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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DIAMOND OFFSHORE COMPANY and DIAMOND OFFSHORE MANAGEMENT COMPANY *Plaintiffs,* 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 SERVICE, *Defendants.*	§ § § § § § § § § § § § § § § § §	Civil Action No. 10-CV-2136

PLAINTIFF'S BRIEF IN SUPPORT OF INJUNCTIVE RELIEF

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DIAMOND OFFSHORE COMPANY and DIAMOND OFFSHORE MANAGEMENT COMPANY *Plaintiffs,*	§	
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 SERVICE, *Defendants.*	§	Civil Action No. 10-CV-2136

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IN THE UNITED STATES DISTRICT COURT
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PLAINTIFFS' BRIEF IN SUPPORT OF INJUNCTIVE RELIEF

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. Dkt. 1.

Plaintiffs believe this brief will be useful for the Court in preparation for the upcoming temporary restraining order and preliminary injunction hearings. The issues addressed in this brief include:

(a) Plaintiffs' clear standing to bring this lawsuit against Defendants;

(b) The "arbitrary and capricious" conduct of the Defendants in this case;

(c) The APA's limitation of the Court's review to the administrative record as it existed when Defendants issued the Moratorium and NTL-4;

(d) The irreparable harm Plaintiffs are suffering and continue to suffer; and

(e) Defendants' issuing of new rules without a proper notice and comment period.

A. <u>Plaintiffs Have Clear Standing to Bring This Lawsuit Against Defendants.</u>

1. 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.

2. 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 <u>Dkt. 1</u> at 10-11 and 15-16.

3. 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. <u>Dkt. 1</u> at p. 3. 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).

4. 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.

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

5. 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).

6. 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.*

7. 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."

8. 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.

9. 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.

10. 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 was 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. Consequently, the Moratorium is the result of a *per se* unreasonable "process" and this Honorable Court should declare the Moratorium void.

11. 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 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.

12. "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.

13. "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…").

14. 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.*

15. *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. 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

16. Further, on June 8, 2010 Defendants issued NTL-5, which states that the cause of the Incident, "is currently under investigation." Dkt. 1, Ex. 8. 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.

17. 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 didn'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 acted arbitrarily and capriciously in issuing the Moratorium and NTL-4.

18. 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.

19. 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,[1] 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.

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[1] 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.

20. 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,[2] 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. Dkt. 1, Ex. 4. 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.

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.

[2] 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.

> 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. 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, e.g. Dkt. 1, Exs. 7 and 13. The APA is not intended to be used as a basis for validating reverse-engineered decisions.[3]

[3] 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 evidence that suggests reverse-engineering of Defendants' decision. See, e.g. Dkt. 1 at pp. 7-10 and Exs. 7 and 13. From 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. Plaintiffs Are Being Irreparably Harmed By the Moratorium and NTL-4.

29. 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.

30. 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. Dkt. 1 at Ex. 10. 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.

31. 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., Dkt. 1, Exs. 11 and 12. 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.

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

32. 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).

33. 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.

34. Further, 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 and NTL-4 has a substantial 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, Defendants' Moratorium and NTL-4 are in violation of the APA.

35. 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.

36. 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 and NTL-4 to the extent that these new rules constitute new formulations of old rules.

37. 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.

38. 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.

39. 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).

40. 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).

41. 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. 2 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.

42. 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).

43. Here, as in *Islander East Pipeline*, the Defendants failed to neutrally evaluate the record evidence and heed their experts' recommendations. *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"). 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.

Conclusion

44. Plaintiffs' prayer for injunctive relief under 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 and request a temporary injunction hearing as soon as possible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

All counsel of record have been provided with a true and complete copy of Plaintiffs' Brief in Support of Injunctive Relief via messenger, email and/or facsimile on this 22nd day of June, 2010.

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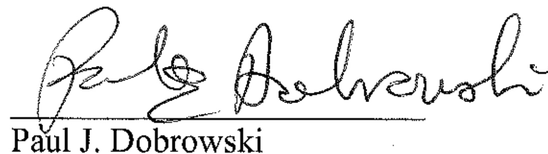

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