UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

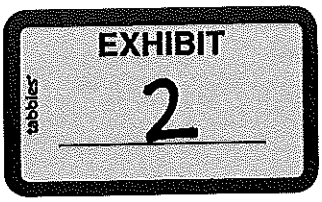
HORNBECK OFFSHORE SERVICES, L.L.C. Plaintiff DIAMOND OFFSHORE COMPANY and DIAMOND OFFSHORE MANAGEMENT COMPANY, Intervenors v. KENNETH LEE "KEN" SALAZAR, in his official capacity as Secretary, United States Department of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; ROBERT "BOB" ABBEY, in his official capacity as Acting Director, Minerals Management Service; and MINERALS MANAGEMENT SERVICES Defendants	CIVIL ACTION No. 10-1663(F)(2) SECTION F JUDGE FELDMAN MAGISTRATE 2 MAGISTRATE WILKINSON

INTERVENOR PLAINTIFFS' BRIEF IN SUPPORT OF INJUNCTIVE RELIEF

Intervenor Plaintiffs (collectively "Diamond," "Diamond Offshore," or "Plaintiffs") file the following brief in support of their request for a temporary restraining order and injunctive relief, the grounds for which are set forth in Plaintiffs' complaint.

INTRODUCTION

Diamond is an offshore drilling contractor which operates deepwater drilling rigs in the Gulf of Mexico. Diamond has successfully drilled over 650 wells in the GOM



without incident over the last 10 years. Some of Diamond's customers have publicly indicated that the Moratorium constitutes a force majeure event, potentially impacting Plaintiffs' contract rights and creating a risk of further adverse consequences.

On June 22, 2010, this Honorable Court granted Plaintiff's Application for Preliminary Injunction and issued an Order, pursuant to which the Court "immediately prohibited" Defendants "from enforcing the Moratorium, entitled 'Suspension of Outer Continental Shelf (OCS) Drilling of New Deepwater Wells,' dated May 28, 2010, and NTL No. 2010-N04 seeking implementation of the Moratorium, as applied to all drilling on the OCS in water depths greater than 500 feet." (Dkt. 68) (the "Preliminary Injunction Order").

After their issuance, and in open defiance of the clear import of the Court's Order and Opinion, Defendant Salazar stated as follows:

> The decision to impose a moratorium on deepwater drilling was and is the right decision. The moratorium is needed to protect the communities and the environment of the Gulf Coast, and DOI is therefore appealing today's ruling.
>
> We see clear evidence every day, as oil spills from BP's well, of the need for a pause on deepwater drilling. That evidence mounts as BP continues to be unable to stop its blowout, notwithstanding the huge efforts and help from the federal scientific team and most major oil companies operating in the Gulf of Mexico. The evidence also continues to mount that industry needs to raise the bar on blowout prevention, containment, and response planning before deepwater drilling should continue.
>
> Based on this ever-growing evidence, I will issue a new order in the coming days that eliminates any doubt that a moratorium is needed, appropriate, and without our authorities.

(A copy of Secretary Salazar's Statement Regarding the Moratorium on Deepwater Drilling, dated June 22, 2010, is attached as Exhibit "A") (emphasis added). In fact, just yesterday morning Secretary Salazar testified in response to questions from Senator Lamar Alexander of Tennessee about the "Moratorium in place" and Senator Lisa Murkowski of Alaska that "this moratorium stays in place." See unofficial partial transcript of testimony attached hereto as Exhibit "B."

A. The Court Should Enjoin the Department of the Interior and Secretary Salazar from Issuing Moratorium Orders that Would Seek to Circumvent the Court's Rulings and Authority.

1. Secretary Salazar's comments reflect a surprisingly defiant attitude towards the judicial branch, unequivocally stating an intent to invoke some form of "executive" authority defy this Court's orders. Ex. A. Secretary Salazar's comments create an imminent threat to this Court's orders, and equally important, constitute an imminent threat of irreparable harm to those private and public interests that the Court sought to protect through injunctive relief. A temporary restraining order is appropriate where the movant proves: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) the threatened injury to the movant outweighs any harm to the nonmovant that may result from the injunction; and (4) the injunction will not undermine the public interest. *Sanzone Brokerage, Inc. v. J&M Produce Sales, Inc.*, 547 F. Supp. 2d 599, 601 (N.D. Tex. 2008). In support of its recently entered temporary injunction in this case, the Court has already determined that Plaintiffs proved all of these elements with respect to the currently enjoined Moratorium and NTL-4. Because Secretary Salazar's threatened moratorium orders threaten to recreate the precise conditions that the Court has

already enjoined, the Court should enter a Temporary Restraining Order enjoining Secretary Salazar's threatened future moratorium orders. Consequently, the Court should enter a temporary restraining order enjoining Secretary Salazar's threatened future moratorium orders. At least two independent grounds support granting this relief. First, the threatened moratorium will undercut the Court's ability to protect the public and private interests that the Court found were being harmed by the currently enjoined Moratorium and NTL-4, disturbing the *status quo ante* that the temporary injunction was designed to protect. Second, because the threatened moratorium order is necessarily grounded in *post hoc* justifications adopted solely as a rationalization for a predetermined conclusion, it cannot cure any of the deficiencies in the currently enjoined moratorium order.

(a) The Threatened Moratorium Undercuts this Court's Ability to Prevent Irreparable Harm to Private and Public Interests.

2. This Court's order enjoining enforcement of the Moratorium stands on solid legal ground. "Once a plaintiff establishes an equitable cause of action, the district court may use its full equitable powers to grant appropriate preliminary relief." *Federal Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 561-62 (5th Cir. 1987); *see Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. U.S. Dep't of Energy,* 232 F.3d 1300, 1305 (9th Cir. 2000). The right to equitable relief is pronounced when, as the Court found in this case, an agency's arbitrary and capricious act threatens serious harm to both public and private interests. *See United States v. Alisal Water Corp.,* 431 F.3d 643, 654 (9th Cir. 2005). In such cases, the Court exercises increased powers to fashion equitable remedies. *Id.* ("Where the public interest is involved, 'equitable powers assume

an even broader and more flexible character than when only a private controversy is at stake.'") (quoting *Porter v. Warner Holding Co.,* 328 U.S. 395, 398 (1946). "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *United States v. Coca-Cola Bottling Co. of L.A.,* 575 F.2d 222, 228 (9th Cir. 1978) (quoting *United States v. First Nat'l City Bank,* 379 U.S. 378, 383, 85 S.Ct. 528, 13 L.Ed.2d 365 (1965)).

3. The circumstances of this case support broad equitable relief. Indeed, the Court found that public as well as private interests weighed in favor of granting a preliminary injunction. Dkt. 67 at 21-22. While broad equitable relief was justified based solely on injury to an important public interest, other exacerbating circumstances informing the Court's decision also support the use of broadened equitable powers, including but not limited to: disingenuous use of expert opinion (Dkt. 67 at 3); the absence of analytical support for the scope of the moratorium (Dkt. 67 at 17); and the failure to consider any alternatives to the moratorium (Dkt. 67 at 18-19).

4. It seems unlikely that any party besides Secretary Salazar anticipated the brazen tactic of issuing a new order on the heels of the Courts' injunction. Had it been seriously contemplated by Plaintiffs or the Court, it might have been prevented at the time, since broader equitable relief, *i.e.,* relief beyond merely enjoining the original Moratorium order, is justified in this case. The Court should now exercise the authorized, broader equitable power to protect the same interests it intended to protect when it enjoined enforcement of the Moratorium. In the two days since the Court issued

its order, the facts supporting the Court's conclusions have not changed. A moratorium will still deprive businesses and residents of income and livelihoods, the Gulf Coast economy will suffer, and the United States will still lose crucial oil production now and in the future.

5. Any threatened new moratorium order constitutes a direct, unjustifiable attack on the Court's order. Indeed, though this Court took pains to identify the gross evidentiary and analytical gaps in the "reasoning" supporting the issuance of the Moratorium order, as well as procedural failures in the rule-making process, Secretary Salazar's offer to supply new evidence is nothing more than *post-hoc* rationalizations for a fore-ordained conclusion. Nothing in Secretary Salazar's threat of a new moratorium order even hints at allowing time for publication and a notice-and-comment period, as required under the APA. 5 U.S.C. § 553(b), (c).[1] He does not indicate that the experts whose recommendations were misrepresented will be given proper weight. He does not indicate that less disruptive alternatives will be considered. He offers only to provide new justification for the same decision. As the Court noted, *post-hoc* rationalization for an administrative rule are "an insufficient basis for the exercise of substantive review of an administrative decision." (Dkt. 67 at 13) (citing *United States v. Garner*, 767 F.2d 104, 117 (5th Cir. 1985). Secretary Salazar's disregard for administrative procedure and his apparent contempt for judicial review and authority should not be tolerated. The Federal Courts are charged with the responsibility of reviewing administrative decisions,

[1] The requirements of the APA are discussed in detail below.

and are vested with the authority to issue injunctions to protect the public from arbitrary and capricious agency action. That review will be thwarted if administrators are permitted to escape review by simply reissuing functionally-identical rulings accompanied by *post-hoc* rationalizations made in response to adverse judicial determinations. Moreover, if Secretary Salazar is permitted to issue a new moratorium order each time the predecessor order is enjoined, then the result will be a series of illegal moratoriums that will have the chilling effect of extending the drilling ban until the Secretary chooses to terminate them.

6. The Court has found that an important public interest will be harmed by failing to enjoin the Moratorium and NTL-4. Diamond Offshore asks the Court to use its equitable powers to protect that interest, as well as the affected private interests, by enjoining Defendants from issuing further moratoria, however attenuated, until the Court has an opportunity to rule on the merits of Plaintiffs' application for permanent injunction.

(b) Secretary Salazar's Proposed Re-Packaging of the Moratorium With New *Post-Hoc* Rationalizations is Entitled to No Deference

7. The ordinary deference accorded to agency decisions is inapplicable to Secretary Salazar's threatened new moratorium. When, as here, an agency advocates a position that is "wholly unsupported by regulation, rulings, or administrative practice," and that it adopted for the purpose of litigation, no presumption of correctness applies. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). Such an explanation must reflect the agency's fair and considered judgment

on the matter. *See Auer v. Robbins,* 519 U.S. 452, 462, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). Secretary Salazar has not, and cannot, offer a justification of either the currently enjoined moratorium, or of the threatened one, that is grounded on a "fair and considered judgment," or on "regulation, rulings, or administrative practice." Indeed, despite clear evidence (and this Court's findings) to the exact contrary, Secretary Salazar's comments reflect his continuing, unsupported generalization that the events surrounding the Incident are endemic to the entire offshore industry when no such evidence has been presented.

8. Because the threatened new moratorium order cannot address any of the deficiencies of the currently-enjoined one, it is merely an attempt to use executive authority to circumvent this Court's orders. A court may ordinarily enforce an injunction through the power of contempt. *Dominguez-Perez v. Chertoff,* 294 F. App'x 981, 983 (5th Cir. 2008) (citing *Gunn v. Univ. Comm. to End the War in Viet Nam,* 399 U.S. 383, 388, (1970). However, because of the important public interest at stake, the Court has broad authority to fashion equitable remedies. *See Alisal Water Corp.,* 431 F.3d at 654. In this case, Diamond Offshore urges the Court to issue an injunction against further administrative or executive orders restricting deepwater drilling until such time as this Court to rules on the merits of Plaintiffs' pending application for permanent injunction. Such an injunction will prevent irreparable harm to public and private interests until the Court concludes its review of the merits, and will prevent a parade of moratorium orders calculated to stymie the Court's authority.

B. **Defendants Were Required to Have a "Notice-and-Comment Period" Before Instituting the Moratorium.**

9. Before an agency issues new rules, they must provide notice of a proposed rule in the Federal Register and afford an opportunity for interested persons to present their views. 5 U.S.C. § 553(b), (c). "After publishing the prospective rule, the agency must give third parties a chance to comment on the prospective rule." *Id.*; *Fleming Cos. v. U.S. Dept. of Agriculture*, 322 F. Supp.2d 744 (E.D. Tex. 2004). The Fifth Circuit has held that a thirty day notice and comment period is sufficient. *Chem. Mfrs. Ass'n v. EPA*, 899 F.2d 344, 347 (5th Cir. 1990).

10. The notice-and-comment provisions of the APA "were designed to assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). "These provisions afford an opportunity for 'the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated.'" *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir. 1994) (quoting *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740, 744 (3d Cir.1969)). "Congress realized that an agency's judgment would be only as good as the information upon which it drew. It prescribed these procedures to ensure that the broadest base of information would be provided to the agency by those most interested and perhaps best informed on the subject of the rulemaking at hand. *Phillips Petroleum*, 22 F.3d at 620; *Shell Oil Co. v. Federal Energy Admin.*, 574 F.2d 512, 516 (Temp. Emer. Ct. App. 1978). In short, the notice-and-comment provisions were intended to avoid the type of irrational, emotion-triumphing-over-logic decisions at

issue here. By ignoring the notice-and-comment requirements, Defendants failed to perform the analysis required to institute a new rule of this magnitude.

11. The Fifth Circuit has long held that "[w]hen a proposed regulation of general applicability ***has a substantial impact on the regulated industry, or an important class of the members or the products of that industry***, notice and opportunity for comment should first be provided." *Brown Exp., Inc. v. U.S.*, 607 F.2d 695, 702 (5th Cir. 1979) (emphasis added) (internal quotation omitted). There can be no question that the Moratorium, NTL-4 and Secretary Salazar's statements has a substantial chilly impact on the Gulf Coast offshore drilling industry: it was specifically intended to *literally* bring GOM offshore drilling in more than 500' of water to a halt. As such, Defendants were obligated to comply with the notice-and-comment requirements of the APA. They did not. Their failure to do so has adversely affected Plaintiffs in violation of 5 U.S.C. §552(a)(1). Accordingly, the Moratorium, NTL-4, and any attempt to do an "end-run" around the Court's orders are in violation of the APA.

12. Further, Defendants were also required to hold a notice-and-comment period because the Moratorium and NTL-4 – which are self-identified as "prescriptive" in nature – constitute a fundamental change in MMS and DOI rules and regulations. They did not, and violated federal law as a result.

13. The APA defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes [various substantive agency functions] or practices bearing on any of the

foregoing." 5 U.S.C. § 551(4). The Moratorium and NTL-4 do just that; they prescribe law, policy, procedure, and practice requirements. The APA further defines "rulemaking" as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. 551(5). This definition would also apply to the Moratorium, NTL-4 and any new NTLs to the extent that these new rules constitute new formulations of old rules.

14. There are occasions where an agency issuing new rules is entitled to deference. This is not one of those occasions. There are three levels of deference that may be afforded to an agency with respect to its rule-making authority. *Demahy v. Wyeth Inc.*, 586 F.Supp. 642, 646-48 (E.D. La. 2008) (discussing *Chevron, Auer,* and *Skidmore* deference). The highest level of deference, *Chevron* deference, is normally reserved for cases of regulatory measures. See, generally, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But *Chevron* deference is unavailable to Defendants because (a) Defendants ignored their notice-and-comment obligations and (b) Defendants' interpretation of the regulations they relied on, and the lack of an administrative record that contained a rational, reasoned analysis based on all relevant information, resulted in an interpretation that was necessarily unreasonable." *United States v. Mead Corp.*, 533 U.S. 218, 229-31 (2001). Further, in considering the application of *Chevron* deference, "courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *Id.* at 228. Here, Defendants' actions were inconsistent with prior practice, lacked compliance with formal procedures (*e.g.* notice-and-comment) and were contrary to their own experts' analysis. They also lacked persuasiveness insofar as they

were based on either a non-existent administrative record or one that was reverse-engineered to obtain a desired result. In short, it is clear that Defendants are not entitled to *Chevron* deference.

15. The intermediate level of deference, *Auer* deference, applies when (a) the language of the regulation is "ambiguous with respect to the question considered" *and* (b) the agency's interpretation of the ambiguous regulation is not "plainly erroneous or inconsistent with the regulation." *Belt v. EmCare, Inc.*, 444 F.3d 403, 408 (5th Cir. 2006) (citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) and *Auer v. Robbins*, 519 U.S. 452, 461 (1997)) (internal quotations omitted). Here, the Defendants assert their basis for instituting the Moratorium is 30 C.F.R. §§ 250.172 (b) and (c). These sections are unambiguous. Section 250.172(b) applies when there is a finding supported by analysis that "activities pose a threat of serious, irreparable, or immediate harm or damage." Here, there was no such assessment, nor is there any explanation of what *new* threat exists that did not exist prior to the Incident. Section 250.172(c) applies when there is a finding supported by analysis that "the installation of safety or environmental protection equipment" is necessary. Here, again, there was no such assessment. Further, the installation of safety equipment does not require a moratorium; it simply requires that the new equipment be installed before the rig goes back to work. See Dkt. 1, Ex. 8 (NTL-5). As such, even if a proper assessment had been performed, the six-month moratorium would still be arbitrary and capricious with respect to § 250.172(c). Defendants are therefore not entitled to *Auer* deference.

16. The final level of "deference" – *Skidmore* deference – is not really deference at all. Where (a) *Chevron* deference does not apply and (b) the regulation's language is not ambiguous, an agency's "rulings, interpretations, and opinions" are not controlling on courts, but merely "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). However, *Skidmore* deference must be weighted by the reviewing court based on "the thoroughness evident in its consideration, the validity in its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* "Essentially, under *Skidmore* a court merely considers whether the agency statement at issue has the 'power to persuade.'" *Demahy*, 586 F.Supp. at 48 (quoting *Skidmore*, 323 U.S. at 140).

17. While Defendants may argue they are entitled to deference based upon an "emergency" decision, that argument is not supported by the law or the facts. The appropriate standard for judicial review of Defendants' decision to promulgate a challenged emergency rule is the arbitrary and capricious standard under the APA, 5 U.S.C. § 706(2)(A); *see e.g., Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). Further, while the oil spill caused by the Incident is indeed an emergency situation, Defendants' drilling Moratorium is not. Absent a showing that conditions on each of the other GOM deepwater rigs actually posed a threat of serious, irreparable, immediate harm or damage, or required installation of safety or environmental protection equipment, the Moratorium is unlawful and should be voided. *Compare Id.* to 30 C.F.R. 250.170 & 172(a) & (c).

18. In fact, Defendants are not entitled to *any* deference. First, Defendants failed to perform a case-by-case analysis pursuant to their obligation under 30 C.F.R. § 250.170 to limit each Suspension of Operations based on "the conditions of the individual case(s) involved." Second, it is now clear that Defendants did not even attempt to perform the balanced analysis required under the rules. In fact, as noted by Louisiana Attorney General James D. "Buddy" Caldwell in an *amicus* brief filed on behalf of Louisiana Gov. Jindal and the State of Louisiana, Defendants "had a legal obligation under OCSLA to consult with the State" and "certainly knew that Louisiana was the state most affected, both positively and negatively, by this moratorium," yet the Defendants "never contacted the State about the moratorium, nor did they seek any information about the potential negative effects of the moratorium," all of which taken together makes clear that "Defendants never considered the most relevant factor of all, namely, how will this action affect the State of Louisiana and its citizens." Ex. C at 13. While Mr. Caldwell focuses on the State of Louisiana, there can be no doubt that the Moratorium and NTL-4 will substantially and adversely affect Texas and its residents in the same way.

19. Finally, the deference courts accord agency decisions depends on a record showing that the agency has, in fact, "examine[d] the relevant data" and itself identified "a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 42. The mere appending of voluminous documents to a brief agency decision is insufficient to demonstrate the agency's adequate examination of the relevant data, particularly where, as in this case, (1) the facts in dispute are complex, (2) the agency fails to identify and resolve critical factual conflicts discussed in the appended

documents, and (3) some circumstantial evidence suggests that the agency issued its decision despite recognition of the inadequacy of its factual analysis. *Islander East Pipeline Co., LLC v. Connecticut Dept. of Environmental Protection,* 482 F.3d 79, 99 (2d Cir. 2006).

20. Here, as in *Islander East Pipeline*, the Defendants failed to neutrally evaluate the record evidence and heed their experts' recommendations and appears intent on continuing to do so. *Id.* at 105 (finding the agency decision was arbitrary and capricious based on indications that the agency was "concerned with mounting a public relations campaign than with neutrally evaluating the record evidence"); see also Dkt. 69. In short, Defendants are not entitled to *any* deference with respect to their actions in issuing the Moratorium and NTL-4, as their issuance was arbitrary and capricious, both on its face and with respect to Defendants' failure to gather and review an administrative record based on relevant information.

C. The APA Limits the Court's Review to the Administrative Record as it Existed When Defendants Issued the Moratorium and NTL-4.

21. Here, the administrative record contains exactly three documents: the Secretary's Report, the Moratorium, and NTL-4. Dkt. 1, Exs. 1, 2 and 3. No other documents are included or otherwise referenced by Defendants in the Moratorium or NTL-4.

> The record consists of the order involved, any findings of reports on which that order is based, and "the pleadings, evidence, and other parts of the proceedings before the agency." Fed. R. App. P. 16(a). Supplementation of the administrative Record is not allowed unless the moving party demonstrates "unusual circumstances justifying a departure" from the

general presumption that review is limited to the record compiled by the agency.

Medina County Environmental Action Ass'n v. Surface Transportation Board, 602 F.3d 687 (5th Cir. 2010).

22. After-the-fact rationalization by the agency or its counsel may not be considered by the court. *American Petroleum Institute v. E.P.A.*, 540 F.2d 1023, 1029 (10th Cir. 1976) (*construing Motor Vehicle Mfrs. Ass'n*). The agency's decision must clearly state its course of inquiry, its analysis, and its reasoning. Further, the court must consider only (a) the reasons stated by the agency in its decision and (b) the administrative record relied on by the agency decision-maker at the time it reached the decision. *Id.* In other words, the administrative record – not counsel's briefs or post-decision analysis – must provide "substantial evidence" for the agency's decision. For the administrative record to be considered at all, it must include the *relevant data* related to the agency's intended action, not simply the reverse engineering of a record by gathering documents that support the foregone conclusion of the agency to the exclusion or limitation of relevant data that supports an alternate finding. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

23. It is noteworthy that at least one court in this Circuit has held that the MMS and DOI have done precisely that in the past. *Blanco v. Burton*, 2006 WL 2366046 (E.D. La. 2006) (not reported). In *Blanco,* the Governor of Louisiana sued essentially the same parties as Plaintiff sued here – the MMS and the DOI, along with their respective Director and Secretary – because the MMS and DOI were proceeding with a lease sale to

which the State of Louisiana objected because proper environmental studies had not been conducted. *Id.* at 3-4. The court agreed with the then-Governor of Louisiana and held that the so-called environmental analysis relied on by the MMS and DOI was not properly performed. *Id.* at 11. The court referred to the so-called analysis performed by the MMS as "a *fait accompli.*" *Id.* The *Blanco* court went on to hold that the MMS's review "[did] not adequately evaluate all of the 'relevant enforceable policies' of the [procedure] pursuant to [the relevant statutes]" and that the so-called analysis prepared by the MMS "appear[s] to have been compiled in an arbitrary and capricious manner such that the result...was fore-ordained." *Id.*

24. Similar concerns exist in the case before this Court. Secretary Salazar's most recent comments make clear that the prior Moratorium was not the result of adequate analysis and that any future moratoriums will be similarly disabled. Further, while the Report makes clear that "the President ordered the Secretary of the Interior to evaluate 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," evidence has come to light that Secretary Salazar's "evaluation" – concluding that a six month moratorium on both present and future drilling activity – appears to have been the result not of actual analysis, but rather the result of a White House directive. See Exs. D and E. The APA is not intended to be used as a basis for validating reverse-engineered decisions.[2]

[2] In *Hornbeck v. Salazar*, Defendants sought a continuance of the injunction hearing so that they could assemble the administrative record. Civil Action No. 10-1663(F)(2), United States District Court for the

25. If, after reviewing the administrative record for factual support, the court does not find "substantial evidence" in the record for the agency's decision, the agency's action will be set aside. *Ass'n of Data Processing v. Bd. Of Governors*, 745 F.2d 677, 683-84 (D.C. Cir. 1984) (*Scalia, J.*).

26. The "substantial evidence" test complements the "arbitrary and capricious" analysis when analyzing factual support for an agency's conclusions. *Cooper v. Hewlett-Packard Co., Disability Plan*, 592 F.3d 645, 652 (5th Cir. 2009) (defining "substantial evidence" as "more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.") But there is more to § 706(2)(a) than just the "substantial evidence" test. The "arbitrary and capricious" provision of the APA, to quote Justice Scalia, "is a catchall, picking up administrative conduct not covered by more specific paragraphs" of the APA. *Id.* (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971) (*abrogated on other grounds*)). An action supported by "substantial evidence" may still be arbitrary and capricious where it (a) departs from agency precedent or (b) is the result of interference. *Id.*

27. As cautioned by the Supreme Court in *Motor Vehicle Mfrs. Ass'n*, to the extent the court is inclined to assist the agency by providing a basis for the agency's

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Eastern District of Louisiana, at Dkt. 15. Although Defendants assert that the administrative record is not complete, they listed several documents they claim Defendants reviewed and relied upon when imposing the Moratorium. However, Defendants' "record" omits the report actually reviewed and endorsed by its own experts as well as the summary of the inspections performed post-Incident. Thus, the partial record Defendants provided contains only documents supporting the Moratorium, rendering the Moratorium fore-ordained. *See Blanco* at 11.

action that the court deems relevant but that the agency did not state itself, "the reviewing court should not attempt to make up for such deficiencies; it may not supply a reasoned basis for the agency's actions that the agency has not given itself." *Id.* (*citing SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). The Fifth Circuit echoed the Supreme Court's caution that the reviewing court must cautiously review the administrative record to ensure that the agency has derived a reasoned judgment from the consideration and application of all pertinent factors. *Sabine River Auth. v. U.S. Dept. of the Interior*, 951 F.2d 669, 678 (5th Cir. 1992).

28. Here, there is substantial evidence that suggests reverse-engineering of Defendants' decision. See, e.g. Exs. D and E. From Secretary Salazar's statements together with the MMS's inspection and approval of the twenty-seven rigs as safe, combined with Defendants' experts' disavowal of the Moratorium and the revelation that the Moratorium was actually the result of a White House request, it is clear that the Moratorium was not a conclusion reached after an MMS neutral review of the record in compliance with the APA. To the extent that the Defendants' actions were driven not by analysis of relevant data, but rather by White House directives to implement a six-month moratorium (and gather data supporting that result), any deference to which Defendants might otherwise be entitled must be questioned.

D. <u>Defendants' Conduct Is Arbitrary, Capricious, and an Abuse of Discretion.</u>

29. Secretary Salazar's most recent threats only underscore the arbitrary and capricious nature of the actions of the DOI and MMS. Defendant Salazar has concluded that a moratorium *will* be imposed and that he's going to come up with the justification to

do so just as soon as he can find it. Dkt. 69. This is exactly the type of reverse-engineering that no court should allow.

30. A district court is "statutorily authorized under the APA to reverse or strike down agency action that is arbitrary or capricious." *Grocery Services, Inc. v. USDA Food and Nutrition Service,* 2007 WL 2872876 at *8 (S.D. Tex. 2007); *see* also 5 U.S.C. § 706(2)(A); *Harris v. United States*, 19 F.3d 1090 (5th Cir. 1994). Judicial review under the APA is governed by § 706, which states that a "reviewing court shall...hold unlawful and set aside agency action, findings, and conclusions" where the agency's actions fail to meet any one of six separate standards. 5 U.S.C. § 706(2)(a)-(f). The first of the six criteria requires setting aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a). The duty of any court reviewing agency action under this standard – hereafter referred to as the "arbitrary and capricious" standard – is to determine whether the agency (a) examined the relevant data and (b) articulated a rational connection between the facts found and the decision made. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

31. The duty of any court reviewing an agency's action under the "arbitrary and capricious" standard is to determine (a) whether the agency's administrative record contained relevant data needed to properly analyze the issues, (b) whether the agency examined the relevant data in the administrative record, and (c) whether the agency properly articulated a rational connection between the data reviewed and the decisions made. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Agency action will be set aside (a) if

the agency relied on factors that Congress did not intend for the agency to consider, (b) if the agency failed to consider an important aspect of the problem, (c) if the agency offered an explanation for its decision that runs counter to the evidence before the agency, *or* (d) if the agency's action is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise. *Id.*

32. According to the Moratorium and NTL-4, the Report provided the basis for Defendants' decision to suspend deepwater drilling. See Dkt. 1, Exs. 2 and 3. The Moratorium and NTL-4 rely exclusively on 30 C.F.R. § 250.172(b) & (c) as the bases for the six-month suspension and cessation of all GOM drilling in water depths greater than 500 feet. *Id.* Section 250.172 provides: ". . . (b) the Regional Supervisor may grant or direct a suspension when activities pose a threat of serious, irreparable, immediate harm or damage, and (c) the Regional Supervisor may grant or direct a suspension when necessary for the installation of safety or environmental protection equipment."

33. The decision to impose a moratorium was not based on a concern for safety, immediate harm or the opinion of the Defendants' experts. Instead, as set forth in Exs. 7 and 13, it appears the Moratorium was imposed at the request of the White House. The record does not show that the White House made necessary findings upon which its requested Moratorium was based.

34. Moreover, the White House does not appear to have any specialized knowledge of the potential harm, environmental protection equipment or safety systems

involved. In fact, there has been no showing that the White House has specialized knowledge of deepwater drilling at all.[3]

35. Moreover, Secretary Salazar's most recent threats and comments that he will issue a new moratorium are not supported by any findings. Instead, the Secretary makes clear that he will issue a moratorium in the coming days once he gathers the findings. A more result-oriented decision-making process is hard to imagine.

36. The arbitrary and capricious standard "focuses on the reasonableness of an agency's decision-making process" pursuant to its interpretation of statutory power. *Grocery Services, Inc.*, 2007 WL 2872876 at *8, citing *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 619 (5th Cir. 2000). In the instant case, there has been no decision-making process conducted by the MMS. Instead, the Moratorium was inserted outside the agency's process and after the agency's experts had completed their analysis and given recommendations. And any new moratorium would be equally flawed. Consequently, the Moratorium is the result of a *per se* unreasonable "process" and this Honorable Court should declare the Moratorium void.

37. Moreover, the Report issued by Defendants misrepresented the opinions of the Defendants' NAE panel of experts cited in the Report. *Compare* Dkt. 1, Ex. 1 with Dkt. 1, Exs. 5, 6, 7 and 13. The Report states that "[t]he recommendations contained in this report have been peer-reviewed by seven experts identified by the National Academy of Engineering. Those experts, who volunteered their time and expertise, are identified in

[3] It is interesting to note that after the Court issued its Order on Preliminary Injunction, the non-party White House (not the MMS or DOI) immediately stated it would appeal the decision.

Appendix 1." Dkt. 1, Ex. 1 at 4. That statement was not true – none of the experts cited ever reviewed the recommendation to suspend *current* drilling activity for six months. *See* Dkt. 1, Exs. 5, 6, 7 and 13. In fact, had such a proposal been made, at least five of the seven NAE experts would have advised *against* such a "crazy" idea. Dkt. 1, Exs. 5, 6, 7 and 13.

38. "When an agency adopts a regulation based on a study [that is] not designed for the purpose and ***is limited or criticized by its authors on points essential to the use sought to be made of it the administrative action is arbitrary and capricious and a clear error in judgment.***" *Texas Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 935 (5th Cir. 1998) (emphasis added) (quoting *Humana of Aurora, Inc. v. Heckler*, 753 F.2d 1579, 1583 (10th Cir.), cert. denied, 474 U.S. 863, 106 S.Ct. 180, 88 L.Ed.2d 149 (1985)). Here, the very NAE experts cited by Defendants for their expertise in this area have been publically flogging Defendants for both misrepresentation of their recommendations and misuse of their proposals. Thus, according to *Texas Oil & Gas Ass'n*, Defendant's issuance of the Moratorium and NTL-4 "is arbitrary and capricious and a clear error in judgment." *Id.* at 935.

39. "An agency may not act first and study later." *Western Land Exchange Project v. U.S. Bureau of Land Management*, 315 F.Supp.2d 1068, 1092 (D. Nev. 2004) (quoting *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001) (internal quotations omitted). Defendants admit that this is *exactly* what they have done here. Dkt. 1, Ex. 1 at 3 (the moratorium ... would allow for ... consideration of the

findings from ongoing investigations..."). Dkt. 69. (Secretary Salazar: "The moratorium must remain in effect.")

40. In *Western Land Exchange*, the Bureau of Land Management (BLM) issued an environmental assessment (EA) related to the privatizing of certain desert lands. The EA had to address the impact on certain environmental factors and any potential mitigation. But the record contained no supporting analytical data concerning mitigation measures that were purportedly incorporated into the plans. *Id.* Nevertheless, the BLM, moved forward with the process of privatizing the land. *Id.* The court in *Western Land Exchange* – noting that the mitigation data did not exist, held the BLM's actions to be arbitrary and capricious. *See, generally, Id.* The court went on to note that the analysis in question "must be 'developed to a reasonable degree,'" and that "neither a 'perfunctory description' nor a 'mere listing' of measures, in the absence of 'supporting analytical data,' is sufficient to sustain [the BLM's findings]." *Id.*

41. *Western Land Exchange* is directly on point with our case. Defendants issued the Moratorium and NTL-4 when the analysis of the Incident had not even been developed, much less completed. That analysis is still not complete but Secretary Salazar insists on issuing a new moratorium on deepwater drilling. Further, without any supporting analytical data, much less a rational conclusion based on an analysis of that data, Defendants shut down all offshore drilling in the GOM in more than 500' of water for the express purpose of studying the future findings of currently incomplete investigations. As such, Defendants' actions cannot be characterized as anything other than arbitrary and capricious. See *id.* at 1092

42. Further, on June 8, 2010 Defendants issued NTL-5, which states that the cause of the Incident, "is currently under investigation." Ex. F. Therefore, as of June 8, 2010, Defendants still didn't know why the Incident occurred. Reasons for concluding that an agency's actions were arbitrary and capricious include when the agency "entirely failed to consider an important aspect of the problem" or when the agency "offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (quoting *SEC v. Chenery Corp.*, 332 U.S. at 196). Defendants' failure to understand why the Incident occurred, but nevertheless shutting down all offshore drilling in water deeper than 500 feet of water as a result of the Incident, means that Defendants failed to consider an important aspect of the problem. It goes almost without saying that Defendants could not have considered something they admit they did not know.

43. Thus, NTL-5 makes clear that when Defendants issued the Moratorium and NTL-4, they still didn't know why the Incident happened. And if they don't know why the Incident happened, that means they could not possibly have (a) weighed the relevant facts and data and (b) articulated a rational connection between the facts surrounding the Incident and the conclusions Defendants reached in the Moratorium and NTL-4. *Id.* In the words of the Supreme Court and the Fifth Circuit, Defendants' actions "entirely failed to consider an important aspect of the problem" and "offered an explanation for its decision that runs counter to the evidence before the agency." *Id.*; *Texas Oil & Gas Ass'n*, 161 F.3d at 934. Simply put, that means Defendants are acting arbitrarily and capriciously in issuing the Moratorium and NTL-4.

44. In fact, the Report affirmatively states that the changes in policies, practices, and procedures are being recommended *"before completion of the investigation into the event."* Dkt. 1, Ex. 1 at p. 18 (emphasis added). The law is clear on this issue. Agency action is arbitrary and capricious if it departs from agency precedent *without adequate analysis and explanation. Dillmon v. National Transp. Safety Bd.*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009) (citing *F.C.C. v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1811 (U.S. 2009)). When an agency adopts a rule that changes the agency's prior position, the agency "is obligated to supply a reasoned analysis for the change," such that it is clear that agency precedent is being deliberately changed, not casually ignored. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. And while Defendants are not required to demonstrate that the new policy is *better* than the old policy, Defendants must, at a minimum, supply a reasoned analysis, accompanied by relevant facts, to support their proposed change. *Id.* at 43; *F.C.C. v. Fox*, 129 S.Ct. at 1804. But, as noted throughout this brief, Defendants failed to supply any facts, data, or analysis when issuing the Moratorium and NTL-4. And *Motor Vehicle Mfrs. Ass'n, Dillon* and *Fox* make clear that failure to do so will result in a finding that the agency acted arbitrarily and capriciously.

45. Further, the length of any suspension "must be based on the individual case involved." 30 C.F.R. § 250.170(a). Here again, because Defendants admitted that they still did not know why the Incident happened, they could not have performed the case-by-case analysis required by 30 C.F.R. § 250.170(a) to determine whether the same factors that caused the Incident exist on any other deepwater rig in the GOM. It therefore

follows that this "final" agency action,[4] is overly-broad, not based any rational factual inquiry, and issued in violation of 30 C.F.R. 250.170. In other words, the six-month "blanket" suspension of operations contemplated by the Moratorium and NTL-4 are arbitrary and capricious, constitute an abuse of discretion and are not in accordance with APA, OCSLA, or their implementing regulations.

46. In addition, nowhere in the NTL-4 or the Moratorium is there any explanation or analysis concluding that all OCS drilling operations in more than 500 feet of water posed any greater threat on May 30, 2010, the date NTL-4 was issued, than existed on April 19, 2010, the day before the Incident. Dkt. 1, Exs. 2 and 3. Nor does NTL-4 or the Moratorium discuss or refer to (a) any safety or environmental equipment that should be installed or (b) that drilling may resume upon installation of any such equipment. *Id.* In fact, the post-Incident inspection summary for the 29 (of the 33) drill sites affected by the Moratorium and NTL-4 found no violations on 27 of the 29 rigs inspected,[5] no major violations on any of the rigs, and made no conclusion that there was any "threat of serious, irreparable, immediate harm or damage" or any need for additional "safety or environmental equipment" for any of the inspected rigs. Ex. G. While these inspections all occurred after the Incident but before the issuance of the Moratorium and NTL-4, this document is not part of the administrative record.

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[4] The Moratorium and NTL-4 constitute a final agency action rather than an interim or temporary suspension in order to complete individual rig assessments required under the law.

[5] The two violations were found on Transocean rigs. Transocean owned the rig involved in the Incident and owns the only two deepwater rigs currently working in the GOM drilling the relief wells exempted under NTL-4.

E. Plaintiffs Have Clear Standing to Bring This Lawsuit Against Defendants.

47. The Moratorium and NTL-4 constitute "final" agency action under the APA. 5 U.S.C. § 704. The Defendants' decision-making process is complete – i.e. the Moratorium and NTL-4 are neither "tentative" nor "interlocutory" – and the rights and obligations of drilling companies in the GOM "have been determined" in such a manner that "legal consequences will follow." *Id.* Plaintiffs therefore meet the standing requirements of the APA.

48. Plaintiffs also meet OCSLA's standing requirements. 43 U.S.C. § 1349. Plaintiffs operate drilling rigs in the GOM, including on the OCS. Defendants' enforcement of the Moratorium and NTL-4 is directly and irreparably injuring Plaintiffs. See Plaintiffs' Original Complaint and Application for Temporary Restraining Order and Injunctive Relief.

49. Further, the Outer Continental Shelf Lands Act ("OCSLA") authorizes citizen suits to challenge OCSLA violations by government agencies, subject to a pre-suit notice requirement. 43 U.S.C. §1349(a). Plaintiffs' verified complaint confirms that proper notice was provided. Specifically, Plaintiffs provided notice and an advance copy of the complaint to:

(a) The United States Department of the Interior;

(b) The Department of Justice;

(c) The Attorneys General of Texas and Louisiana; and

(d) The United States Attorney for the Southern District of Texas.

Ex. 1. Because of the nature of the complaint and the immediate effect of the Moratorium and NTL-4 on Plaintiffs' legal interests, Plaintiffs' right to file vested immediately after serving notice. 43 U.S.C. §1349(a)(3).

50. Plaintiffs have a valid interest that is being adversely affected by the Moratorium and NTL-4, and Plaintiffs have met OCSLA's notice provisions. Plaintiffs are therefore properly before the Court on this matter.

F. Plaintiffs Are Being Irreparably Harmed By the Moratorium and NTL-4.

51. One of Plaintiffs' customers – Anadarko Petroleum – has filed a declaratory judgment action in the United States District Court for the Southern District of Texas seeking judicial approval to terminate its contract with another drilling contractor – Noble Drilling – based on the Moratorium and NTL-4 constituting a *force majeure*. See *Anadarko Petroleum Corp. v. Noble Drilling (U.S.) LLC*, Civil Action No. 4:10-cv-02185 at Dkt. 1. Plaintiffs also have a contract with Anadarko, and it is reasonable to expect that Anadarko will seek similar relief against Plaintiffs. Plaintiffs' experienced crews are being dismantled as a result of the Moratorium The increased safety risk if deepwater offshore drilling is ever permitted is incalculable. These facts alone prove Plaintiffs' irreparable harm.

52. In addition to the harm to Plaintiffs cited above and in their Complaint, it is also significant that Plaintiffs have current, existing contracts that the Moratorium and NTL-4 have already impacted. As a direct result of Defendants' actions, certain customers have instructed Plaintiffs to stop drilling in the GOM. Some of these customers have also publicly indicated they intend to use the Moratorium as basis to

claim a Force Majeure event and potentially terminate their drilling contracts. H. From whom will Plaintiffs collect as a result of the termination of their contracts? If Plaintiffs' customers are correct that the Moratorium constitutes a force majeure (which Plaintiffs deny), the answer is: No one. Termination of Plaintiffs' contracts coupled with an uncertain end to the Moratorium will continue to irreparably harm Plaintiffs.

53. Further, offshore oil and gas operations provide direct employment estimated by *Defendants* at 150,000 jobs. Dkt. 1, Ex. 1 at p. 4. Tens of thousands of Gulf Coast citizens are expected to lose their jobs if the Moratorium and NTL-4 remain in place. See, e.g., Exs. I and J. And those companies and individuals that survive will likely go where the work is, meaning the potential loss of the workers and the infrastructure that ensure continued safe and orderly resource development on the OCS. The impact of this loss was not considered by Defendants when they issued the Moratorium and NTL-4, and a monetary award won't bring those jobs back to the Gulf Coast or those offshore support companies back to life. Thus, the Moratorium and NTL-4 continue to cause irreparable harm not only to Plaintiffs but to the entire Gulf Coast economy.

Conclusion

Diamond prays for temporary and injunctive relief which is properly before the Court. Defendants' actions, when reviewed in the context of the administrative record, constitute an arbitrary and capricious abuse of discretion under § 706(2)(a) of the APA. As Plaintiffs continue to suffer irreparable harm as a result, Plaintiffs seek a temporary restraining order restraining Defendants from issuing any further regulations banning or

designed to ban offshore drilling in greater than 500' of water. In addition, Diamond requests a temporary injunction hearing as soon as possible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2010, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system. Notice of this filing will be sent to all counsel of record registered to receive electronic service by operation of the Court's electronic filing system and manual notice to the following counsel:

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