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	*	

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HORNBECK'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, Hornbeck Offshore Services, L.L.C. ("Hornbeck"), seeks a preliminary injunction staying the effect of unlawful, arbitrary and capricious decisions by the Department of the Interior that have imposed a six-month moratorium on all existing and further deepwater drilling on the Outer Continental Shelf.

Hornbeck recognizes that, in the aftermath of the Deepwater Horizon explosion and oil spill, with its loss of lives and environmental effects of great magnitude, the request for an injunction of this action by the Department of the Interior may, at first blush, appear extraordinary. This Motion, however, is an appropriate response to the unprecedented action by the Department in issuing a Moratorium that shuts down the entire Gulf of Mexico deepwater drilling industry for at least six months. Indeed, inconsistent with the Department's decision to issue the blanket Moratorium, the facts uncovered during on-site investigations conducted within the last month of 29 of the 33 wells affected by the Moratorium show that 27 of the wells were full in compliance with the governing regulations and their existing permits and that there were only minor problems at the other two wells.

I. INTRODUCTION

Hornbeck owns and operates a fleet of vessels that perform services in connection with offshore oil and gas drilling, exploration and production activities in the Gulf of Mexico's Outer Continental Shelf ("OCS"). In the aftermath of the April 20, 2010 fire, explosion and spill at the Deepwater Horizon rig, the Department of the Interior ("DOI") issued a Report based on its OCS safety review that the President had requested. Following the May 27, 2010 issuance of the DOI's Report, DOI and its agency, the Minerals Management Service ("MMS"), imposed a six-month moratorium suspending all OCS drilling activities, even those related to currently permitted wells, in depths of water greater than 500 feet. In imposing the moratorium, DOI and MMS offered no finding of a systemic failure by operators to comply with current regulations or existing permits. Moreover, DOI and MMS offered no facts, data or analysis to support the moratorium, much less to support an arbitrary drilling depth of 500 feet.

Hornbeck respectfully submits that the overly-broad six-month moratorium issued by DOI and MMS violates the Outer Continental Shelf Lands Act ("OCSLA"), 43 § U.S.C. 1331, *et seq.*, and its implementing regulations. The six-month moratorium has caused and will continue to cause immediate, irreparable harm to the entire Gulf of Mexico OCS deepwater industry. It constitutes an industry-wide shut-down as to deepwater drilling that impacts Hornbeck directly, immediately and irreparably. Pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, 706, OCSLA and Rule 65 of the Federal Rules of Civil Procedure, Hornbeck respectfully seeks a preliminary injunction from this Court to enjoin the moratorium for the reasons that follow.

II. FACTS AND BACKGROUND

Hornbeck

Plaintiff Hornbeck operates a fleet of vessels that support deepwater and ultra deepwater exploration, development and production, primarily in the Gulf of Mexico. Hornbeck designed its business model to support oil and gas exploration and production companies drilling in the Gulf by constructing and acquiring United States flagged Jones Act-compliant vessels specifically built and maintained to engage in the deepwater OCS Jones Act trade. Each of these vessels has a limited useful life, and, accordingly, there is no way to recover time lost in the intended Jones Act trade of these vessels as a result of the moratorium.

In addition to its vessel fleet, Hornbeck has a 60-acre shore-base facility in Port Fourchon, Louisiana, that supports deepwater exploration and production in the Gulf of Mexico. Hornbeck also has a training facility that is used to instruct its mariners in the unique navigation skills and practices necessary to engage in deepwater OCS operations. Hornbeck has approximately 1300 employees and has had annual revenues in excess of $400 million.

Hornbeck conducts its business through time charter contracts with oil and gas exploration and production companies operating in the Gulf of Mexico's OCS. These time charter contracts require Hornbeck to provide vessels, as called for, to assist exploration and production companies with their offshore drilling activities.

The Gulf of Mexico's OCS and the Industry that Depends on It

OCSLA mandates that the OCS, "a vital national resource reserve," "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). OCSLA authorizes the Secretary of the Interior to administer the leasing of tracts of the OCS for exploration and to prescribe implementing rules and regulations. 42 U.S.C. § 1334(a). DOI implements its OCSLA obligations through a subordinate entity, the Minerals Management Service ("MMS"), which operates pursuant to authority delegated by the Secretary.

The Gulf of Mexico is one of the world's largest offshore oil and gas basins. According to the DOI's May 27, 2010, Report, entitled "Increased Safety Measures for Energy Development on the Outer Continental Shelf" (the "Report"), the Gulf of Mexico provides 97% of Federal OCS production. Report at p. 3 (attached as Exhibit "A"). The Gulf of Mexico has nearly 7,000 active leases, with 64% of those in deepwater. *Id.* Indeed, as set forth in the Report, by 2009, 80% of offshore oil production and 45% of natural gas production occurred in the deepwater, defined by the Report as depths in excess of 1,000 feet. Report at p. 4.[1]

Gulf of Mexico operations employ a wide variety of companies and workers, and many businesses have been formed and are designed to support the unique niche that exists arising

[1] While the Gulf of Mexico is the world's largest deepwater basin, it is not the only one. The Gulf of Mexico faces increasing competition from emerging deepwater basins, such as Brazil's basin. *See* The Economist, November 14, 2009; *see also* deepwater drilling regions map, entitled "Consider the Global Opportunities in Relation the US Gulf of Mexico" (attached as Exhibit "B").

from drilling, exploration and production activities in the Gulf of Mexico's OCS. Gulf of Mexico drilling activities, particularly deepwater activities, rely upon an intricate network of technology, assets, human capital and experience that has gathered in the Gulf region to make deepwater drilling a reality. Thousands of companies form this network that constitutes the Gulf OCS drilling enterprise. For instance, Hornbeck has nearly 2,000 vendors and other service providers in its current vendor list. These companies, in turn, employ thousands of individuals, who all in some fashion form part of the amalgamation of human capital and know how that is vital to the industry. Because all of these companies and their employees depend on OCS drilling for their livelihood, a decision or order of the DOI or the MMS shutting down the Gulf's deepwater industry necessarily will have adverse economic effects on the human environment in the Gulf region.

The key asset necessary for deepwater drilling is the deepwater drilling rig. Hornbeck's specialized supply vessels, outfitted with specialized technologies and systems and crewed by highly experienced mariners, are indispensable to deepwater exploration and production. They act as the umbilical link to offshore drilling and all of the shore-based infrastructure that supports the deepwater drilling effort. The cost to construct these supply vessels runs from $20 to $120 million each, and they charter at rates ranging from $20,000 to over a $100,000 per day. Port Fourchon, the largest deepwater oil port in the nation, provides a home to the host of oil companies and service companies required to successfully engage in deepwater drilling. Of the 340,936,596 barrels of oil produced in the deepwater Gulf of Mexico in 2006, 90% was supported by the Port Fourchon complex.

Today, there are 33 deepwater drilling rigs actively working in the Gulf of Mexico. *See* Current Deepwater Activity chart, dated June 1, 2010 (attached as Exhibit "C"). Until the

moratorium, 8 additional deepwater rigs were contracted to arrive in the Gulf of Mexico between 2010 and 2011. Because of the extraordinary daily costs associated with contracting a deepwater drilling spread, and because of the ever-increasing worldwide demand for these assets, if the moratorium remains in place, the rigs will likely leave for other international basins. The uncertainty concerning a possible extension of the drilling ban exacerbates this risk. When a deepwater rig or vessel leaves a drilling region, it does so under a long-term contract and will not return for several years, if ever. The departure of the deepwater rig, of course, reduces the demand for local vessel services and shore-based services. Because the moratorium orders an industry-wide shut down of all deepwater drilling, it will have an immediate effect on the complex human environment that supports deepwater drilling and may well mark an end, or severe curtailment, to the Gulf of Mexico deepwater drilling industry. Shore-based businesses will have to close their doors, and vessel crews and other highly trained workers that support deepwater drilling now face the threat of layoffs. Once forced to look for employment in other industries, there can be little to no expectation that this experienced and uniquely skilled workforce can be replaced. The loss of this human capital will worsen an already well-documented shortage of skilled and professional personnel needed in the US offshore energy industry.

The Deepwater Horizon Explosion and Spill

On April 20, 2010, an explosion and fire erupted on an offshore drilling rig in the Gulf of Mexico called the Deepwater Horizon, which resulted in an oil spill that continues at present. (the "Incident"). In response to the Incident, on April 30, 2010, the President directed the Secretary of the Interior, Defendant Salazar, to conduct a safety review and to report within 30 days on "what, if any, additional precautions and technologies should be required to improve the

safety of oil and gas exploration and production operations on the outer continental shelf." On May 6, 2010, Secretary Salazar announced that no applications for drilling permits would go forward for any new offshore drilling activity until the DOI completed the safety review process directed by the President. May 6, 2010 Press Release (attached as Exhibit "D").

The Department of the Interior's Actions in Response to the Incident

MMS performed immediate inspections at 29 of the 33 permitted wells being drilled in water depths of greater than 500 feet and found that 27 of the rigs were fully compliant with governing regulations and their drilling permits and that there were only minor problems at the other 2 rigs. *See* MMS Deepwater Drilling Rig Inspection Report (attached as Exhibit "E").

On May 27, 2010, Secretary Salazar submitted the Report (*see* Exhibit "A"), recommending "a series of steps immediately to improve the safety of offshore oil and gas drilling operations in Federal waters and a moratorium on certain permitting and drilling activities until the safety measures can be implemented and further analyses completed." (Report at Executive Summary). The Report recommended "temporarily halting certain permitting and drilling activities," including: (a) "a six-month moratorium on permits for new wells being drilled using floating rigs" and (b) "an immediate halt to drilling operations on the 33 permitted wells." For the 33 permitted wells, the Report recommended that "Drilling operations should cease as soon as safely practicable for a 6-month period."

While the Report's Executive Summary provided general recommendations to impose the six-month moratorium and to halt drilling operations on the 33 permitted wells, the Report fails to set forth any facts, data, analysis or risk assessment in support of those recommendations. Indeed, despite the post-Incident inspection of 29 of the 33 permitted wells, the Report fails to

even reference the MMS Deepwater Drilling Rig Inspection Report that provided the favorable results of those inspections.

Further, although the Report's Executive Summary states that its recommendations "have been peer-reviewed by seven experts identified by the National Academy of Engineering," Executive Summary at p. 3, five of those experts, along with three other experts who also consulted on the Report, have issued a statement to Louisiana Governor Jindal and United States Senators Landrieu and Vitter in which they state that, while they "broadly agree with the detailed recommendations in the report," they "**disagree with the six month blanket moratorium.**" *See* Fax to Gov. Jindal, Senator Landrieu & Senator Vitter from Kenneth E. Arnold, PE, NAE[2] (attached as Exhibit "F") (emphasis added). The experts also indicate that they did not "peer review" the Executive Summary's recommended moratorium, which "was added after final review and was never agreed to" by them. The experts conclude that a "blanket moratorium will have the indirect effect of harming thousands of workers and further impact state and local economies suffering from the spill" and that the blanket moratorium "will not measurably reduce risk further. . . ."

Following issuance of the Report, Secretary Salazar issued a single-paged Memorandum entitled "Suspension of Outer Continental Shelf (OCS) Drilling of New Deepwater Wells" (the "Moratorium") (attached as Exhibit "G"). The Moratorium stated in conclusory terms:

> I find at this time and under current conditions that offshore drilling of new deepwater wells poses an unacceptable threat of serious and irreparable harm to wildlife and the marine, coastal, and human environment as that is specified in 30 C.F.R. 250.172(b). I also have determined 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. 30 C.F.R. 250.172(c).

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[2] The statement was forwarded on behalf of Kenneth E. Arnold, PE, NAE; Dr. Robert Bea; Dr. Benton Baugh; Ford Brett; Dr. Martin Chenevert; Dr. Hans Juvkam-Wold; Dr. E.G. (Skip) Ward; & Thomas E. Williams.

Based on these findings, the Secretary directed MMS to issue "a six month suspension of all pending, current, or approved offshore drilling operations of new deepwater wells in the Gulf of Mexico and the Pacific regions." The Secretary directed that, "For those operators who are currently drilling new deepwater wells, they shall halt drilling activity at the first safe and controlled stopping point and take all necessary steps to close the well." He further directed: "MMS shall not process any new applications for permits to drill consistent with this directive." Finally, Secretary Salazar requested that MMS "ensure that appropriate Letters of Suspension and any other appropriate documentation, including any additional instructions and details regarding this directive, are sent to all affected lessees, owners, and operators immediately."

Effective May 30, 2010, MMS issued NTL No. 2010-N04, 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 Implement the Directive to Impose a Moratorium on All Drilling of Deepwater Wells" (the "NTL") (attached as Exhibit "H"). Among other things, the NTL implements a "Six-Month Deepwater Moratorium" and contains "Directives" including: (a) the cessation of drilling all new deepwater wells, including any wellbore sidetracks and bypasses; (b) a prohibition from spudding any new deepwater wells; and (c) a notification that, except as provided in the NTL, MMS will not consider for six months from the date of the NTL drilling permits for deepwater wells and for related activities as set forth therein. The NTL defines "deepwater" as "depths of water greater than 500 feet."

The "Findings" section in the NTL set forth that it is based on the one-page Moratorium, referencing its reliance on 30 C.F.R. § 250.172(b)-(c). The Findings also state that the NTL is based on the recommendations in the Report. The Findings conclude that the "Moratorium NTL

is warranted because of the significant risks of OCS drilling in deepwater without implementation of the safety equipment, practices and procedures recommended in the Report."

The NTL contains no factual data or independent factual findings of its own and instead relies exclusively on the Report with respect to the facts. It also inexplicably fails to address the MMS report on the post-Incident inspections.

Notwithstanding that the Incident occurred at a discovery well drilled in nearly 5,000 feet of water and despite the Report's specific reference to "risks associated with operating in water depths in excess of 1,000 feet of water" as being "significantly more complex than in shallow water,"[3] the NTL's Directives define, for the NTL's purposes, "deepwater" to mean "depths greater than 500 feet." Neither the Report, the Moratorium nor the NTL contains any empirical data or factual basis to support the decision to define "deepwater" and impose the moratorium on drilling activity in "depths greater than 500 feet."

Both the Moratorium and the NTL state that the Report provides the factual bases for their decisions. Consequently, the Report, the Moratorium and the NTL form the heart of the Administrative Record upon which this case will be resolved.

III. LAW AND ARGUMENT

To obtain a preliminary injunction, a plaintiff must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat that irreparable injury will result if the injunction is not granted; (3) that the threatened injury outweighs the threatened harm to the defendant; and (4) that granting the preliminary injunction will not disserve the public interest. *Doe v.*

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[3] Report at p. 2. The Report further sets forth the following facts: (a) "In 2001, the U.S. deepwater offshore oil production surpassed shallow water oil production for the first time;" Report at p. 4, (b) "By 2009, 80 percent of offshore oil production and 45 percent of natural gas production occurred in water depths in excess of 1,000 feet, and the industry had drilled nearly 4,000 wells to those depths;" *id.*, and (c) before the Incident, the last well blowout event exceeding 1,000 barrels on the OCS occurred in 1970. *Id.* at p. 6.

Duncanville Indep. Sch. Dist., 994 F.2d 160, 163 (5th Cir. 1993); *Acme Refrigeration Supplies, Inc. v. Acme Refrigeration of Baton Rouge, Inc.*, 961 F. Supp. 936, 938 (E.D. La. 1996). As shown below, each of these requirements is met in this case. Accordingly, Hornbeck is entitled to preliminary injunctive relief.

A. Hornbeck Is Substantially Likely to Prevail on the Merits.

1. The Moratorium and NTL Issued by Defendants Are Arbitrary and Capricious Because They Exceed Defendants' Authority under OCSLA and Its Implementing Regulations.

a. The APA's "Arbitrary and Capricious" Standard.

To prevail on a substantive claim under the OCSLA, which is reviewed pursuant to the Administrative Procedure Act ("APA"), a plaintiff must establish that the challenged agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). The United States Supreme Court has construed the APA's arbitrary and capricious standard to require courts to consider whether the agency decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (citations omitted). An agency at a minimum must weigh relevant data and articulate "an explanation of the basis for its decision" that demonstrates "a rational connection between the facts found and the choice made." *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 626 (1986) (internal quotations and citations omitted). In accordance with the APA, an agency must "explain the rationale and factual basis for its decision." *Id.* at 627. "Post hoc explanations . . . are simply an inadequate basis for the exercise of substantive review of an administrative decision." *United States v. Garner*, 767 F.2d 104, 116-117 (5th Cir. 1985) (quoting *Motor Vehicle Mfr.'s Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)). (citations omitted). Moreover, the

Administrative Record itself must contain evidence and factual support for the decision made, and unsupported agency statements of fact and resulting legal conclusions will not survive scrutiny under arbitrary and capricious review. *Morall v. DEA*, 412 F.3d 165, 180 (D.C. Cir. 2005) (finding it unreasonable for an agency to base its decision on an allegation for which there was no support in the administrative record, particularly when the record contained uncontroverted evidence to support an opposite finding); *Jet Investment, Inc. v. Dep't of Army*, 84 F.3d 1137, 1140-41 (9th Cir. 1996) (concluding that an agency's factual findings and resulting legal conclusions were arbitrary and capricious under circumstances in which the agency relied entirely on "a statement found nowhere in the administrative record" and further observing that "facts or charges set forth in the defendants' moving papers" did not constitute factual support). Under the APA, an agency acts arbitrarily and capriciously when it fails, pre-decision, to find and weigh facts and data appropriate to support the action it elects to take, thus resulting in the inability to demonstrate a rational connection between "the facts found and the choice made." *Bowen*, at 626.

b. OCSLA and Its Implementing Regulations.

The declared policy underlying OCSLA recognizes the OCS as "a vital national resource reserve" and mandates its availability "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). The regulation of OCS exploration and production activities therefore requires a **balancing** between orderly resource development and protection of the human, marine and coastal environments.

c. The Governing Legal Standard.

The provision of OCSLA authorizing the Secretary to suspend OCS lease activity,

OCSLA, 43 U.S.C. § 1334(a)(1)(B), provides that the Secretary shall prescribe regulations "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 (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not lease), or to the marine, coastal, or human environment . . . ." Pursuant to this statutory directive, the implementing regulations provide that MMS "may direct a suspension (Directed Suspension), for all or any part of a lease or unit area." 30 C.F.R. § 250.168(a). With respect to the circumstances under which MMS may direct a suspension, 30 C.F.R. § 250.172(b) provides that the Regional Supervisor may grant or direct an SOO (Suspensions of Operations) "[w]hen activities pose a threat of serious, irreparable, or immediate harm or damage," which "would include a threat to life (including fish and other aquatic life), property, any mineral deposit, or the marine, coastal or human environment." In addition, the Regional Supervisor may grant or direct an SOO "[w]hen necessary for the installation of safety or environmental protection equipment." 30 C.F.R. § 250.172(c).

In accordance with the standards set forth in the APA, OCSLA and its implementing regulations authorize a suspension of operations only upon an appropriate fact-based finding that OCS operations pose a "threat of serious, irreparable, or immediate harm or damage" to life or property. To direct suspensions under OCSLA, DOI and MMS must weigh relevant facts and data and articulate an explanation for their decision to suspend operations that demonstrates a rational connection between the facts found and the choice made.

d. Defendants Have Violated OCSLA and Its Implementing Regulations.

DOI and MMS violated the statute and regulations by directing the suspension of drilling at the 33 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." As reflected by the absence of empirical data, analysis or risk assessment in the Report, the Moratorium or the NTL Defendants have failed to provide any factual findings to support a determination of systemic noncompliance by the operators of the affected 33 permitted wells. To the contrary, the facts found during the inspections of the 29 wells established that the wells were, with minor exceptions, operating in compliance with governing law and their existing permits. The decision of DOI and MMS to suspend drilling at the 33 permitted wells, therefore, falls squarely within the confines of "arbitrary and capricious" agency action because DOI and MMS have not and cannot show "a rational connection between the facts found and the choice made." *Bowen*, 476 U.S. at 626.

Likewise, neither the Report, the Moratorium nor the NTL provides any facts, data or analysis to support the imposition of a blanket moratorium on deepwater drilling at water depths greater than 500 feet. In fact, while the Report references "more complex" risks associated "with operating in water depths in excess of 1,000 feet of water," the NTL inconsistently bans all drilling at depths "greater than 500 feet." Because DOI and MMS failed to find (much less weigh) facts sufficient to support their imposition of a global moratorium on drilling at water depths greater than 500 feet, they acted arbitrarily and capriciously.

Given that both the Moratorium and the NTL point to the material in the Report as the basis for their conclusions, the Report is the key document in the Administrative Record with respect to a review of the factual findings and rational inquiry of Defendants to support their action. The Report, however, contains no factual information that addresses the statutory standard that requires a suspension or temporary prohibition on drilling to be based on a showing of "a threat of serious, irreparable, or immediate harm" to life or property. 43 U.S.C. §

1334(a)(1)(B). In fact, the Report itself admits that no study of the causes of the Incident has been completed, stating that it "has of necessity been conducted without the results of ongoing investigations into the precise causes of the event." Report at p. 18. Also, despite the order to cease all OCS drilling in water depths that exceed 500 feet, the Report sets forth no facts concerning Defendants' analysis of the risks presented by drilling in waters over 500 feet deep.

Although the Secretary in the Moratorium recites the terms of the regulations and represents that the Report presents material sufficient to satisfy the conditions of those regulatory standards, the Report is devoid of any facts to support the Secretary's conclusory assertions. The Secretary's mere recitation of the terms of the regulations cannot fill the vacuum because the APA demands rational inquiry and factual evidence, not verbatim parroting of the rules and unsupported conclusions. *See Morall*, 412 F.3d at 180; *Jet*, 84 F.3d at 1140-41.

OCSLA's implementing regulations prescribe that the MMS Regional Supervisor may "direct" a suspension "for all or any part of a lease or unit area"[4] only upon a finding that operations on "all or part" of a given "lease or unit area" pose a "threat of serious, irreparable, or immediate harm or damage" to life or property. Consequently, OCSLA and its implementing regulations grant DOI and MMS authority to direct a suspension based on an individualized determination, *i.e.*, a determination by particular lease or unit area, that there is a threat of "serious, irreparable, or immediate harm or damage" to life or property arising from safety and environmental concerns posed by activities on that particular lease or unit area.

Given that post-Incident inspections of 29 of the 33 permitted wells revealed only a few "minor" problems and no factual findings of any systemic noncompliance by the operators of the 33 wells, DOI and MMS plainly did not base their decision to halt permitted drilling on any

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4 30 C.F.R. § 250.168(a).

individualized determination that any of those particular 33 wells posed a threat of serious and immediate harm to life or property. Similarly, the global moratorium imposed on drilling at depths beyond 500 feet is, of course, not supported by any individualized determination by DOI or MMS of a threat of serious immediate harm with respect to any particular well being drilled on "all or any part of a lease or unit area."

The blanket moratorium, which orders "zero" drilling in the Gulf of Mexico OCS at water depths beyond 500 feet, also runs afoul of OCSLA's mandate that the agencies must **balance** orderly resource development with protection of human, marine and coastal environments. 43 U.S.C. § 1332(3). In issuing the blanket Moratorium and NTL without consideration of any factual findings concerning the risks currently presented by deepwater drilling or any risk analysis addressing the magnitude of the risks presented, Defendants failed to conduct the required balancing. First, they had and considered no facts or empirical data related to the relevant risks, as defined by OCSLA and the rules. Further, they concluded that no OCS drilling in water depths greater than 500 feet will be permitted for six months, and perhaps longer, without consideration of their statutory obligation to factor "expeditious and orderly" resource development into their decision-making equation. As a result, they failed to comply with the "balancing" requirement of Section 1332(3), and the Moratorium and NTL thus were issued arbitrarily and capriciously. *See State Farm*, 463 U.S. at 43 (an agency action "would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency . . . .")

To summarize, the Moratorium and NTL are "arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with the law," in at least the following ways:

- without any factual finding or data related to any particular drilling activity the Moratorium and NTL arbitrarily suspend all drilling for six months in depths of water greater than 500 feet;

- Although "Offshore operations provide direct employment estimated at 150,000 jobs," Report at p. 4, the Moratorium and NTL fail to weigh the impact that the loss of an experienced workforce will have on future OCS resource development and the livelihood of those employed and fail to provide an articulated rational connection between the facts found with respect to the Incident and the choice made to risk loss of this workforce;

- the Moratorium and NTL are overly broad and not supported by any rational factual inquiry because, without any finding of any systemic failure with respect to OCS deepwater drilling, Defendants' decisions prohibit the consideration of any new applications for permits to drill and require the cessation of all drilling at the 33 permitted wells.

- the Moratorium and NTL halt all drilling in water depths beyond 500 feet despite the lack of any evidence to show any specific circumstances of noncompliance by any particular operator;

- the NTL defines deepwater and halts all drilling activities at water "depths greater than *500* feet," notwithstanding that the Report specifies only that "risks associated with operating in water depths in excess of *1,000* feet of water are significantly more complex than in shallow water."[5]

  The Moratorium and NTL are based on the "recommendations in the Report," but the Report provides no factual findings, data or analysis to support the decision to declare "a six-month moratorium on permits for new wells being drilled using float rigs" and "an immediate halt to drilling operations on the 33 permit wells.

Considering the complete lack of factual findings to support the decision to issue the Moratorium and NTL, Hornbeck respectfully submits that it has met its burden to show that it is substantially likely to prevail on merits with respect to its claim that Defendants have exceeded the authority granted to them pursuant to OCSLA and its implementing regulations.

B. The Harm that the Moratorium and NTL Will Inflict on Hornbeck – and the OCS

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5 (emphasis added).

Industry as a Whole – Is Not Subject to Calculation.

Irreparable harm consists of "a substantial injury that is not accurately measurable or adequately compensable by monetary damages." *Ross-Simmons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 18-19 (1st Cir. 1996). A finding of irreparable harm is appropriate "where economic rights are involved when the nature of those rights makes 'establishment of the dollar value of the loss . . . especially difficult or speculative.'" *Allied Mktg. Group, Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 810 n.1 (5th Cir. 1989) (quoting *Mississippi Power & Light Co. v. United Gas Pipe Line*, 760 F.2d 618, 630 n.12 (5th Cir. 1985)). Moreover, "[i]n making the determination of irreparable harm, both harm to the parties and to the public may be considered." *In re Northwest Airlines Corp.*, 349 B.R. 338, 384 (S.D.N.Y. 2006) (quoting *Long Island R.R. Co. v. Int'l Ass'n of Machinists,* 874 F.2d 901, 910-11 (2d Cir. 1989)). In connection with the irreparable harm standard, the D.C. Circuit has held that irreparable harm existed where it was "exceedingly speculative to place a dollar figure" on the damage to the movant's value absent an injunction. *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673-74 (D.C. Cir. 2005) (reversing the district court and remanding with direction to enter preliminary injunction against enforcement of a post-9/11 District of Columbia Act, which sought to protect the US Capitol from a terrorist attack arising from hazardous materials transported by rail car and finding that the rail car plaintiff, CSX, met the irreparable harm standard on the basis that it "would be exceedingly speculative, particularly in light of the nature of a complex, interdependent national rail system, to place a dollar figure on the difference in value between the rail network CSXT presently operates and the effectively smaller, more constrained network that compliance with the D.C. Act would entail."); *see also, e.g.*, *Baccarat*, 102 F.3d at 19-20 (upholding district court's finding of potential for irreparable harm where movant "would lose incalculable revenues and sustain

harm to its goodwill."); *BNSF v. Co. v. Tri-City & Olympia R.R. Co., LLC*, 2009 WL 3149569, *4 (E.D. Wash. Sept. 28, 2009) (holding plaintiff demonstrated likelihood of irreparable injury where "no monetary recovery at the end of this suit could compensate for [the likely] loss of goodwill.") (citing in part *CSX.*, 406 F.3d at 673).

Similarly, in upholding a preliminary injunction prohibiting railroad unions and their officers from striking, the Second Circuit concluded that "harm to the Railroads and the public resulting from a general cessation of rail service" qualified as irreparable harm. *Long Island R.R. Co.*, 874 F.2d at 911. For similar reasons, in *In re Northwest Airlines Corp.*, the court enjoined flight attendants from striking based in part on a showing by Northwest Airlines that the public would be harmed absent an injunction because: "Northwest carries 130,000 passengers per day, has 1,200 departures per day, is the one carrier for 23 cities in this country, and provides half all airline services to another 20 cities." 349 B.R. at 384; *cf. Starlight Sugar, Inc. v. Soto*, 114 F.3d 330, 332 (1st Cir. 1997) (affirming preliminary injunction granted by district court based on "irreparable harm threatened by the inability of the plaintiff sugar importers to take advantage of an impending shortage of sugar supply in Puerto Rico.")

The Fifth Circuit has likewise affirmed a finding of a substantial threat of irreparable harm based on the conclusion "that the damage to the goodwill of [the movant's] customers . . . might be incapable of calculation." *Allied Mktg. Group, Inc.*, 878 F.2d at 810, n.1; *see also, e.g., Cummins-Allison Corp. v. SBM Co., Ltd.*, 584 F. Supp. 2d 916, 920 (E.D. Tex. 2008) ("[T]he difficulties in arriving at a dollar value of damages weigh in favor of an injunction.") (citing *Baccarat*, 102 F.3d at 19); *Hooters, Inc. v. City of Texarkana, Texas*, 897 F. Supp. 946, 949 (E.D. Tex. 1995) ("When the nature of a plaintiff's loss would make damages difficult to calculate, the injury is not fully compensable by money damages.") (citations omitted).

Hornbeck's principal business is to provide Jones Act-compliant vessel support to deepwater and ultra deepwater drilling operations. Verified Complaint at ¶ 6. Hornbeck's OCS business model substantially depends on its performance of its contracts with deepwater and ultra deepwater oil and gas exploration and production companies. Verified Complaint at ¶¶ 6, 26, 52. As a result, an industry-wide suspension will lead to a lack of prospective contracting opportunities to provide services for new deepwater drilling, causing irreparable harm to Hornbeck's Jones Act US Gulf of Mexico business. Verified Complaint at ¶¶ 26, 52.

Hornbeck thus has been damaged not only by the actual and threatened termination of its contracts with operators of the 33 deepwater wells caused by the industry-wide six month suspension of drilling, but it also faces the lack of any prospective contracting opportunities to provide services for new deepwater drilling with its Jones Act-compliant vessels that are uniquely configured and crewed to support drilling operations in the Gulf of Mexico's deepwater OCS. Once Hornbeck deploys its vessels to foreign locations, it is unlikely to retain the crews that it has trained and developed to support its US OCS operations. Hornbeck has invested millions of dollars in recruiting, retaining, training and developing these mariners to support the unique U.S. OCS drilling industry. The loss of human capital and know-how is difficult if not impossible to measure. Similarly, because Hornbeck invested in US flagged Jones Act qualified vessels, which the law requires for supporting OCS operations, Hornbeck is deprived of the use of these special pedigrees once operating in foreign locations. In fact, Hornbeck may be forced, in many jurisdictions, to reflag its vessels, which will result in a permanent loss of US Jones Act trading privileges. The use of Hornbeck's investments made in the shoreside port, training and recruiting facilities will all be lost as vessels and operations leave the Gulf. Hornbeck will lose access to the network of service vendors, suppliers and other third parties that provide key

services to Hornbeck and have developed knowledge and understanding of Hornbeck's business and vessels. For instance, Hornbeck's vessels have been constructed, maintained and repaired in shipyard facilities in the Gulf region. The workers, supervisors and managers of these facilities understand Hornbeck's vessels and have unique knowledge about them, all of which adds to the value of Hornbeck's business enterprise and all of which will be irretrievably lost as these facilities close down due to loss of business. Put simply, the Moratorium and NTL will harm Hornbeck's business in ways that are irreparable; indeed, they threaten the continued viability of the entire Gulf of Mexico deepwater industry.

The losses to Hornbeck are not subject to monetary measurement because, for instance, each vessel in Hornbeck's fleet of Jones Act-compliant vessels has a limited useful life, and, accordingly, there is no way to recover time lost in the intended Jones Act trade of these vessels. Verified Complaint at ¶ 6. As a result, Hornbeck's place in the OCS industry necessarily leads to an inherent difficulty in calculating the threatened monetary damages to Hornbeck. Likewise, there is no way to estimate the loss Hornbeck would suffer if its crews have to leave in search of other employment. Similarly, Hornbeck's shore-side teams are at risk, as are Hornbeck's contracts with thousands of off-shore service vendors. An industry-wide shut-down would dismantle the complex and intricate network that supports deepwater drilling in the Gulf of Mexico, resulting in irreparable harm to Hornbeck and to the industry as a whole. The harm Hornbeck would sustain without an injunction qualifies as irreparable injury.

C. The Irreparable Injury that Hornbeck and the OCS Industry Will Suffer Absent a Preliminary Injunction Outweighs Any Harm Defendants May Suffer If a Preliminary Injunction Is Granted.

Absent an injunction, Hornbeck will sustain not only significant economic losses but also intangible losses that would force it to change its business model irrevocably. In contrast, because Defendants issued the Moratorium and the NTL without an appropriate factual

underpinning to show a threat of serious immediate harm on a systemic basis or from any particular drilling operation, they would suffer little to no harm if a preliminary injunction were issued for the short period of time that would be necessary to resolve this case on the merits. During that interim period, if they could marshal appropriate facts to support such an action, Defendants would retain their authority to issue a more narrowly tailored order to prohibit particular drilling activities that the facts show pose risks of serious and immediate harm within the meaning of OCSLA and its implementing rules. Therefore, the irreparable injury to Hornbeck if the injunction is not granted outweighs the harm to Defendants if the preliminary injunction issues.

D. Granting a Preliminary Injunction Against the Moratorium and NTL Is in the Public Interest.

While it is true that safe OCS drilling practices are extraordinarily significant to the public interest, it is equally true that the granting of a preliminary injunction here will serve the public interest. In response to tragedies in the industrial settings, the government has never, before now, ordered an industry-wide shut down, lest it compound exponentially the adverse consequences to the economy and general welfare of the public.

Because OCS operations employ a wide variety of companies and workers, in the absence of injunctive relief, the potential losses to those businesses, their workers and the Louisiana economy will be severe and irreparable. Such harms include, but are not limited to, the following: 1) within a very short time, Louisiana will lose 3,000 to 6,000 jobs that are directly and indirectly related to the deepwater drilling operations at the 33 wells; 2) if the Moratorium is maintained for six months, Louisiana could lose 10,000 direct and indirect jobs; 3) if the Moratorium persists while oil prices rise, Louisiana could lose 20,000 direct and indirect jobs over the next twelve to eighteen months, in addition to missed job creation opportunities

stemming from energy development stimulated when oil prices rise; 4) lost wages for direct and indirect jobs lost could be over $165 million to $330 million per month for every month the 33 platforms are idle. Mowbray, Rebecca, *The Times-Picayune*, "Offshore Drilling Ban Could be a Blow to Louisiana Economy," May 30, 2010 (attached as Exhibit "I"); Louisiana Mid-Continent Oil and Gas Association, "Impacts of President Obama's Order Halting Work on 33 Exploratory Wells in Deepwater Gulf of Mexico," May 28, 2010 (attached as Exhibit "J").

The public interest of the entire region, particularly the local communities, will be harmed by the loss of the Gulf of Mexico OCS workforce. The adverse effects will also harm the entire nation. For example,

- a six-month Moratorium in new drilling would defer 80,000 barrels per day, or 4% of 2011 deepwater production in Gulf of Mexico;
- if the Moratorium remains in place, it would possibly drive oil prices to levels over $100 per barrel by decreasing availability of domestic oil; and
- if the Moratorium remains in place, it could deter new drilling operations in the Gulf of Mexico for years to come.

Id. Granting the preliminary injunction will serve the public interest, while at the same time protecting Hornbeck's business and vested contractual interests and those of the entire Gulf of Mexico deepwater industry during the short period of time necessary for resolution of this case on the merits.

IV. CONCLUSION

For the foregoing reasons, Hornbeck is entitled to a Preliminary Injunction enjoining the six-month drilling moratorium as applied to all drilling in water at depths of greater than 500 feet.

This __ day of June, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Hornbeck's Memorandum of Law in Support of its Motion for Preliminary Injunction has been forwarded this day to the parties by e-mail, by telefax, by hand, and/or by United States mail.

New Orleans, Louisiana, this 9th day of June, 2010.