipment damage in deepwater, the large volumes of oil being released, and the longer period of time it may take to drill a relief well or otherwise contain the spill. See PCCI, Oil Spill Containment, Remote Sensing and Tracking for Deepwater Blowouts: Status of Existing and Emerging Technologies, at 1 (1999), available at http://www.mms.gov/tarprojects/311/311AA.pdf ("As the industry advances into deepwater exploration, the risks of blowout increase, due to difficulties related to kick detection and control procedures under deepwater conditions."); MMS, Mechanical Containment and Recovery, http://www.mms.gov/tarprojectcategories/mechanic.htm. Under Plaintiffs' logic, however, during the period required for the Government to conduct individualized reviews, these unacceptable threats of serious and irreparable harm to the environment would continue unabated.

The Government has suspended groups of leases without such individualized findings in the past, and no such individualized findings are required here in light of the ongoing disaster in the Gulf. See, e.g., Calif. ex rel. Calif. Coastal Comm'n v. Norton, 150 F. Supp. 2d 1046 (N.D. Cal. 2001) (considering the Government's wholesale suspension of a set of forty leases). Plaintiffs' arguments for individualized review would impose an unattainable burden of proof on the Government, pursuant to which the Government would have to demonstrate safety issues to justify a suspension before the Government had concluded a final review. Individualized

findings are not required by OCSLA and are impracticable in situations posing an imminent threat of serious harm to the environment.

2. Plaintiffs Cannot Prevail on Their Claim That OCSLA's "Balancing Test" Requires a Suspension of the Moratorium.

Plaintiffs' arguments also misconstrue Congressionally-stated policy in OCSLA section 1332(3). As Plaintiffs note, OCSLA mandates that "the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, **subject to environmental safeguards**, in a manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. § 1332(3) (emphasis added). Plaintiffs contend that this section requires a "balancing" of orderly resource development with environmental concerns, and that the Government has failed to appropriately balance resource development with the protection of the environment by imposing a 6-month moratorium without "facts or empirical data related to the relevant risks." Mot. for PI at 16. Plaintiffs' arguments disregard the fact that, under the plain language they rely upon, the expeditious and orderly development of OCS resources is explicitly made "subject to environmental safeguards." See 43 U.S.C. § 1332(3). In other words, the statute clearly contemplates that OCS development must be conducted with environmental safeguards, and not that the need for OCS development is balanced against, and can trump, environmental concerns.

Under Plaintiffs' logic, the moratorium should be lifted despite the serious ongoing environmental harm in the Gulf because it imposes economic harm and slows down OCS development for a mere six months. This not only ignores the plain directive of the statute, but also ignores the reality of an ongoing, unprecedented environmental catastrophe in the Gulf. The very purpose of the moratorium is to ensure that environmental safeguards are in place so that orderly development of the OCS may occur without another environmental disaster like the

Deepwater Horizon spill. If the environmental harm in the Gulf is not sufficient to justify the moratorium to ensure that environmental safeguards are in place before OCS development proceeds, then no environmental harm would ever be sufficient to satisfy this "balancing test"; economic interests would always prevail. This result contradicts the clear intent of the statute; thus, Plaintiffs cannot prevail on any claims that the Government failed to properly "balance" the interests at stake here.

3. Plaintiffs Cannot Prevail on Their Claim That the Government Has Acted Arbitrarily Because the Suspended Wells Have All Been Subject to a Rigorous MMS Permitting Process, and Have All Been Inspected.

Throughout their motion for a preliminary injunction, Plaintiffs assert that there is no evidence of a systemic failure to comply with governing laws and regulations, Mot. for PI at 2, 14, 15, and that the facts found during the 30-day safety review established that offshore drilling in the Gulf complies with governing law. Id. at 14. The Amended Complaint goes further and claims that the 33 drilling rigs "had previously satisfied the rigors of the MMS permitting process." Amended Complaint ¶ 46. Plaintiffs base these assertions solely on the 30-day safety review, which, due to its expedited and time-limited nature, was by necessity cursory and targeted at specific safety equipment and procedures. Mot. for PI, Ex. A at 18. What has become painfully apparent since the Deepwater Horizon explosion is that MMS had almost entirely abdicated its regulatory responsibility to ensure that adequate oil spill response capabilities would be in place for deepwater drilling in the Gulf of Mexico. The MMS permitting process could hardly be called "rigorous"; instead, it was more of a blank check.

First, MMS has promulgated regulations specifying the required contents of exploration and production drilling plans to enable it to ensure that offshore drilling will not "cause serious undue harm or damage to (a) life, (b) property . . . or (e) the marine, coastal, or human

environment; , , , [or] result in pollution." 70 Fed. Reg. 51,478, 51,478 (Aug. 30, 2005). These regulations require that every exploration and production plan provide a blowout scenario disclosing the volume of crude oil that could be discharged in a blowout, the potential for controlling a blowout, and the response capabilities to address a worst case oil spill. 30 C.F.R. §§ 250.213(g); 250.219(a)(2)(iv)-(v). Together, these requirements ensure that both the operators and regulators consider what can go wrong and how to prevent or mitigate the damage before proceeding with a deepwater drilling operation.

In April 2008, the Regional Director of the MMS Gulf of Mexico Region issued a Notice to Lessees waiving this requirement for most areas of the Gulf. Notice to Lessees & Operators of Federal Oil and Gas Leases, 2008-G04, at 6 (Apr. 1, 2008), attached as Ex. 1. ("Provide this blowout scenario only when you propose the following"). The Notice to Lessees contains a similar waiver from the regulatory requirement that drilling plans must discuss oil spill response capabilities for a worst case scenario oil spill. It directs lessees to "[p]rovide this oil spill response discussion **only** when you propose" activities in the same circumstances where the blowout scenario will continue to be required. Ex. 1 at 19 (emphasis added). In practical effect, the Notice to Lessees waives the blowout scenario requirement for almost all offshore drilling that could take place in the Gulf of Mexico south of Louisiana, Mississippi and the sliver of Alabama that touches the Gulf Coast, including Mobile and the surrounding areas.

In reliance on this waiver, lessees routinely submitted and MMS routinely approved drilling plans that lack a blowout scenario or the required discussion of oil spill response capabilities should a blowout occur. Often, the company explicitly cited the Notice to Lessees as its justification for not complying with the regulations. See, e.g., Chevron Exploration Plan ("EP") at 3, attached as Ex. 2 ("A scenario for a potential blowout of the well with the expected

highest volume of liquid hydrocarbons proposed in this plan is not required for this plan based on the guidelines provided in NTL No. 2008-G04."); Phoenix Exploration Co. EP at 4, 14, attached as Ex. 3; PetroQuest Energy EP at 15, 34, attached as Ex. 4. In other instances, the exploration plan simply lacks the detailed information on blowout and worst case oil spill scenarios required by the regulations. See, e.g., Mariner EP and Cobalt Int'l Energy EPs, attached as Exs. 5 & 6.[1]

Second, Congress directed the Department of Interior to comply fully with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, in its offshore leasing and permitting activities. See 43 U.S.C. § 1866(a). NEPA directs federal agencies to prepare an environmental impact statement ("EIS") for every recommendation on "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). While MMS has prepared environmental analyses on deepwater drilling in the Gulf, it has minimized the risks of a blowout and the magnitude of a worst case oil spill, and accordingly it has lacked a sufficient predicate to ensure adequate oil spill response planning. For example, in its April 2007 EIS covering eleven lease sales in the central and western Gulf, MMS identified "the most likely oil-spill scenario" as 4600 barrels from a pipeline break that leaks for 12 hours and concluded that the oil would quickly disperse, causing no lasting negative impacts. Multisale EIS for Gulf of Mexico Lease Sales 2007-2012 at 4-259 (2007), attached as Ex. 7. The same EIS asserted that blowouts are "rare events of short duration" and therefore "potential impacts to marine water quality are not expected to be significant." Id. at 4-260. While one might expect MMS to provide a more detailed NEPA analysis at the exploration plan stage, MMS has made the remarkable assertion that most exploration and production plans in the central or western Gulf of

[1] Proposed Intervenor Sierra Club has challenged the NTL No. 2008-G04, as well as five exploration plans adopted without a blowout scenario in reliance on the waiver. Gulf Restoration Network v. Salazar, No. 2:10-cv-1497 (E.D. La.); Gulf Restoration Network v. Salazar, Nos. 10-60411, 10-60413, 10-60414, 10-60415, 10-60416 (5th Cir.).

Mexico have no significant environmental effects and therefore are categorically excluded from NEPA review. Department of Interior Manual at § 15.4(C)(10) (2004), attached as Ex. 8. Relying on this categorical exclusion, MMS has routinely approved EPs in the central and western Gulf without preparing either an environmental assessment or an EIS..[2]

Third, the Oil Pollution Act of 1990 ("OPA 90"), enacted after the Exxon-Valdez spill, requires federal lessees to have approved oil spill response plans in place before MMS may approve their drilling plans and issue drilling permits. A response plan required under OPA 90 "shall . . . identify, and ensure by contract or other means approved by the President the availability of, private personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge (including a discharge resulting from fire or explosion), and to mitigate or prevent a substantial threat of such a discharge." 33 U.S.C. § 1321(j)(5)(C)(iii). To implement this mandate, MMS has issued regulations requiring that oil spill response plans calculate the volume of a "worst case discharge scenario" and describe response plans to contain and recover the discharge "to the maximum extent practicable." 30 C.F.R. § 254.26(a) & (d). In practice, however, MMS has rubber-stamped oil spill response plans that grossly exaggerate response capabilities. For example, BP's regional oil spill response plan for the Gulf of Mexico represents that BP has the capacity to recover over 491,000 barrels of oil per day in adverse weather conditions. See BP 2009 Regional Plan, App. H. at 32, attached as Ex. 9. BP estimated "the highest capacity well uncontrolled blowout volume associated with [the] exploration well"

[2] Proposed Intervenors Defenders of Wildlife and Center for Biological Diversity have challenged this categorical exclusion because exploration and production drilling in Gulf has significant environmental impacts and therefore cannot be excluded from NEPA. Defenders of Wildlife v. MMS, No. 10-254 (S.D. Ala.); Center for Biological Diversity v. Salazar, Case No. . 1:10-cv-00816-HHK (D.D.C. 2010); Center for Biological Diversity v. Salazar, Case No. 10-60417 (5th Cir. 2010). In addition, Sierra Club has challenged MMS's failure to comply with NEPA in approving five deepwater exploration plans in reliance on this overbroad categorical exclusion, see supra n.2, and CBD has similarly challenged MMS's NEPA violations with respect to 39 exploration and development plans in the Gulf. Center for Biological Diversity v. Salazar, Case No. 10-60417 (5th Cir. 2010).

as 250,000 barrels per day, id. at 30, but since it boasted a capacity to recover almost twice that volume, it undertook virtually no worst case oil spill planning, nor did MMS compel it to so do.

Other offshore oil companies' plans were written by the same company that wrote BP's plan and share the gross exaggerations made by BP. Both Shell and Chevron claim they can recover over 200,000 barrels of oil per day; Shell OSRP, attached as Ex. 10 at p 21; Chevron OSRP at App. H, p.43, attached as Ex. 11. Exxon claims it can handle over 150,000 barrels of oil per day. Exxon OSRP at App. H, attached as Ex. 12 at p. 41. This is far more oil than is leaking into the Gulf from the Deepwater Horizon oil spill, which is currently estimated to be discharging at a rate of between 35,000 to 60,000 barrels per day. As of this filing date, the discharge remains largely uncontained. Fully one-third of the Gulf's federal waters, or 78,603 square miles, remains closed to fishing. See NOAA Fishing Closure Map, available at http://gomex.erma.noaa.gov/layerfiles/3023/files/BP_OilSpill_FisheryClosureMap_060710.pdf. The spill has adversely impacted over 120 linear miles of shoreline, including environmentally sensitive beaches and marshes, stretching across four states. See Excerpt from Transcript of Coast Guard Adm. Thad Allen's White House Briefing, June 7, 2010, available at http://www.mcclatchydc.com/2010/06/07/95444/what-thad-allen-told-white-house.html. The risk presented by allowing drilling to go forward in the face of evidence of the complete unpreparedness of the oil industry to deal with a worst case scenario blowout is neither hypothetical nor speculative. Nine of the 33 deepwater operations which are the subject of the moratorium rely upon Shell's, Exxon's, and Chevron's grossly inadequate regional oil spill response plans.[3] MMS approved these plans even though MMS knew at the time it approved the

[3] *See* Docket No. 7-2, page 49, listing current deepwater activity that is subject to the moratorium. The EPs for these projects rely upon the companies' regional oil spill response plans that are attached as exhibits hereto.

plans that containment and recovery of oil at sea (where deep water drilling is located) is at best minimal and at worst negligible:

> Overall, containment and recovery operations at sea require extensive logistical support. In rough seas, a large spill of low viscosity oil such as a light or medium crude oil can be scattered over many square kilometers within just a few hours. Oil recovery systems typically have a swath width of only a few meters and move at slow speeds (1 knot) while recovering oil. Thus, even if response personnel can be operational within a few hours, it will not be feasible for them to encounter more than a fraction of a widely dispersed slick. This is the main reason why containment and recovery at sea rarely results in the removal of more than a relatively small proportion of a large spill, at best only 10 - 15% of the spilled oil and often considerably less.

MMS Website on Oil Spill Response Technology, printout attached as Ex. 13.

Fourth, the Department of the Interior's Inspector General ("IG") has documented long-standing, fundamental flaws in MMS's permitting, oversight, and enforcement with respect to offshore oil drilling operations in the Gulf of Mexico. The moratorium is a necessary step towards curing the systemic failures of government oversight that led to the Deepwater Horizon disaster. Investigations by Department of the Interior's Inspector General reveal that regulatory oversight by MMS had been rendered meaningless by widespread corruption among MMS inspectors. See Dep't of the Interior, Office of Inspector General, Report of Investigation – Island Operating Company et al. Case No. PI-GA-09-0102-1 (Mar. 31, 2010), available at http://www.doioig.gov/images/stories/reports/pdf/IslandOperatingCo.pdf ("IG Report"). The IG found that MMS staff regularly socialized with industry representatives in ways that directly undermined MMS's regulatory role, with interactions ranging from MMS inspectors accepting extravagant industry gifts to MMS staff seeking employment with the very people they were "inspecting" and engaging in illicit drug use with members of industry and performing inspections under the influence of these drugs. Id. at 2-6. Indeed, the IG concluded that prior to its investigation, accepting gifts such as hunting trips, fishing trips, and meals from oil

companies was a generally accepted practice by MMS inspectors and supervisors in the Gulf of Mexico region. Id. at 2.

The IG found direct evidence that these interactions gutted the validity of MMS safety inspections. One MMS inspector, who had found numerous incidents of non-compliance at a company's rigs in the past, suddenly stopped finding any violations once he started seeking employment with the same company he was inspecting. Id. at 7. Even more disturbingly, the IG received reports that multiple MMS inspectors falsified government documents by allowing industry personnel to fill out inspection forms in pencil and then writing over these entries in ink. Id.

The IG's doubts regarding the validity of MMS oversight of offshore oil and gas activities are bolstered by reviews completed by the General Accounting Office ("GAO"). An audit of MMS found that the agency was allowing industry to regulate itself. The GAO found that MMS lacked basic procedures to monitor the offshore oil and gas industry, and instead neglected to conduct annual inspections and allowed industry to simply self-report. GAO, "Additional Guidance Would Help Strengthen the Minerals Management Service's Assessment of Environmental Impacts in the North Aleutian Basin" (March 2010), available at http://www.gao.gov/new.items/d10276.pdf. Even as recently as 2010, the GAO concluded that MMS regulations and policies failed to provide reasonable assurance that oil and gas are accurately measured for the calculation of royalties due the U.S. government. See Dep't of Interior, Office of Inspector General, Reducing the risk of lost oil royalties (2009), available at http://www.doioig.gov/images/stories/reports/pdf/BeneficialUse.pdf.

Finally, Plaintiffs make much of the fact that the rigs in question have undergone an initial safety review. See Mot. for PI at 14-16. The initial inspections and 30-day safety review

are merely the first in a series of reviews of the regulatory shortcomings precipitated by the Gulf oil spill. Spurred by the Gulf spill, the Council on Environmental Quality is conducting a review of MMS's NEPA practices and policies for offshore drilling. 75 Fed. Reg. 29,996 (May 28, 2010). CEQ has solicited public input and is on track to recommend revisions and changes in MMS practices in mid-June. On May 22, 2010, President Obama signed an executive order establishing the Commission to further study necessary environmental and safety precautions. Both of these reviews will likely produce further changes in MMS regulatory oversight of offshore drilling in the Gulf, and the interim safety inspections conducted by the Government do not obviate the need for a moratorium while these larger reviews continue.

In sum, the lack of competent oversight by MMS and, in some cases, MMS's willful corruption of the oversight process have long undermined the basis of the inspection program and call into question the safety of offshore oil and gas operations in the Gulf of Mexico. Absent the current moratorium, we could easily see more accidents akin to the ongoing spill. The Deepwater Horizon disaster has taught the nation that a blowout in deepwater can cause extensive devastation and that containing such a spill calls for equipment, preparedness, and know-how beyond what BP and other lessees have amassed in the Gulf. A moratorium remains appropriate in light of these regulatory failures, and Plaintiffs cannot prevail in demonstrating that MMS has sufficiently regulated these risks.

B. Plaintiffs Have Failed to Demonstrate Irreparable Harm

Plaintiffs next assert that the moratorium will inflict irreparable harm on their business interests. Mot. for PI at 17-21. Plaintiffs fail to meet their burden because their protestations of harm are unsupported, exaggerated, and contradicted by their own candid statements to their investors.

The crux of plaintiffs' irreparable injury argument is that the moratorium will idle and destroy the value of their vessels, which are under contract to provide services to deepwater drillers in the Gulf. Plaintiffs claim damage from "actual and threatened termination of its contracts with operators of" deepwater wells. Mot. for PI at 20. But to the extent these contracts are in fact in jeopardy, they have a discernible dollar value, and are amenable to an appropriate money damages claim against an appropriate party at an appropriate time. An injury is only irreparable if it cannot be remedied by monetary means. *Paulsson Geophysical Services, Inc. v. Sigmar*, 529 F.3d 303, 312 (5th Cir. 2008) (citing *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472-73 (5th Cir. 1985)).

In addition, plaintiffs contend that they suffer from a loss of "prospective contracting opportunities" in the Gulf's deepwater OCS. Mot. for PI at 20. Plaintiffs provide no basis for this self-serving assertion. Indeed, given plaintiffs' description of the Gulf as "one of the world's largest offshore oil and gas basins," with more than 4,000 active deepwater leases, id. at 4, it is difficult to imagine that a six-month moratorium threatens future leasing in a way that causes plaintiffs irreparable harm.

Plaintiffs state that the vessels in its fleet have "limited useful life." Mot. for PI at 21. But plaintiffs nowhere explain the limitations in the fleet's useful life, or why a short-term suspension of deepwater drilling would diminish a vessel's long-term value. Plaintiffs raise the specter of well-trained crews fleeing the Gulf, but provide no factual support for that assertion. Where would they go? Why would they not return when the moratorium ends? Plaintiffs do not address these salient questions. Speculative injury is insufficient to satisfy plaintiffs' burden. *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985) (citing *Carter v. Heard*, 593 F.2d 10, 12 (5th Cir. 1979)).

Plaintiffs go so far as to claim that the moratorium might "dismantle the complex and intricate network that supports deepwater drilling in the Gulf." Mot. for PI at 21. Plaintiffs provide no *evidence* to support this sweeping statement. The only factual source cited in the section of plaintiffs' memorandum addressing irreparable harm is to the company's own complaint in this action. The complaint, in turn, is a collection of litigant assertions, without citation to any underlying source. In the public interest section, plaintiffs do no better, citing an article from *The Times-Picayune* (Exhibit I) and an unsigned, unsworn set of talking points from an oil and gas trade association (Exhibit J). Id. at 23. Despite their burden of proof as a party seeking extraordinary injunctive relief, plaintiffs have failed to present a single competent, concrete, credible fact supporting its claim of irreparable harm.

Plaintiffs further undermine their claim of irreparable injury by acknowledging the legitimacy of a moratorium of some scope and duration. Plaintiffs do not contend that the Department of Interior lacks authority to suspend some drilling activity in the Gulf; rather, they claim that the six-month moratorium the Secretary imposed is "overly broad." Mot. for PI at 3, 17. Plaintiffs suggest that Secretary Salazar could impose a moratorium that is supported by the 30-day Safety Report. Id. at 10, 14. A draft of that Report recommended a six-month moratorium on new exploratory wells with a depth of 1000 feet or more. Id., Ex. F. at 3-4. The draft similarly recommended "a temporary pause in all current drilling operations for a sufficient length of time to perform additional blowout preventer function and pressure testing and well barrier testing for the existing 33 permitted exploratory wells currently operating in deepwater in the Gulf of Mexico." Id. at 4. The Safety Report supports a suspension of operations that reflects these recommendations. Id. at 7-8 & Exh. F. Even if the broader deepwater moratorium

were not in place, a "temporary pause in all current drilling operations" could be stopping many of the same operations now and for weeks to come.

Plaintiffs likewise lack a basis to dispute the suspension of deepwater operations in depths of 1000 feet or more, given the rationale for such a suspension set forth in the Safety Report. Throughout their motion, plaintiffs take issue with the moratorium extending to production and exploratory wells in waters between 500 and 1000 feet in depth, not to its suspension of exploration in deeper waters. Id. at 10, 14, 17. They have failed to separate out the impacts of what they suggest would be a legitimate moratorium from what they claim is overly broad. Their injuries *from the portion of the moratorium they contend is unlawful* is the relevant measure here, and those injuries are far less severe than the ones plaintiffs claim to suffer.

Plaintiffs' motion is both remarkable and suspect because it fails to include any credible factual support for its claim of irreparable harm. In particular, the motion omits critical facts concerning the current economic value of its fleet of vessels. On June 15, 2010, in a conference call with the company's investors, Todd Hornbeck supplied some of these facts. Mr. Hornbeck is plaintiff Hornbeck's Chairman of the Board, President, and Chief Executive Officer. See http://www.hornbeckoffshore.com/company management.html (last visited June 16, 2010).

In the conference call, Mr. Hornbeck reported that the company has 29 vessels operating in the Gulf, 22 of which support deepwater drilling operations. See Transcript of Call at http://ir.hornbeckoffshore.com/phoenix.zhtml?c=132245&p=irol-news. Of those 22 vessels, ten are involved in oil spill relief efforts "and are currently expected to remain in that service for the foreseeable future." Id. Of the 12 remaining vessels, eight "are currently operating under

customer charters unrelated to the oil spill." Id. The company's last four vessels in the Gulf are on the spot market. Id.

Mr. Hornbeck reported that he does not believe any of the company's customers will succeed in suspending or cancelling current contracts for force majeure. Id. This calls into question whether plaintiff will suffer *any* economic harm flowing from its current deepwater drilling contracts. In addition, Mr. Hornbeck identified myriad productive uses to which the company's vessels can be put during the moratorium. These include oil spill response efforts, drilling support in waters of 500 feet or less, workover operations, completion operations, abandonment operations, intervention operations, and other production-related activities and specialty non-drilling applications. Id. The company will also address near-term uncertainty in the Gulf and diversify its revenue base by bidding on jobs in foreign markets and domestic non-oilfield markets. Id. Mr. Hornbeck further told investors that he expects that projected cash flows from operations for the remainder of 2010 will suffice to meet anticipated operating needs, debt service, and capital cash requirements. Id. These candid admissions against interest do not portray a company experiencing irreparable economic harm from the moratorium.

By themselves, Mr. Hornbeck's statements refute the company's claim of irreparable harm. Such harm is the preeminent prerequisite for a preliminary injunction. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F. 2d 618, 628 (5th Cir. 1985) (citing *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)). On this basis alone, the Court should deny plaintiffs' motion.

C. The Harm to the Environment and the Public at Large Outweigh Plaintiffs' Claimed Economic Injuries and the Public Interest Favor an Injunction

Plaintiffs' claims of speculative economic harm are clearly outweighed by the ongoing

environmental harm in the Gulf, and the devastation that this is causing for the larger Gulf economy in terms of lost tourism and harm to commercial and recreational fisheries. The Environmental Protection Agency has estimated that the Gulf Coast tourism industry is worth approximately $20 billion per year; the Gulf Coast fish shellfish, shrimp, and oysters have a value of approximately $1 billion per year, and that 24 million annual sport fishing trips also provide a significant revenue stream. See Gulf of Mexico Program, General Facts and Figures, available at http://www.epa.gov/gmpo/about/facts.html. Likewise, the Louisiana Department of Wildlife and Fisheries estimates that the total value of Louisiana commercial and recreational fishing to the state is $4 billion. See La. Dep't of Wildlife & Fisheries, Letter to Tony Hayward (May 29, 2010), available at http://emergency.louisiana.gov/Releases/05292010-safety.html. Similarly, the National Oceanic and Atmospheric Administration's Marine Recreational Information Program ("MRIP") stated in its 2008 report that economic impacts from the commercial seafood industry in Florida generated $5.7 billion in total sales, supporting 108,600 full- and part-time jobs within the industry. See MRIP 2008 Report, Gulf of Mexico, available at http://www.st.nmfs.noaa.gov/st5/publication/econ/2008/gulf_ALL_econ.pdf, p. 118; summary included with Declaration of Manley Fuller, attached as Ex. 14. Recreational fisheries in Western Florida alone contributed an additional $5.65 billion in total sales to the regional economy. Id. at 120. According to this same report, recreational fishing activities in West Florida supported more jobs than any other state in the Gulf Region, with approximately 54,600 full- and part-time jobs in 2008. Id. In the Gulf of Mexico, an average of 3.1 million anglers fished annually from 1999-2008, with most of these anglers fishing in West Florida. Id. at 121. An average of 22 million fishing trips were taken annually in the Gulf Region between 1999 and 2008. Again, most of these trips were taken in West Florida. Id. The Gulf Coast contains four of

the top seven fishing ports in the nation by landed weight, and has ten of the top twenty-five fishing ports in the nation by dollar of value landing. Currently, as result of just one oil spill, one-third of the Gulf of Mexico, 78,254 square miles, is closed to fishing. See NOAA Fisheries Closure Map.

Tourism and recreational and commercial fisheries all rely upon a clean environment free from oil pollution. Given the environmental disaster that will continue through the summer, and for many years to come, these industries will all be significantly harmed. See, e.g., Decl. of Steve Howard, attached as Ex. 15; Decl. of Johnny Earles of 30A Resorts, attached as Ex. 16; and Affidavit of Brian J. Bruhmuller, attached as Ex. 17. The full scope and extent and long-term ecological and environmental damage to the Gulf of Mexico and associated coastal ecosystems is yet to be determined. Over twenty years after the much smaller 1989 Exxon Valdez oil spill in Prince William Sound in Alaska, only ten of the 27 monitored species and natural communities have recovered to pre-spill numbers. See http://www.evostc.state.ak.us/recovery/status.cfm. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 544 (1987). There is no question that this harm Gulf of Mexico marine, estuarine, and coastal ecosystems and the tourism, recreation, and fishing industries they support outweighs Plaintiffs' speculative and short-term harm from alleged lost revenues, and that the public interest favors maintaining the moratorium to ensure that a disaster of this magnitude does not occur again.

CONCLUSION

For all of the reasons stated herein, Plaintiffs' Motion for a Preliminary Injunction should be denied.

Respectfully submitted this 18th day of June, 2010.

/s John Suttles
John Suttles
Louisiana Bar No. 19168
Catherine M. Wannamaker, GA Bar 811077
Application for Pro Hac Vice forthcoming
Counsel for Defendant-Intervenor Defenders of Wildlife
SOUTHERN ENVIRONMENTAL LAW CENTER
200 West Franklin Street, Suite 330
Chapel Hill, North Carolina 27516
Telephone: (919) 967-1450
jsuttles@selcnc.org

/s Adam Babich
Adam Babich
Louisiana Bar No. 27177

Counsel for Sierra Club
TULANE ENVT'L LAW CLINIC
6329 Freret St.
New Orleans, LA 70118
Telephone: (504)865-5789
ababich@tulane.edu

/s Alisa A Coe
Alisa A. Coe
La. Bar No. 27999
David G. Guest
Fla. Bar No. 0267228
Pro Hac Vice Pending
Monica K. Reimer
Fla. Bar No. 0090069
Pro Hac Vice Pending
Earthjustice
P.O. Box 1329
Tallahassee, FL 32302-1329
Phone: (850) 681-0031
Fax: (850) 681-0031

/s Mitchell Bernard
Mitchell Bernard
NY Bar No. 1684307
Pro Hac Vice application forthcoming
Natural Resources Defense Counsel
40 West 20th Street
New York, NY 10011
Phone: (212)727-4469
Fax: (212)727-2700

David Pettit
CA Bar No. 67128
Pro Hac Vice application forthcoming
1314 Second Street
Santa Monica, CA 90401
Phone: (310) 434-2300
Fax: (310) 434-2399

COUNSEL FOR SIERRA CLUB and FLORIDA WILDLIFE FEDERATION

COUNSEL FOR NATURAL RESOURCES DEFENSE COUNCIL, INC.

/s Miyoko Sakashita
Andrea A. Treece
CA Bar No. 237639
Miyoko Sakashita
CA Bar No. 239639
Pro Hac Vice applications forthcoming
351 California Street, Suite 600
San Francisco, CA 94104
Phone: (415) 436-9682

COUNSEL FOR CENTER FOR BIOLOGICAL DIVERSITY

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2010, I electronically filed the foregoing with the Clerk of court by using the CM/ECF system, which will send a notice of electronic filing to the following:

Carl David Rosenblum	crosenblum@joneswalker.com
Alida C. Hainkel	ahainkel@joneswalker.com; rmiller@joneswalker.com
Grady S. Hurley	ghurley@joneswalker.com; dward@joneswalker.com
Guillermo A. Montero	guillermo.montero@usdoj.gov; efile_nrs.enrd@usdoj.gov; jane.bamford@usdoj.gov
Brian M. Collins	brian.m.collins@usdoj.gov; efile_nrs@usdoj.gov
Sharon Denise Smith	sharon.d.smith@usdoj.gov; Rosanne.alford@usdoj.gov; jerrilyn.dufauchard@usdoj.gov

I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

John F. Cooney
Venable, LLP
575 7th St., NW
Washington, DC 20004

Marjorie Ann McKeithen
Jones Walker
Place St. Charles
201 St. Charles Ave., Suite 5100
New Orleans, LA 70170-5100

The foregoing document is available for viewing and downloading from the ECF system.

/s John Suttles
John Suttles
Louisiana Bar No. 19168
SOUTHERN ENVIRONMENTAL LAW CENTER
Attorney for Defendant-Intervenor
Defenders of Wildlife
200 West Franklin Street, Suite 330
Chapel Hill, North Carolina 27516
Telephone: (919) 967-1450
jsuttles@selcnc.org