

Energy Summit 2010

 **LSU** Center for Energy Studies

October 26, 2010

THE DEEPWATER DRILLING MORATORIUM LITIGATION...

By Carl D. Rosenblum
crosenblum@joneswalker.com



WHAT REALLY HAPPENED

By Carl D. Rosenblum
crosenblum@joneswalker.com



April 20, 2010



April 30, 2010

The White House

Office of the Press Secretary

Statement by the President on the Economy and the Oil Spill in the Gulf of Mexico
Rose Garden



11:26 A.M. EDT

...

I've ordered (sic) Secretary Salazar to conduct a thorough review of this incident and report back to me in 30 days on what, if any, additional precautions and technologies should be required to prevent accidents like this from happening again. And we're going to make sure that any leases going forward have those safeguards. We've also dispatched teams to the Gulf to inspect all deepwater rigs and platforms to address safety concerns.

May 6, 2010

DOI NEWS RELEASE



OFFICE OF THE SECRETARY
U.S. Department
of the Interior



...Secretary Salazar announced that, as a result of the Deepwater Horizon explosion and spill, beginning April 20 - the date of the explosion - **no applications for drilling permits will go forward for any new offshore drilling activity** until the Department of the Interior completes the safety review process that President Obama requested. In accordance with the President's request, the Department will deliver its report to the President by May 28, 2010.

May 6, 2010

DOI NEWS RELEASE

**NOTE: No differentiation as to
“shallow” water drilling versus
“deepwater” drilling**

May 11, 2010

MMS Deepwater Drilling Rig Inspection Report

Inspection Results:

All deepwater rig inspections have been completed, except for one rig that was evacuated due to the oil spill and has not resumed operations. The MMS inspected a total of twenty-nine deepwater drilling rigs with subsea blowout preventer (BOP) stacks.

May 11, 2010

MMS Deepwater Drilling Rig Inspection Report

Inspection Results:

The following Incidents of Non-Compliance (INC) were issued:

- The Transocean Development Driller II (DD II) working for BP, received one INC because it had not alternated between control stations for BOP testing.

[This rig was moved to drill the second relief well]

May 11, 2010

MMS Deepwater Drilling Rig Inspection Report

Inspection Results:

The following Incidents of Non-Compliance (INC) were issued:

- The Transocean Nautilus working for Shell, received three Incidents of Non-Compliance:
 - A warning for having some flammable material in the scrap metal bin of the safe welding area.
Corrective Action Taken: the material was removed at the time of the inspection.
 - A warning INC for having a 6-inch x 12-inch hole by the mud pump suction pipe.
Corrective Action Taken: additional grating was placed (sic) over the hole.
 - A warning INC for having expired eye wash bottles.
Corrective Action Taken: the eye wash bottles were replaced.

May 11, 2010

MMS Deepwater Drilling Rig Inspection Report

Inspection Results:

- No other violations were found on the rigs operating in deep water.

May 27 , 2010

DOI'S INCREASED SAFETY MEASURES FOR ENERGY
DEVELOPMENT ON THE OUTER CONTINENTAL SHELF

“EXECUTIVE SUMMARY”

The Secretary also recommends temporarily halting certain permitting and drilling activities. First, the Secretary recommends a six-month moratorium on permits for new wells being drilled using floating rigs. The moratorium would allow for implementation of the measures proposed in this report and for consideration of the findings from ongoing investigations, including the bipartisan National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling.

May 27 , 2010

DOI'S INCREASED SAFETY MEASURES FOR ENERGY
DEVELOPMENT ON THE OUTER CONTINENTAL SHELF

“EXECUTIVE SUMMARY”

The Secretary further recommends an immediate halt to drilling operations on the 33 permitted wells, not including the relief wells currently being drilled by BP, that are currently being drilled using floating rigs in the Gulf of Mexico. Drilling operations should cease as soon as safely practicable for a 6-month period.

May 27 , 2010

**DOI'S INCREASED SAFETY MEASURES FOR ENERGY
DEVELOPMENT ON THE OUTER CONTINENTAL SHELF**

“EXECUTIVE SUMMARY”

The recommendations contained in this report have been peer-reviewed by seven experts identified by the National Academy of Engineering.

“The **recommendations** contained **in this report** have been **peer-reviewed** by **seven experts** identified by the National Academy of Engineering.”

What the Experts Really Said...



Kenneth E. Arnold



J. Ford Brett



Benton F. Baugh



Thomas E. Williams
MANAGING DIRECTOR



Hans Juvkam-Wold

...

6.
I did not “peer review” the blanket moratorium set forth in the “Executive Summary” of the Report. The blanket moratorium was added after final review and was never agreed to by me.

7.

The scope of the blanket moratorium in the “Executive Summary” of the Report differs in important ways from the recommendation in the draft of the Report which I reviewed.

8.

The Report does not justify the blanket moratorium

9.

I disagree with the six month blanket moratorium.

May 27 , 2010

What the Experts Really Recommended...

VI. Recommendations For Immediate Action To Improve Offshore Drilling Safety

...

Each recommendation below is accompanied by a brief discussion of the context of the recommendations and an explanation of how it will enhance the safety of future OCS drilling activities. Each is also identified with regard to *priority* of expected implementation. Certain measures are intended for *immediate implementation* (within the next 30 days), through issuance of either a NTL, internal Departmental guidance, or in the case of a safety and environmental rule, through publication of the final rulemaking....

Other recommendations will be addressed *through emergency rulemaking*, where appropriate....

Finally, several recommendations require further study and, therefore, *will be addressed through notice and comment rulemaking....*

May 28, 2010 – “THE MORATORIUM”

MEMORANDUM

To: Director, MMS

From: Secretary

Re: Suspension of Outer Continental Shelf (OCS) Drilling of New Deepwater Wells

...

Therefore, I am 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. ... For those operators who are currently drilling new deepwater wells, they shall halt drilling activity at the first safe and controlled stopping point and take all necessary steps to close the well. In addition, MMS shall not process any new applications for permits to drill consistent with this directive...

May 30, 2010 –

“THE MORATORIUM NTL” - NTL No. 2010-N04

[NTL 4]

NOTICE TO LESSEES AND OPERATORS OF FEDERAL OIL AND GAS LEASES IN THE OUTER CONTINENTAL SHELF REGIONS OF THE GULF OF MEXICO AND THE PACIFIC TO IMPLEMENT THE DIRECTIVE TO IMPOSE A MORATORIUM ON ALL DRILLING OF DEEPWATER WELLS

...

The Six-Month Deepwater Moratorium as set forth in this Notice to Lessees and Operators (“Moratorium NTL”) directs you to cease drilling all new deepwater wells, including any wellbore sidetracks and bypasses; prohibits you from spudding any new deepwater wells; and puts you on notice that, except as provided herein, MMS will not consider for six months from the date of this Moratorium NTL drilling permits for deepwater wells and for related activities as set forth herein. For the purposes of this Moratorium NTL, **“deepwater” means depths greater than 500 feet.**

...

If you have an approved Application for a Permit to Drill (“APD”) or other required permit for wells covered by this Moratorium NTL, but have not spud the well, you may not start drilling for the duration of this Moratorium NTL.

...

The Secretary’s determination that deepwater drilling activities on new wells must cease for six months, and that MMS will not process permits for such activities accordingly, is based on the recommendations in the May 27, 2010, Report from the Secretary of the Interior to the President, Increased Safety Measures for Energy Development on the Outer Continental Shelf (“Report”).

HOW DEEP IS “*DEEP*”?

May 27, 2010

“DOI’s Increased Safety Measures Report”

...the risks associated with operating in water depths in excess of **1,000 feet** are significantly more complex than in shallow water.

May 28, 2010

“THE MORATORIUM”

...deepwater wells,...deepwater drilling,
...new deepwater wells...

May 30 2010

“*The Moratorium NTL*”

...“*deepwater*” means depths
greater than 500 feet.

June 7, 2010 (as supplemented and amended on June 9, 2010)

HORNBECK, CHOUEST, & BOLLINGER FILE SUIT SEEKING...



- ...that the Court order the following relief: preliminarily, and after a full trial on the merits, permanently,
- Declare both the Moratorium and NTL invalid and unenforceable;
 - Declare that Defendants have violated and continue to violate OCSLA and its implementing regulations, and, accordingly, that Defendants have violated the APA;
 - Enjoin the Moratorium and NTL as applied to all drilling in water at depths of greater than 500 feet, and;
 - ... further relief as the Court deems just, proper and equitable.

June 22, 2010

Judge Feldman Grants Preliminary Injunction

This Court having considered the Motion for Preliminary Injunction of Hornbeck Offshore Services, L.L.C.,....IT IS ORDERED that Honorable Kenneth Lee “Ken” Salazar, [etc.] ...until a full trial on the merits is had **are hereby immediately prohibited 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 at depths greater than 500 feet;**

June 22, 2010

Basis for Issuance of Preliminary Injunction

- (1) that plaintiffs are substantially likely to prevail on the merits of their claim for the government defendants' violations of the Outer Continental Shelf Lands Act and its implementing regulations;
- (2) that, in the absence of the relief requested, plaintiffs will incur immediate and irreparable harm to business including the irretrievable loss of vessels' useful life, loss of crews that have long been associated with their particular vessels, loss of shore-side teams and disruption of longstanding contractual relationships with offshore service vendors and other satellite services for the operation of its fleet, all of which is not subject to calculation;
- (3) that the irreparable harm to plaintiffs should the Court decline to grant the application for the relief requested outweighs the harm which the granting of such relief may cause to any legitimate interest of defendants; and
- (4) that the entry of this Order will serve the interests of justice and the public interest.

June 22, 2010

www.doi.gov

News Release



OFFICE OF THE SECRETARY
U.S. Department
of the Interior

Secretary Salazar's Statement Regarding the Moratorium on Deepwater Drilling

...

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 DOJ is therefore appealing today's court ruling.

...

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 within our authorities.



June 23, 2010

Excerpts of Secretary Salazar Testimony Before Senate
Appropriations Sub-Committee on Interior and Environment

Response to questions by Senator Lamar Alexander:

- “Senator Alexander, we will, and in the weeks and months ahead, take a look at how the moratorium in place can be refined...”

Response to questions by Senator Lisa Murkowski:

- “At the same time it is important that this moratorium stay in place until we can ensure that deepwater drilling can be done in a safe way. We are not there today so I will move forward with the executive authority that I have to ensure that the moratorium stays in place.”

June 24, 2010

Judge Feldman Denies Government's request to Stay Pending Appeal

...IT IS FURTHER ORDERED: that the **defendants' motion to stay pending appeal is hereby DENIED** for the same reasons given in this Court's June 22, 2010, Order granting the plaintiffs' motion for preliminary injunction;

June 24, 2010

Diamond Offshore Intervenes in Hornbeck Suit



June 23-25, 2010

**Government Appeals Granting
of Preliminary Injunction
and Files Motion to Stay Pending
Appeal with the U.S. Fifth
Circuit Court of Appeals**

July 8, 2010

5th Circuit Denies Motion to Stay

No. 10-30585

Before DAVIS, SMITH and DENNIS, Circuit Judges.

PER CURIAM:

The Motion for stay pending appeal is denied because the Secretary has failed to demonstrate a likelihood of irreparable injury if the stay is not granted; he has made no showing that there is any likelihood that drilling activities will be resumed pending appeal.

July 9, 2010

ENSCO Files Suit seeking...

- Hold unlawful and set aside the Deepwater Moratorium, in whole or in part, and NTL-5;
- Hold unlawful and set aside other new substantive requirements on offshore drilling adopted by Defendants in violation of the APA.
- Compel Defendants to act without unreasonable delay on the pending APDs and other Permit Applications in accordance with the OCSLA;
- Declare that Defendants issued the Deepwater Moratorium, NTL-5, and other substantive offshore drilling requirements in violation of the APA and the OCSLA, and that Defendants have unreasonably delayed the issuance of new drilling permits and approval of other Permit Applications under the APA and the OCSLA;
- Permanently enjoin Defendants from enforcing the Deepwater Moratorium, in whole or in part, NTL-5, and other substantive offshore drilling requirements, and from delaying the issuance of new drilling permits and approval of other Permit Applications under the OCSLA;

July 12, 2010

Government Imposes the “Second” Moratorium



OFFICE OF THE SECRETARY
U.S. Department
of the Interior



...I am directing BOEM to direct the suspension of any authorized drilling of wells using subsea BOPs or surface BOPs on a floating facility. I further direct BOEM to cease the approval of pending and future applications for permits to drill wells using subsea BOPs or surface BOPs on a floating facility. These suspensions shall apply in the Gulf of Mexico and the Pacific regions through November 30, 2010, subject to modification if I determine that the significant threats to life, property, and the environment set forth in this memorandum have been sufficiently addressed. These suspensions do not apply to production activities; drilling operations that are necessary to conduct emergency activities, such as the drilling operations related to the ongoing BP Oil Spill; drilling operations necessary for completions or workovers (where surface BOP stacks are installed, they must be utilized during these operations); abandonment or intervention operations; or waterflood, gas injection, or disposal wells....

July 12, 2010

Government Imposes the “Second” Moratorium and Recinds “First” Moratorium



OFFICE OF THE SECRETARY
U.S. Department
of the Interior



...this memorandum replaces and supersedes the memorandum dated May 28, 2010, entitled “Suspension of Outer Continental Shelf (OCS) Drilling of New Deepwater Wells.” NTL No. 2010-N04, which was used to implement the decision made in the May 28, 2010, memorandum and is hereby rescinded.

July 12, 2010

Government Imposes the “Second” Moratorium

[Footnote 6]



OFFICE OF THE SECRETARY
U.S. Department
of the Interior



In my May 28 suspension decision, I used a 500-foot water depth delineation as part of the description of the suspension. This 500-foot delineation served as a shorthand proxy for the risks associated with using subsea BOPs or surface BOPs on floating facilities. To avoid any possible confusion over the use of the proxy, I have chosen to make this new suspension decision in reference to the types of blowout prevention equipment used in deepwater operations, rather than in reference to *the functionally equivalent* concept of water depth.

July 12, 2010

Government Seeks to Dismiss Hornbeck Suit Alleging It Is “Moot”

August 11, 2010

State of Texas Files Suit

State of Texas v. Salazar, No. 4:10-2866 (S.D. Tex.)

In its Complaint, Texas asserts that the defendants violated the federal Administrative Procedure Act (“APA”) and/or Outer Continental Shelf Lands Act (“OCSLA”) by (1) failing to consult with Texas prior to issuing the July 12 Moratorium, (2) failing to consider the economic impact of the July 12 Moratorium on Texas and its citizens, and (3) issuing a “blanket” or “global” moratorium.

September 1, 2010

Judge Feldman Denies Motion to Dismiss

Because this Court has determined that the process leading to the first moratorium lacks probity; because this Court has determined that no rational nexus exists between the fact of the tragic Deepwater Horizon blowout and placing an attainder of universal culpability on every other deepwater rig operator in the Gulf of Mexico; because this Court has determined that the first moratorium is invalid in law; and because the Interior Secretary's second moratorium arguably fashions no substantial changes from the first moratorium, the government has failed to circumvent the voluntary cessation exception to mootness.

Accordingly, the **defendants' motion to dismiss**, or alternatively for a stay, is **DENIED without prejudice**.

September 2, 2010

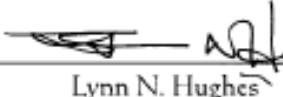
Texas Suit Transferred to Louisiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Order to Transfer

This case is transferred to the United States District Court for the Eastern District of Louisiana.

Signed on September 2, 2010, at Houston, Texas.



Lynn N. Hughes
United States District Judge

September 9, 2010

State of Alaska Files Suit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

State of Alaska v. Salazar, 3:10-cv-00205-JWS

**Petition For Writ Of Mandamus And
Petition For Review; Request For Injunctive
Relief**

September 27, 2010

State of Louisiana Intervenes in Hornbeck Suit



September 29, 2010

5th Circuit Dismisses Government's Appeal

...The order preliminarily enjoining the moratorium that was issued on May 28, 2010, is the sole subject of the appeal.

...

We therefore hold that this appeal, seeking to set aside the subject preliminary injunction, has been mooted by the acts of the appellant Secretary and by the subsequent rulings of the district court that granted that injunction.

...

This appeal is therefore **DISMISSED** as moot.⁴

² We do not express any opinion on whether the issuance of a second moratorium (1) violated the district court's preliminary injunction; (2) was done merely to avoid judicial review of the first moratorium; or (3) renders moot the merits of the underlying suit.

⁴ Because the appeal itself is dismissed as moot, we need not decide any ancillary motions currently pending before this court. We make clear that our ruling is limited to the preliminary injunction and has no effect on the merits of the declaratory judgment or other underlying issues now before the district court.

October 12, 2010

Government “Lifts” Moratorium

www.doi.gov

News Release



OFFICE OF THE SECRETARY
U.S. Department
of the Interior

Salazar: Deepwater Drilling May Resume for Operators Who Clear Higher Bar for Safety, Environmental Protection

...Secretary of the Interior Ken Salazar has determined it is appropriate that deepwater oil and gas drilling resume, provided that operators certify compliance with all existing rules and requirements, including those that recently went into effect, and demonstrate the availability of adequate blowout containment resources.

October 19, 2010

NTL-05 “interpretative” or “substantive”

...It seems unrestrained by the facts before the Court to characterize the government’s edicts as interpretative. That the notice is called a “guidance document” is wishful at best....The NTL’s requirements in practice fit well within the APA’s definition of a substantive rule as understood by the courts....The NTL-05 imposes additional duties on operators and lessees; it mandates new certifications and safety inspections that were not in place before; it does not simply track statutory language or reiterate existing duties. It is, by its very thrust, substantive. Notice and comment were required by law. The government did not comply, and the NTL-05 is of no lawful force or effect.

Moratorium Litigation (Status as of 10/25/10)

Hornbeck Case (Feldman)

State of Louisiana/Governor's Intervention Complaint – addressed 11/3
Diamond Offshore Intervention Complaint - pending

ENSCO Case (Feldman)

Fed's Motion to Dismiss Counts I & II as Moot – addressed 11/3
MSJ on Count II (Second Moratorium) – addressed 11/3

State of Texas Case (Feldman)

Fed's response to Complaint - due 11/5

State of Alaska

Motion for Partial Summary Judgment – all briefing due by 11/12/10

*“Louisiana’s economic hurt
from drilling moratorium
warrants action”*

The Times-Picayune
Wednesday, June 9, 2010

“Crude Politics” Disaster”
Gulf state economies.

*“Protests from experts show
drilling moratorium based
on politics, not science”*

The Times-Picayune
Wednesday, June 11, 2010

“Crude Politics”

THE WALL STREET JOURNAL.
Thursday, June 17, 2010