

**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;
UNITED STATES DEPARTMENT OF
THE INTERIOR; ROBERT “BOB”
ABBEY, in his official capacity as Acting
Director, Bureau of Ocean Energy
Management, Regulation, and
Enforcement; and BUREAU OF OCEAN
ENERGY MANAGEMENT,
REGULATION, AND ENFORCEMENT,**

Defendants.

CIVIL ACTION No. 10-1663(F)(2)

SECTION F

JUDGE FELDMAN

**MAGISTRATE 2
MAGISTRATE WILKINSON**

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS’ MOTION FOR STAY PENDING APPEAL OR IN THE
ALTERNATIVE FOR A TEMPORARY STAY UNTIL RESOLUTION BY THE
COURT OF APPEALS OF AN EMERGENCY STAY REQUEST**

Defendants, Kenneth Lee Salazar, the United States Department of the Interior, Robert Abbey, and the Bureau of Ocean Energy Management, Regulation, and Enforcement (“Defendants”), hereby request that the Court stay its Order granting Plaintiffs’ Motion for Preliminary Injunction (the “Order”) pending Defendants’ appeal to the Fifth Circuit Court of Appeals under Rule 62(c) of the Federal Rules of Civil Procedure. In the alternative, Defendants request that the Court issue a temporary stay until resolution by the Court of Appeals of an emergency motion by the United States for a stay pending appeal of the District Court’s Order, under Rule 8(a) of the Federal Rules of Appellate Procedure.

The Secretary of the Department of the Interior has announced that, in addition to appealing this Court's decision, he will undertake a process to issue a new suspension decision that reflects information learned since the original suspension decision and provides further explanation of the need for a pause in deepwater drilling operations. A stay pending appeal would maintain the legal status quo prior to the Court's issuance of the preliminary injunction while the Secretary undertakes this process. A stay pending appeal would further serve the public interest by eliminating the risk of another drilling accident while new safety equipment standards and procedures are considered. Of course, until a further order of this Court or the Court of Appeals granting relief from this Court's Preliminary Injunction Order, Defendants will comply with the Court's Order.¹

I. INTRODUCTION

As a result of the April 20, 2010 explosion and fire on the Deepwater Horizon – which resulted in the loss of eleven lives and an unprecedented environmental catastrophe – the Department of the Interior ("Department") undertook immediate precautions to ensure that another such tragedy would not occur while it implemented necessary safety measures and investigated the cause of the accident. Specifically, the Secretary of the Interior ("Secretary") and the Bureau of Ocean Energy Management, Regulation, and Enforcement ("BOEMRE") exercised their regulatory authority to suspend oil and gas drilling operations in the Gulf of Mexico for a period of six months, pursuant to temporary suspension letters sent to each affected operator, see *Montero Decl. Ex. A*, and a Notice to Lessees ("NTL") issued on May 30, 2010. Hornbeck Offshore Services, L.L.C. and other companies (hereinafter "Plaintiffs") brought suit seeking an order preliminarily enjoining the suspensions on grounds that they violate the Outer

¹ Plaintiffs have filed a Motion to Enforce the Court's Preliminary Injunction Order. [Docket No. 69]. Defendants will file a response explaining that the Motion is unwarranted and should be denied.

Continental Shelf Lands Act (“OCSLA” or “Act”) and the Administrative Procedure Act (“APA”). After a hearing on June 21, 2010, the Court granted Plaintiffs’ motion and issued a preliminary injunction enjoining Defendants from enforcing the suspensions.

Defendants now respectfully request that the Court stay its Order pending Defendants’ appeal of that Order. Defendants have raised substantial defenses to Plaintiffs’ claims: Plaintiffs have failed to demonstrate that Defendants’ exercise of their broad discretion to act to protect the environment and human health and safety was arbitrary and capricious. Furthermore, the balance of harms weighs strongly in favor of staying the Court’s Order. Defendants’ suspensions were issued to prevent the risk of more loss of life and long-term environmental and economic devastation like that arising from the Deepwater Horizon accident. In contrast, Plaintiffs have demonstrated a risk of short-term economic harm. Finally, the public interest is overwhelmingly served by the limited six-month suspensions because the time is needed to implement necessary safety measures to increase the margin of safety in deepwater drilling. The Court should therefore stay its injunction pending appellate review.

In the alternative, if the Court decides against staying its Order pending appeal, Defendants respectfully request that the Court issue a temporary stay until resolution by the Court of Appeals of an emergency motion by the United States for a stay pending appeal of the District Court’s Order, under Rule 8(a) of the Federal Rules of Appellate Procedure.

II. FACTUAL BACKGROUND

The Court is familiar with the factual background of this case, which is described in Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction, filed June 16, 2010 (Docket No. 33). That description is incorporated herein by reference.

III. PROCEDURAL BACKGROUND

Plaintiffs filed their complaint seeking a preliminary injunction on June 7, 2010, which they amended on June 9, 2010. Dkt. ## 1, 5. Contemporaneously with their complaint, Plaintiffs filed their Motion for Preliminary Injunction (“Motion”). Dkt. #7. Defendants filed their Opposition to Plaintiffs’ Motion for a Preliminary Injunction (“Opposition”) on June 16, 2010. Dkt. #33. The Court held a hearing on the Motion on June 21, 2010. On June 22, the Court entered the Order granting Plaintiffs’ Motion. Defendants now move for a stay pending appeal of the June 22 Order.

IV. ARGUMENT

A. Standard for Granting a Stay Pending Appeal

Under Rule 62(c) of the Federal Rules of Civil Procedure, a district court may, in its discretion, stay any interlocutory order, including one granting a preliminary injunction, during the pendency of an appeal of that order. Fed. R. Civ. P. 62(c). In order to obtain a stay pending appeal, the moving party must: (1) make a strong showing that it is likely to succeed on the merits; (2) demonstrate that it would suffer irreparable injury if the stay were not granted; (3) show that granting the stay would not substantially harm the other parties; and (4) show that granting the stay would serve the public interest. Hilton v. Braunskill, 481 U.S. 770, 776 (1987). However, the Fifth Circuit has not applied these factors in a rigid, mechanical fashion, but rather has adopted a “balance of equities approach in determining whether to grant a stay pending appeal.” Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981). See also Nat’l Treasury Employees Union v. Von Raab, 808 F.2d 1057, 1059 (5th Cir. 1987). Specifically, “the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay.” Id. The Fifth Circuit’s approach results from a common-sense interpretation of Rules 62(c) and Federal Rule of Appellate Procedure Rule 8. As the Ruiz Court reasoned:

If a movant were required in every case to establish that the appeal would probably be successful, the Rule would not require as it does a prior presentation to the district judge whose order is being appealed. That judge has already decided the merits of the legal issue. The stay procedure of Fed.R.Civ.P. 62(c) and Fed.R.App.P. 8(a) affords interim relief where relative harm and the uncertainty of final disposition justify it.

650 F.2d at 565; see also Mazurek v. United States, No. 99-2003 C/W 99-2229, 2001 WL 260064 at *1 n.1 (E.D. La. Jan. 11, 2001) (Feldman, J.) (same); Wildmon v. Berwick Universal Pictures, 983 F.2d 21, 23-24 (5th Cir. 1992). Thus, because Defendants can demonstrate a substantial case on the merits and that the balance of equities weigh heavily in their favor, their request for stay pending appeal should be granted.

B. Defendants Have Demonstrated a Substantial Case on the Merits Involving Several Legal Questions.

Defendants have demonstrated a substantial case with respect to the merits. As discussed in Defendants' Opposition, the Act and the implementing regulations provide the Secretary with broad discretion to act to protect the environment and human health and safety, and the Department properly exercised this discretion in issuing the temporary suspensions of deepwater drilling operations.

Plaintiffs incorrectly assert that the Secretary's finding that OCS operations pose a threat of "serious, irreparable, or immediate harm or damage' to life or property," was based on insufficient facts, data, or analysis. See Pls' Br. at 13, 14, 15. As discussed in Defendants' Opposition and in the declarations of David J. Hayes, Deputy Secretary of the Department of the Interior, and Steven Black, Counselor to the Secretary, attached to Defendant's Opposition, the Secretary's determination that a threat exists has firm support from a variety of sources. In fact, the existence of such a threat is not seriously contested by any expert cited by Plaintiffs or the State. To the contrary, the State of Louisiana concedes that additional safety measures are

necessary, and disputes only the length of time needed to implement them. See Dkt. #53 at 10 (“In essence, the State of Louisiana believes that . . . by immediately implementing the recommendations in the DOI’s Safety Report which can be implemented in 30 days, deepwater drilling may promptly resume in a reasonably safe manner.”); see also Louisiana Gulf Economic Survival Team Website, available at <http://www.crt.state.la.us/GEST/index.aspx> (last visited June 22, 2010) (“GEST is requesting that the President and Secretary Salazar reduce the moratorium to no more than 30 days, during which time thorough rig safety inspections can be conducted by federal inspectors”).

Moreover, independently of this threat, the Secretary may also issue suspensions whenever “necessary for the installation of safety or environmental protection equipment.” See 30 C.F.R. § 250.172(c). The Department invoked both regulatory provisions, and each serves as an independent and adequate basis for the suspensions and each will be fully supported by the Administrative Record.

Further, contrary to Plaintiffs’ argument, no relevant provisions in the APA, OCSLA, or its implementing regulations require the Department to prepare a formal decision document or findings of fact prior to issuing a suspension. See, e.g., Madison County Bldg. and Loan Ass’n v. Fed. Home Loan Bank Bd., 622 F.2d 393, 396 (8th Cir. 1980) (“Overton makes it clear that [APA] 706(2)(A) does not require that the agency make any formal findings of fact”). Rather, a challenged action will be upheld if the requisite basis and explanation can be discerned from the administrative record. See Miller v. Lehman, 801 F.2d 492, 496-97 (D.C. Cir. 1986). As discussed above, even though the Administrative Record has yet to be filed, the declarations and other evidence provided to the Court demonstrate that the Department’s issuance of suspensions is adequately supported and that it was based on a thorough consideration of relevant factors.

Finally, the fact that some reviewers of the Safety Report disagreed with the proposed suspensions is not relevant here. The discretion to invoke or not invoke the suspension authority in 30 C.F.R. § 250.172 is entrusted to the Department, and to survive judicial review, the Department need only identify its factual basis for determining that the standards in 30 C.F.R. § 250.172 are satisfied.² Here, the Department has determined that certain risk factors likely caused the Deepwater Horizon incident, that those risk factors are shared by the rigs whose operations were suspended, and that they need to be addressed through the installation of new equipment and through other regulatory safety measures. Section 250.172 requires nothing more.

In sum, Defendants have established a substantial case on the merits with respect to serious legal questions, and this factor weighs in favor of a stay pending appeal. See Von Raab, 808 F.2d at 1059.

C. The Balance of Harms Weighs Heavily in Favor of Granting Defendants' Request for a Stay Pending Appeal

As demonstrated in the Government's Opposition, the decision to suspend drilling operations grew out of a tragedy of historic proportions. Defendants' Opposition describes in detail how the Deepwater Horizon explosion and ensuing oil spill continues to have devastating social, economic, and environmental impacts on communities throughout the entire Gulf Coast Region. Defs.' Opp'n, at 24-25. Among other things, vast areas of some of the Nation's most productive fishing grounds have been closed to fishing because of the oil spill, and there is an increased potential for even further spreading of the effects of the oil through a hurricane which

² Further, Plaintiffs' argument that the suspensions are arbitrary and capricious because the Department failed to identify a "systemic failure" to comply with current regulations or existing permits fails as well. See Pls' Br. at 2, 14, 17. "Systemic failure" is not one of the findings required by 30 C.F.R. § 250.172(b), (c). Nor does a favorable result in previous inspections limit the Department's discretion and authority to impose heightened safety standards in response to catastrophic events.

could force oil contaminated seawater far inland through storm surges, compounding the existing impacts of the spill. Further, given the efforts that are being directed at trying to stem the flow of oil from the Deepwater Horizon and to clean up the oil that has already been released, a second deepwater blowout could overwhelm the efforts to respond to the current disaster, and dramatically set back recovery. Further, as described in the Declaration of Robert P. LaBelle, attached to Defendants' Opposition, a second blowout—and mitigation activities it might necessitate—could exacerbate the unprecedented environmental effects from the Deepwater Horizon spill. LaBelle Decl. ¶ 5.

The suspensions are necessary to provide lessees and the Department time to implement already identified additional safety measures and to assess whether further measures are needed to ensure that we do not fall victim to another disastrous oil spill. As the Deepwater Horizon disaster illustrated, the special conditions and challenges associated with deep water drilling operations and the magnitude of the potential impacts from accidents in such operations make manifest the importance to the Department of ensuring to the best of its ability that it further reduce the chance of another such event occurring. See LaBelle Decl., ¶ 3. Further, as described in more detail in Defendants' Opposition, the information already available to the Department supports an immediate implementation of new interim measures for equipment, systems, procedures, and practices in order to ensure the safe operation of offshore drilling activities. Defs.' Opp'n, at 4. The temporary suspension of operational drilling will allow the Department to ensure that operators install additional safety equipment before more deepwater drilling can take place, and to implement new safety measures and regulations through the use of various regulatory mechanisms. See Hayes Decl., attached to Defs.' Opp'n, ¶ 11(a).

The risk of potential harm to the people and public lands of the United States should the Court not grant Defendants' request for a stay significantly outweighs the harm Plaintiffs can establish. The essence of Hornbeck's and the other Plaintiffs' entities' claims of injury is that the Secretary's narrowly tailored six-month suspensions "threaten the continued viability of the entire Gulf of Mexico deepwater industry." Pls' Br. at p. 21 (emphasis added). Plaintiffs further allege that the suspensions will cause a cataclysmic collapse of every shoreside shipyard, maintenance facility, and the entire network of "service vendors, suppliers, and other third parties that provide key services to Hornbeck." *Id.* As discussed in detail in Defendants' Opposition, the presented facts do not support Plaintiffs' allegations. Defs.' Opp'n, at 18-23. The Secretary's Directive affects 33 active deepwater drilling wells in the Gulf of Mexico. As noted in the Safety Report, there are nearly 7,000 active leases in the Gulf of Mexico, with approximately 3,600 structures in the Gulf that account for 31% of total domestic oil production in the United States. Pls' Mot., Ex. A at 3. The Secretary's temporary suspensions therefore affect less than 1% of the existing structures in the Gulf dedicated to oil exploration and production. *Id.* Moreover, it is clear that Plaintiffs are not solely dependent on the 33 affected operating drilling rigs to stay in business for the next six months, nor does the "viability of the entire Gulf of Mexico deepwater industry" depend solely on drilling those 33 wells. Moreover, as noted in its amicus brief, the State of Louisiana convened a Gulf Economic Survival Team (GEST) to review the moratorium and to recommend alternatives. The State's own GEST team, tasked with studying the economic impacts of the suspension, concedes that additional safety measures are needed, that a limited duration moratorium is justified, but disagrees with the length of the moratorium. Consequently, the balance of harms weighs heavily in favor of granting the request for a stay.

D. An Injunction Would Not Be in the Public's Interest

Finally, while short-term job loss and economic impacts to the Outer Continental Shelf deepwater drilling industry are indeed cause for concern, the Department has an obligation to manage the public lands and minerals for the long term benefit of the Gulf Region and the United States. The Department has to make sure that Gulf of Mexico OCS drilling operations are safe and secure and that the Nation's fisheries, coastal ecosystems, and other public lands continue to provide jobs, recreation opportunities, habitat for wildlife, healthy ecosystems, and economic resources for all of the public. The Department does this with a view not just for this year or this quarter, but for the long-term future as well.

The temporary suspension of drilling operations was ordered with this long-term view in mind. By providing time to implement needed safety measures and further assess the safety and regulation of deepwater drilling in the Gulf of Mexico, the Department is engaging in a deliberate and measured effort to reduce the risk of another disaster like the Deepwater Horizon for the long-term benefit of local economic, social, and ecological health. The public's interest weighs heavily in favor of making sure that a tragedy like this does not occur again. Enjoining the challenged suspensions before the Department has had the chance to complete its safety assessment and before it can implement additional safety measures for deepwater drilling operations would inhibit this critical endeavor.

E. In the Alternative, the Court Should Enter a Temporary Stay Until Resolution By the Court of Appeals of an Emergency Stay Request

Should the Court decide against granting Defendants' request that its Order be stayed pending appeal, then Defendants respectfully request that the Court temporarily stay the Order pending resolution by the Court of Appeals of an emergency motion by the United States for a stay pending appeal of the District Court's Order, under Rule 8(a) of the Federal Rules of

Appellate Procedure. See, e.g., Kouba v. Allstate Ins. Co., Civil Action No. S-77-99 LKK, 1981 WL 278, *7 (E.D. Cal. Nov. 12, 1981) (“in order to facilitate defendant’s Rule 8(a) application, this court grants defendant’s motion for a temporary stay”). Even crediting Plaintiffs’ claims of harm arising from the suspensions, a stay for this purpose will not impose appreciable hardship upon them, and will ensure that the Court of Appeals has sufficient opportunity to review the parties’ competing positions on whether a stay issued by that court is appropriate.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court enter a stay of its Order granting Plaintiffs’ Motion for Preliminary Injunction pending appeal, or in the alternative, that it enter a temporary stay until resolution by the Court of Appeals of an emergency motion by the United States for a stay pending appeal of the District Court’s Order.

Dated: June 23, 2010

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division

/s/ Guillermo A. Montero
GUILLERMO A. MONTERO (T.A.)
BRIAN COLLINS
U.S. Department of Justice
Environment and Natural Resources Division
Natural Resources Section
PO Box 663
Washington, DC 20016
Tel: (202)305-0443
Fax: (202)305-0267

PETER MANSFIELD
Assistant United States Attorney
Eastern District of Louisiana
Hale Boggs Federal Building
500 Poydras Street, Suite B-210
New Orleans, Louisiana 70130
Tel: (504)680-3000

ATTORNEYS FOR FEDERAL DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2010, I caused a copy of the foregoing to be served through the Court's CM/ECF System to all parties.

/s/Guillermo A. Montero
Guillermo A. Montero
Attorney for Defendants