

Federal District Court Blocks Enforcement of Drilling Moratorium

By *Jon Simon and Bob Szabo*

Earlier this afternoon, a federal judge in New Orleans temporarily barred the federal government from enforcing the moratorium imposed by the Obama Administration on deepwater oil and gas drilling activity in late May in response to the Deepwater Horizon oil rig explosion on April 20, 2010. *Hornbeck Offshore Services, L.L.C. v. Salazar*, Civ. No. 10-1663 (E. D. La. June 22, 2010). On June 7, 2010, Hornbeck Oil Services, L.L.C., subsequently joined by several other oil and gas service companies, sued the Department of the Interior (DOI), the Minerals Management Service (MMS), and the MMS Director, arguing that the moratorium was arbitrarily imposed and seeking a preliminary injunction. Today's decision by Judge Martin Feldman of the U.S. District Court for the Eastern District of Louisiana grants the companies' request for preliminary injunction, barring enforcement of the moratorium. The Administration has indicated that it will appeal the decision quickly, as well as seek an immediate stay of the decision pending appeal.

BACKGROUND

Following the explosion of the Deepwater Horizon drilling platform on April 20, the President established a bipartisan commission—the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling—tasked with investigating the facts and circumstances relating to the root causes of the blowout. The President also directed Secretary of the Interior Ken Salazar to conduct a thorough review of the blowout and to report, within 30 days, on any additional precautions and technologies that should be required to improve the safety of oil and gas development on the Outer Continental Shelf (OCS). This 30-day examination culminated in the issuance of a report by the Secretary on May 27, entitled “Increased Safety Measures for Energy Development on the Outer Continental Shelf,” the summary of which recommended a six-month moratorium on “permits for new wells being drilled using floating rigs” and an “immediate halt to drilling operations on the 33 permitted wells, not including relief wells currently being drilled by BP, that are currently being drilled using floating rigs in the Gulf of Mexico.” The report is available at:

<http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=33598>.

The following day, acting under the agency's authority to suspend drilling operations under the Outer Continental Shelf Lands Act (OCSLA) “if there is a threat of serious, irreparable, or immediate harm or damage” to life, property, mineral deposits, or the environment, or when “necessary for the installation of safety or environmental protection equipment,” Secretary Salazar issued a memorandum to the MMS Director directing “a six-month suspension of all pending, current, or approved offshore drilling operations of new deepwater wells in the Gulf of Mexico and the Pacific Regions.” On May 30, the Deputy of Director of MMS issued a Notice to Lessees implementing the moratorium, for wells at depths greater than 500 feet.



JUDGE FELDMAN'S DECISION

“The court is unable to divine or fathom a relationship between the findings and the immense scope of the moratorium,” Judge Feldman wrote in his decision. While he indicated that MMS was justified in considering the implementation of new regulations and a new culture of safety, he found that the facts developed during the Administration’s 30-day review did not support a decision to impose a “blanket, generic, indeed punitive, moratorium.”

The Judge further agreed with the oil service companies’ assertions that they have suffered, and will continue to suffer, irreparable harm as a result of the moratorium. The court found not only that the moratorium has affected some of the companies’ contracts, but that “it is only a matter of time before more business and jobs and livelihoods will be lost.” “The effect on employment, jobs, loss of domestic energy supplies caused by the moratorium as the plaintiffs (and other suppliers, and the rigs themselves) lose business, and the movement of the rigs to other sites around the world will clearly ripple throughout the economy in this region.”

Finally, despite the government’s assertion that the public interest “weighs heavily in favor of making sure that a tragedy like this does not occur again,” Judge Feldman was persuaded that the public interest weighed in favor of granting the preliminary injunction. “While a suspension of activities directed after a rational interpretation of the evidence could outweigh the impact on the plaintiffs and the public, here, the Court has found the plaintiffs would likely succeed in showing that the agency’s decision was arbitrary and capricious. An invalid agency decision to suspend drilling of wells in depths of over 500 feet simply cannot justify the immeasurable effect on the plaintiffs, the local economy, the Gulf region, and the critical present-day aspect of the availability of domestic energy in this country.

ADMINISTRATION WILL APPEAL

After the release of the decision, White House Press Secretary Robert Gibbs indicated that the Administration will appeal the decision to the U.S. Court of Appeals for the Fifth Circuit, which is likely to occur on an expedited basis. Gibbs stated that the President strongly believes that “continuing to drill at these depths without knowing what happened . . . does not make any sense” and “potentially puts the safety of those on the rigs and the safety of the environment in the Gulf at a danger that the President does not believe we can afford right now.” The Administration likely will also seek an immediate stay of the decision.

CONGRESSIONAL RESPONSE POSSIBLE

In response to the District Court decision, some Members of Congress could advocate for a statutory moratorium. Any such proposals to legislatively impose a moratorium are likely to be controversial, particularly among Members who have expressed concerns regarding the economic impact of the moratorium. While the prospects for success on a moratorium proposal cannot be handicapped at this early date, there will be opportunities over the coming months for Congress to consider legislation related to the Deepwater Horizon incident, either as a part of a comprehensive energy bill or on a more narrow, stand-alone basis.



SEPARATE LITIGATION PENDING IN HOUSTON

A similar case filed on June 17, 2010 by Diamond Offshore Co., which owns the second-largest floating drill rig fleet in the world, remains pending in federal district court in Houston. *Diamond Offshore Co. v. Salazar*, Civ. No. 10-2136 (S. D. Tex. June 17, 2010). A scheduling conference was held today in that case before U.S. District Judge Nancy Atlas.

FOR MORE INFORMATION

For energy and financial sector clients interested in following the ongoing federal regulatory and policy developments relating to Gulf of Mexico oil spill, Van Ness Feldman offers significant depth of experience and capabilities. Over half of the firm's 80 lawyers and policy advisors have worked as congressional staff, or at the U.S. Departments of the Interior and Energy, the U.S. Environmental Protection Agency, and the White House (including the Council on Environmental Quality). We have formed a dedicated Oil Spill team that is monitoring developments and providing strategic advice to a range of clients. For more information, please contact Bob Szabo (rgs@vnf.com), Rick Agnew (raa@vnf.com), John Iani (lji@vnf.com), Sam Kalen (smk@vnf.com) or Curt Moffatt (jcm@vnf.com), or your usual Van Ness Feldman point of contact at 202.298.1800.

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