No. 10-30585

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HORNBECK OFFSHORE SERVICES, INC.,

Plaintiff-Appellee,

v.

KENNETH SALAZAR, in his official capacity as Secretary of the Interior, UNITED STATES DEPARTMENT OF THE INTERIOR, THE BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION, AND ENFORCEMENT, and MICHAEL R. BROMWICH, in his official capacity as Director of that Bureau,

Defendant-Appellants.

On Appeal from the U.S. District Court for the Eastern
District of Louisiana, No. 10-CV-1663(F)(2)
(Hon. Martin Feldman)

MOTION FOR A STAY PENDING APPEAL

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Defendants Kenneth Salazar, Michael Bromwich, the Department of the Interior, and the Bureau of Ocean Energy Management, Regulation, and Enforcement[1] (collectively "Interior") hereby move for a stay of a preliminary injunction that the United States District Court for the Eastern District of Louisiana entered on June 22, 2010. The injunction forbids Interior from enforcing temporary suspensions on new deepwater drilling in the Gulf of Mexico. Interior issued those suspensions in response to the Deepwater Horizon disaster; they are crucially important to protect human health and the environment from another deepwater drilling disaster while Interior investigates the Deepwater Horizon event and acts to prevent another similar disaster from happening.

Interior reviewed information from scientists, industry, and agency experts in considering its course of action, and tailored its regulatory response to address the concerns it identified. The challenged suspension orders target only those deepwater operations that present safety concerns similar to those raised by the Deepwater Horizon event. In all, 33 drilling rigs were actively engaged in deepwater operations at the time of the issuance of NTL 2010-N04[2]—a small

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[1] On June 21, 2010, Secretary Salazar issued an order renaming the Minerals Management Service as the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE).

[2] At the time of the suspensions, only 21 of the 33 active rigs were engaged in operations covered by the suspensions, and therefore immediately affected. Additional rigs may have become available or unavailable for prohibited deepwater operations since the time of the suspensions. Interior believes that the

fraction of the approximately 3,600 structures in the Gulf dedicated to offshore oil exploration and production.

The district court committed legal error and abused its discretion in issuing its preliminary injunction order. Interior has therefore filed an appeal from that order. At the same time, Interior is continually collecting new information regarding the safety and reliability of deepwater drilling operations. It plans to evaluate this new information along with existing record information, and to issue new suspension decisions in the near future. Interior asks that this Court promptly stay the district court's preliminary injunction order to preserve the status quo ante during the course of this appeal and Interior's further deliberations. Indeed, Interior reserves the right to seek emergency consideration of this motion under Circuit Rule 27.3 if it becomes aware that drilling operations will commence imminently at any of the rigs affected by the suspension decisions.

FACTUAL AND PROCEDURAL BACKGROUND

On April 20, 2010, the Deepwater Horizon offshore drilling rig exploded off the Louisiana coast, claiming eleven lives and causing the largest oil spill in American history. The ongoing spill now already ranks among the worst environmental disasters this Nation has ever confronted. While it is impossible to

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33-rig figure represents a reasonable estimate of the total number of rigs that would be affected by the suspensions, and we accordingly will use that approximation in this motion.

determine its full environmental impact, the spill has already closed vast areas of the Gulf of Mexico to commercial fishing, polluted coastal ecosystems, diminished tourism, and demanded an immense cleanup response.

President Obama responded to the Deepwater Horizon event in several ways, two of which are particularly relevant here. First, the President created a bipartisan National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling. The President charged the Commission with investigating the root causes of the event and with identifying better ways to prevent and/or address any future spills associated with offshore drilling. The Commission expects to report its findings and recommendations within six months of its first meeting.

The President also ordered the Secretary of the Interior (the "Secretary") to review the circumstances of the Deepwater Horizon event and to report within 30 days on what additional precautions and technologies should be required to improve the safety of offshore oil exploration and production. Dkt. #7-2 at 3 (Executive Summary). The Secretary conducted this examination in concert with experts from state and federal governments, academic institutions, industry, and advocacy groups, and produced a report on May 27, 2010, entitled "Increased Safety Measures for Energy Development on the Outer Continental Shelf" (hereafter "Safety Report"). The Safety Report recognizes that other investigations are ongoing, but explains that already-available information supports the need for

interim measures to improve offshore drilling safety. *Id.* at 5, 8, 25, 37. The Report therefore recommends specific measures to ensure the effectiveness of blowout preventers, promote the integrity of wells, enhance well control, and facilitate a culture of safety within the offshore drilling industry. *Id.* at 5-6.

After reviewing numerous sources of information, including the Safety Report, the Secretary concluded on May 28, 2010, that "at this time and under current conditions . . . offshore drilling of new deepwater wells poses an unacceptable threat of serious and irreparable harm to wildlife and the marine, coastal, and human environment." Dkt. #5-1 at 2 (citing 30 C.F.R. § 250.172). The Secretary also determined that "the installation of additional safety or environmental protection equipment" at deepwater drilling rigs is "necessary to prevent injury or loss of life and damage to property and the environment." *Id.*

In accordance with these findings, the Secretary directed BOEMRE to exercise its authority under the Outer Continental Shelf Lands Act (OCSLA) to suspend drilling operations at deepwater rigs in the Gulf of Mexico that are "similarly situated" to Deepwater Horizon. Dkt. #33-2 at 4 ¶11. BOEMRE determined that the Secretary's directive applied to certain specific deepwater operations, and sent temporary suspension letters to each affected lessee. *See, e.g.*, Dkt. #33-4 at 3 to 6. BOEMRE informed these lessees that temporary suspensions were necessary, among other things, "because of the significant risks of [offshore]

drilling in deepwater without implementation of the safety equipment, practices and procedures recommended in the Report." Dkt. #7-2 at 69.

Hornbeck Offshore Services, L.L.C. and the other plaintiffs (collectively "Plaintiffs") are not offshore lessees, nor are they the recipients or subjects of the orders they challenge. Instead, they offer support services for offshore drilling operations. They argue that the suspensions violate the OCSLA and the Administrative Procedure Act (APA). Plaintiffs filed their initial complaint on June 7, 2010, and moved for a preliminary injunction two days later. Dkt. #1,5,7.

The district court granted the Plaintiffs' requested injunction in a June 22, 2010, order. Dkt. #67 (hereafter "Order"). The court concluded that the suspension orders were arbitrary or capricious in several respects. Among other things, the court suggested that the findings of the Safety Report did not support what it characterized as a "blanket moratorium" of "immense scope." Order at 17, 21. The court complained that "the parameters of 'deepwater' remain confused," *id.* at 18, because Interior had suspended new drilling in water deeper than 500 feet, but the Safety Report had used "deep water drilling operations" to refer to those in over 1000 feet of water. And the court scolded Interior for suspending operations at 33 affected rigs despite their individual safety records and the fact that they recently passed BOEMRE inspections. *Id.* at 19-20 n.11.

Interior filed a notice of appeal and a motion for a stay pending appeal on June 23. The district court denied Interior's stay motion on June 24. Dkt. #82.

LEGAL STANDARDS

1. OCSLA suspension standards. The OSCLA describes the OCS as "a vital national resource" that should be developed "subject to environmental safeguards." 43 U.S.C. § 1332(3). Congress expected that drilling operations would employ "technology, precautions and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages . . . or other occurrences which may cause damage to the environment or to property." *Id.* § 1332(6). To ensure this, Congress instructed the Secretary of the Interior to prescribe regulations to govern drilling operations, prevent waste and damage to natural resources, and protect health and safety. *Id.* § 1334(a).

The OCSLA directs the Secretary to promulgate rules addressing "the suspension or temporary prohibition of any operation" where there is "a threat of serious, irreparable, or immediate harm" to human or aquatic life, property, "or to the marine, coastal, or human environment." *Id.* § 1334(a)(1). BOEMRE regulations in turn authorize the agency to direct a suspension if it determines that "activities pose a threat of serious, irreparable, or immediate harm or damage" to human or animal life, "property, any mineral deposit, or the marine, coastal, or human environment," 30 C.F.R. § 250.172(b), or "[w]hen necessary for the

installation of safety or environmental protection equipment." Id. § 250.172(c).

2. The Administrative Procedure Act (APA). The APA provides that an agency action may be overturned only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989). A reviewing court examines only whether the agency based its decision "on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The decision must be sustained if it articulates a rational relationship between the facts it finds and its policy choices. *Guste v. Verity*, 853 F.2d 322, 327 (5th Cir. 1988).

3. Preliminary injunctions. A preliminary injunction is an "extraordinary and drastic" remedy. *Anderson v. Jackson*, 556 F.3d 351, 360 (5th Cir. 2009). To merit such relief, a plaintiff must make a "clear showing" that: (1) it is likely to succeed on the merits; (2) it stands a substantial threat of irreparable harm absent an injunction; (3) the balance of equities tips in its favor; and (4) the requested injunction serves the public interest. *Winter v. NRDC*, 129 S.Ct. 365 (2008).

4. Stay pending appeal. To obtain a stay pending appeal, the moving party must demonstrate: (1) that it is likely to succeed on the merits; (2) that it would suffer irreparable injury if the stay were not granted; (3) that granting the stay would not substantially harm the other parties; and (4) that granting the stay would

serve the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Under *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981), that test is flexible and a movant can obtain a stay pending appeal by showing "a substantial case on the merits when a serious legal question is involved" and that "the balance of the equities weighs heavily in favor of granting the stay." *Id.*

ARGUMENT

Interior and the United States government are in the midst of investigating and responding to an unprecedented environmental disaster. After an evaluation ordered by the President, Interior decided that human lives and the environment would best be safeguarded by temporarily suspending a narrow class of activities. The temporary suspensions only affect rigs operating in conditions that present safety concerns similar to those raised by the Deepwater Horizon event. Dkt. #7-2 at 3. Plaintiffs did not dispute that these safety concerns exist or that they should be addressed. Instead, they argued that Interior acted arbitrarily and capriciously by suspending activities instead of allowing the 33 affected deepwater rigs to conduct new drilling while Interior acts to address safety concerns. The district court second-guessed Interior's decisions and held that the challenged suspensions were "blanket, generic, indeed punitive." Order at 21. The district court erred, and Interior respectfully requests that this Court issue a stay of the district court's order

pending appellate review or pending Interior's preparation of new decision documents regarding any necessary suspensions.

I. INTERIOR RAISES SUBSTANTIAL QUESTIONS REGARDING THE MERITS OF THE PRELIMINARY INJUNCTION ORDER.

Although Interior submitted documents and declarations explaining why the record supported its decisions,[3] the district court improperly overruled those decisions and substituted its own views about the proper balance of risk and cost. Interior identified logical connections between record facts and the need for a temporary suspension of drilling operations in water depths greater than 500 feet. With that justification established, the law required the court to defer to Interior's judgment. Because it failed to do so, Interior is likely to prevail in its appeal. [4]

The Secretary had ample basis on which to conclude that deepwater drilling operations pose "a threat of serious, irreparable, or immediate harm or damage" to life, property, or the environment, as required by law. 43 U.S.C. 1334(a)(1)(B); 30

[3] To facilitate expedited consideration of Plaintiffs' preliminary injunction motion, Interior submitted a small subset of the record documents to the district court along with declarations describing additional materials in the record. This approach is permissible in situations where the immediate lack of a record would otherwise frustrate review. *See Camp v. Pitts*, 411 U.S. 138, 142-143 (1973).

[4] The district court also improperly asserted jurisdiction. Plaintiffs challenge suspensions under 43 U.S.C. § 1349(b)(1), but did not satisfy the jurisdictional prerequisites for such a challenge. They never filed the pre-suit notice that 43 U.S.C. § 1349(a)(2)(A) requires, without which "no action may be commenced." *See Hallstrom v. Tillamook County*, 493 U.S. 20, 23-26 & n.1 (1989).

C.F.R. § 250.172(b) (emphasis added).[5] The Deepwater Horizon blowout is itself powerful proof that a "serious" threat exists on the rigs that Interior targeted with suspension orders, all of which use "the same technologies employed by Transocean's Deepwater Horizon," Declaration of Walter Cruickshank at 2 (attached), and are "similarly situated to the Deepwater Horizon." Dkt. #33-2 at 4 ¶11. Moreover, the Safety Report lists a host of safety measures that Interior found necessary to improve the safety of deepwater drilling operations. Interior could therefore reasonably conclude that allowing continued drilling without those measures poses "a threat of" further spills and further damage to the environment. Neither Plaintiffs, amicus the State of Louisiana, nor any of their experts seriously dispute that this threat exists. The State instead concedes that further safety measures are necessary, and merely disagrees with Interior's assessment of the time necessary to implement them. See Dkt. #53 at 10 ("Louisiana believes that . . . by immediately implementing the recommendations in the DOI's Safety Report which can be implemented in 30 days, deepwater drilling may promptly resume in a reasonably safe manner."); *see also* Louisiana Gulf Economic Survival Team Website (*available at* http://www.crt.state.la.us/GEST/index.aspx) (requesting that Interior "reduce the moratorium to no more than 30 days").

[5] Interior also relied upon authority granted by 30 C.FR. § 250.172(c), which provides authority to issue suspensions when "necessary for the installation of safety or environmental protection equipment."

The district court made a series of analytical errors in rejecting Interior's suspension decisions. Each error alone would raise substantial questions about the Order's merit; taken together they amply demonstrate the need for a stay.

First, the district court held Interior to a standard more stringent than the "arbitrary and capricious" review standard it purported to apply. Order at 10-13. Under the proper standard, the court should have asked only whether there is a rational connection between, on one hand, undisputed safety concerns and concededly "compelling" recommendations for improvement, Order at 17, and on the other, a finding that given those concerns and the undisputed need for those improvements, there exists "a threat of serious, irreparable, or immediate harm." That is the only finding the OCSLA demands in order to justify temporary suspensions. 43 U.S.C. § 1334 (emphasis added).

In light of the fact that Deepwater Horizon exploded for reasons that "no one yet fully knows," Order at 21, Plaintiffs cannot establish that Interior acted arbitrarily in concluding that continued drilling on similar rigs poses a "threat" of serious harm. Courts must defer to agency determinations and expertise when agencies are forced to proceed in the face of uncertainty, and especially when agencies impose emergency interim protective measures. *Cf. State Farm*, 463 U.S. at 57 n.21 (agency had authority to "suspend" standard even if it lacked authority to rescind it). That is especially so under the OCSLA, which calls for preventive

measures to ensure a firm margin of safety, *see* 43 U.S.C. § 1332(3), and thus authorizes suspensions based on a "threat" of harm.

Instead of deferring to Interior's technical judgments, the district court dismissed them wherever it disagreed. For example, the court independently concluded that a 7.5% failure rate in certain blowout preventer equipment was acceptable, and chastised Interior for concluding that this failure rate justified the temporary suspensions. Order at 19. The court also complained that Interior "refuses to take into measure" the past safety and compliance records of individual deepwater leases, and that its approach equated to concluding that "all airplanes [are] a danger because one was." *Id.* Here the court profoundly misunderstood the problem Interior was addressing. Interior does not deny that "[m]ost of the currently permitted rigs passed MMS inspection after the Deepwater Horizon exploded." Order at 19 n.11; *see also* Declaration of Walter Cruikshank ¶6. But the Gulf spill demonstrates that "those regulations and technologies . . . proved inadequate in deepwater conditions." *Id.* Until Interior can implement regulations to address newly-identified deepwater drilling concerns, rig-by-rig compliance reviews under an outdated regime cannot ensure safety; Interior "cannot cite operators for violation of regulations not yet written." *Id.* Put another way, when Interior suspended activities at leases "similarly situated" to Deepwater Horizon, Dkt. #33-2 at 4 ¶11, it merely recognized the obvious: an intolerable disaster has

identified inadequacies in existing safety regulations and practices, which in turn justify a suspension targeted at those similar drilling operations.

Second, the district court repeatedly reviewed Interior's temporary suspension decisions as if Interior had based those decisions solely on the Safety Report. Although the court acknowledged that Interior based its suspensions on "a great deal of information" beyond the Safety Report, Order at 18, it nevertheless rejected the suspensions almost entirely because it identified differences between the Report's findings and the suspensions' scope. For example, the court complained that the suspension applied to areas deeper than 500 feet, whereas the Report defines "deepwater" as areas deeper than 1000 feet. *Id.* From this, the court leapt to the conclusion that Interior was "driven by political or social agendas" rather than facts. *Id.* The court all but ignored a sworn declaration from Deputy Secretary of the Interior David Hayes explaining precisely why Interior suspended drilling operations in water deeper than 500 feet, and attaching supporting documents. Dkt. #33-2 at 6 ¶13. The fact that the Safety Report does not define deepwater in that way is irrelevant; Deputy Secretary Hayes' declaration and attachments show that other record documents support Interior's approach. That is more than enough to satisfy the APA's standard of review.

Third, the district court mistakenly believed that Interior's suspension decisions were fatally undermined by the fact that some scientific peer reviewers

did not agree with them. Order at 3, 19 n.10. The court expressed apprehension about a sentence in the Safety Report that it viewed as erroneously suggesting that those reviewers had endorsed the suspensions, and seized on the error to call "the process that led to the Report" into question. *Id.* at 3. In doing so, the court again focused erroneously on the Safety Report, and also misunderstood the scope of Interior's peer review request. Interior never asked the drafters and peer reviewers of the Safety Report to make policy suggestions about how best to implement their recommendations. The OCSLA places that duty squarely on Interior's shoulders, and gives Interior considerable discretion in making that judgment. Whether certain scientists now agree with Interior's ultimate decision is irrelevant; so too is whether a sentence in the record might be read to claim their support incorrectly.

Fourth, the district court did not analyze the limited and temporary suspensions that Interior issued. It instead targeted a strawman. Despite the fact that that the suspensions affect only 33 rigs, the court complained that Interior had not properly examined the impact of "a blanket, generic, indeed punitive, moratorium," Order at 21, a "blanket moratorium with no parameters," *id*., or a moratorium of "immense scope," *id*. at 17. The court noted that Plaintiffs "employ over 11,875 people" and that "150,000 jobs are directly related to offshore operations," Order at 5-6, but disregarded the fact that the suspensions apply only to certain drilling operations, only to waters over 500 feet deep, and

only for six months. And even though it emphasized the fact that the Gulf provides 31% of domestic oil, and complained that Interior could not justify a "present-day" impact on "the availability of domestic energy," it failed to recognize that these observations were irrelevant because Interior did not suspend any ongoing oil production. *Id.* at 22.

II. INTERIOR IS REVIEWING ADDITIONAL INFORMATION AND PREPARING NEW SUSPENSION DECISIONS.

As discussed above, Interior amply supported its suspension orders, and the district court erred in concluding otherwise. Nevertheless, the Secretary has announced that he will issue new suspension decisions. Interior is doing this for several reasons. First, since it issued the suspension decisions, Interior has continued to gather further information about safety and regulatory concerns at deepwater drilling rigs. The Secretary plans to review this information and consider it in his further decisionmaking. Second, reducing deepwater drilling risks is a national priority; the Secretary will pursue all avenues for addressing risky operations, and will take new and immediately effective action as necessary. Plaintiffs admit that the Secretary has the authority to do so. Dkt. #69-1 at 2.

The Secretary's plan to issue new suspension decisions provides a further reason to stay the district court's preliminary injunction order. *Cf. A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961) (declaratory relief inappropriate if challenged practice is "undergoing significant modification so that

its ultimate form cannot be confidently predicted"); *Building & Const. Dep't v. Rockwell Int'l Corp*., 7 F.3d 1487, 1492 (10th Cir. 1993) (courts may withhold equitable relief "where it appears that a defendant, usually the government, has already changed or is in the process of changing its policies"). The district court never disputed that the OCSLA grants Interior the authority to issue the suspensions at issue. It merely complained that Interior had not adequately explained its reasons for doing so. Given the importance of Interior's decisions and the disruptive consequences of nullifying them immediately, this Court should stay the injunction pending Interior's new suspension decisions even if it concludes that Interior has not raised "substantial questions" regarding the injunction's propriety. *Cf. Allied-Signal Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993) (identifying circumstances in which agency decisions should be remanded for further explanation without vacatur); *see also Monsanto Co. v. Geertson Seed Farms*, __ S.Ct. __, 2010 WL 2471057 (June 21, 2010).

III. THE BALANCE OF HARMS AND PUBLIC INTEREST SUPPORT A STAY.

A. Interior May Suffer Irreparable Harm Absent A Stay.

The risk that the district court's order poses to the American people and their coastal lands and waters strongly counsels that this Court grant Interior's requested stay. The broken riser pipe at the Deepwater Horizon site continues to pour oil into the Gulf. The United States government has directed every available resource to stem that flow and clean up the horrific spill. The injunction order prevents

Interior from enforcing suspension orders it deems essential to carry out its OCSLA mission. Moreover, a second deepwater spill could overwhelm response efforts and dramatically set back recovery. The district court recognized Interior's concern that national resources are "stretched thin," Order at 17 n.9, and BOEMRE's Deputy Director further declares that even assuming that the chances of another deepwater event are low, the damage such an event might cause still counsels in favor of suspension. Declaration of Walter Cruickshank at 3. He explains that a second deepwater blowout "would further stress the response capacity of US national assets," especially in light of the difficulties of responding to deepwater events and the onset of the Gulf hurricane season. *Id.* at 3-4.

B. A Stay Would Not Harm The Plaintiffs.

In contrast to the harm that might be caused by resuming deepwater drilling without further safeguards, Plaintiffs cannot show that they would be harmed by a stay. The district court cursorily concluded that Plaintiffs made the showing of irreparable injury from the temporary suspensions necessary to obtain preliminary injunctive relief, but gave no basis for that conclusion. In fact, Plaintiffs would suffer no relevant harm from a stay.

In examining the potential harm to Plaintiffs' interests, it is crucial first to recognize that none of them is an offshore lessee, and that none of them was the recipient of any challenged suspension. Instead, they are companies that provide

"services to support offshore oil and gas drilling." Order at 1. It is far from clear that the targeted suspensions would cause Plaintiffs the sort of irreparable harm that justifies a preliminary injunction. Indeed, when speaking to its investors, and not the courts, the lead plaintiff here were more optimistic. Just before challenging the suspension orders, Hornbeck filed a statement telling investors that only 21 of its 55-vessel "upstream" fleet was supporting deepwater drilling operations in the Gulf. Dkt. #33-4 (Form 8-K for Hornbeck Offshore Services, Inc.). Of these 21 vessels, only nine were operating under time charter contracts, and the company did not think that those contracts could be "validly cancelled" as a result of Interior's actions. *Id*. Hornbeck told investors that it would "mitigate its exposure" to the uncertainties in the regulatory environment "by bidding additional vessels into foreign markets and domestic non-oilfield markets," and that it remained "reasonably optimistic about its ability to further diversify its revenue base." *Id.* (emphasis added). Finally, it anticipated that "projected cash flows from operations for the remainder of 2010 will be sufficient to meet its anticipated operating needs, its debt service and the total remaining cash requirements under its capital programs." *Id.* In conceding that Interior's suspension orders would not cause it any irreparable injury, Hornbeck necessarily admits that a temporary stay of the district court's injunction would cause it no harm either.

Because they lack any direct interest in the deepwater leases that Interior has

suspended, Plaintiffs relied on asserted harm to others, alleging that halting drilling at the 33 affected rigs "threaten[s] the continued viability of the entire Gulf of Mexico deepwater industry." Dkt. #7-1 at 21. Plaintiffs further allege that the suspensions will cause a collapse of the entire network of "service vendors, suppliers, and other third parties that provide key services to Hornbeck." *Id*. at 20-21. Plaintiffs cannot back up these allegations. Again, the temporary suspensions affect less than 1% of the existing structures in the Gulf dedicated to oil exploration and production. *Id*. Plaintiffs exaggerate by contending that the "viability of the entire Gulf of Mexico deepwater industry" turns on six months' worth of continued operations at a small fraction of nearly 7,000 active leases in the Gulf. Dkt. #7-1 at 21; Dkt #7-2 at 10.

C. The Public Interest Demands A Stay.

Finally, while potential economic impacts to the Gulf's drilling industry and the businesses that support it are valid causes for concern, Interior's stay request also reflects its unique obligation to manage outer continental shelf lands and minerals for the United States' long-term interests. While Plaintiffs' concerns appear limited to the next financial quarter, Interior must ensure not only that OCS drilling operations are safe and secure but also that the Nation's fisheries, coastal ecosystems, and other public lands continue to provide jobs, recreation opportunities, habitat for wildlife, healthy ecosystems, and economic resources for

all of the public. In doing so, Interior takes an appropriately long-term view.

Interior had the long-term public interest in mind when it ordered the temporary suspensions here at issue. By assessing the safety and regulation of deepwater drilling in the Gulf of Mexico over the next six months, Interior is engaging in a deliberate and considered effort to protect the Gulf's economic, social, and ecological health by reducing the risk of another disaster like the Deepwater Horizon. The public's interest weighs heavily in favor of making sure that another comparable tragedy does not occur. Staying the district court's injunction order while Interior appeals it and issues new suspension decisions would directly serve that interest.

CONCLUSION

This Court should grant a stay pending Interior's appeal of the injunction and issuance of new suspension decisions.

Respectfully submitted,

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June 25, 2010

CERTIFICATE OF SERVICE

On June 25, 2010, I served copies of the foregoing motion and attachment on the following counsel via overnight courier:

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HORNBECK OFFSHORE SERVICES, LLC, **Plaintiff,** **v.** **KENNETH LEE "KEN" SALAZAR, in his official capacity as Secretary, United States Department of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; ROBERT "BOB" ABBEY, in his official capacity as Acting Director, Mineral Management Service; and MINERALS MANAGEMENT SERVICE,** **Defendants.**	**APPEAL FROM:** **CIVIL ACTION No. 10-1663(F)(2)** **EASTERN DISTRICT OF LOUISIANA**

DECLARATION OF WALTER D. CRUICKSHANK

I, Walter D. Cruickshank, do hereby declare as follows:

1. I am currently the Deputy Director, Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), formerly called the Minerals Management Service ("MMS"), an agency of the United States Department of the Interior. I am the senior career employee in that agency, which oversees oil and gas leasing and operations on the Outer Continental Shelf and manages revenue collection and distribution for all Federal and Indian energy and minerals leasing programs.

2. I have over 25 years experience working in the Department of the Interior, over 22 of them with the Minerals Management Service. I have been Deputy Director of MMS, and now BOEMRE, since 2002, and in that capacity, I have played an active role in managing all of the bureau's programs. Prior to becoming Deputy Director, I served

as Associate Director for Policy and Management Improvement, which included oversight of the MMS regulatory program.

3. The BOEMRE manages the offshore oil and gas leasing program created by the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.* Following the explosion and subsequent spill from the Deepwater Horizon, the President charged the Secretary of the Interior with reporting on means of preventing a recurrence of that blowout and massive spill. The resulting Interim Safety Report identified a number of measures that would significantly reduce the risk of blowout preventer failure, prevent future loss of well control and promote development of safety management systems to minimize human error. In some cases the measures can be required under current regulations, but in others rulemaking will be required.

4. The preliminary injunction entered by the district court will allow, in part, the resumption of drilling from floating rigs in deepwater by operators using the same technologies employed by Transocean's Deepwater Horizon (DWH) under the same regulatory regime in which the massive blowout occurred, causing a spill that is already several times greater than that associated with the Exxon Valdez. The Macondo well is still not under control two months later and the injunction will permit similar operations to be conducted before all of the enhancements in safety precautions identified in the Interim Safety Report can be implemented.

5. Of the greatest concern is the possibility that a second such spill could occur even before the DWH spill is halted and the damage to waters and coastlines in the Gulf region ceases to expand. Although the historical record for large spills from offshore well blowouts and drilling operations shows very few large incidents previous to DWH, the

magnitude of the potential impacts from a second such incident mitigates against solely relying on this low probability. Moreover, a second spill incident would further stress the capacity of US national assets for oil spill containment, response, cleanup and restoration.

6. As opposed to shallow water operations, the deep water conditions of high pressures, low temperatures, inaccessibility, need for use of robotic vehicles to manipulate equipment, and inability for workers to directly handle the equipment on the seafloor, all pose special challenges to both "routine" operations and especially to spill response operations. The injunction will allow risky drilling in deepwater conditions to resume, relying on blowout preventers resting on the seafloor hundreds or thousands of feet below the surface, difficult to access in the event they fail to function as intended. In addition, the oil and gas reservoirs in many of the deep geologic areas can generate very high flow rates for hydrocarbons, as we are seeing in the DWH spill flow calculations and observations. For these reasons, it is important that the lessons learned from the DWH event are ascertained and applied to other deep water operations, to further lower the chance of another such disaster. While further investigations are needed to determine the precise causes of the loss of control involved in the DWH incident, the Interim Safety Report has already identified significant shortcomings in Interior Department regulations and industry practices. Like the Transocean Deepwater Horizon, deepwater drilling rigs have a generally clean record of compliance with existing regulations, but those regulations and the technologies relied upon proved inadequate in deepwater conditions. The Department cannot cite operators for violation of regulations not yet written and in force. If it is denied the ability to suspend operations while enhanced technology is installed and tougher regulatory standards are put in place, it has

no means of insisting that its lessees operate with a greater margin of safety than BP and Transocean did.

7. The impact of the injunction will be felt not only by workers exposed to risky operating conditions, but by other living resources, including marine mammals, turtles, fish, birds, and benthic creatures (living on/in seafloor) which are being observed to have been contacted and harmed by the oil. Scientists expect that other mortality is occurring but not observable in the ocean depths. Sub-lethal effects from exposure to hydrocarbons are also possible, including reduced abilities for organisms to forage, thrive, reproduce, and acquire prey. Such lethal and sub-lethal effects may result in impacts to the health of given species, especially those that are depleted or recovering due to other stressors in their environments. The impacts of a second DWH type oil spill on these organisms and species could be exacerbated by the current exposures and potential debilitation of these living resources and habitats. This is also the case with regard to possible lethal or sub-lethal effects from not only the oil, but the chemicals used in spill response dispersants, and impacts from other spill response and mitigation activities, such as the berming of beaches, booming of marshes and other techniques.

8. The injunction of the suspension of deepwater drilling has been entered at a time in which attempts to control the spread of spilled oil will be greatly exacerbated by the hurricane season. Storms have the potential to drive oil currently residing in the water column and floating on the ocean surface far inland on storm surges. Enjoining the agency's suspension of that narrow range of operations at greatest risk, those in waters too deep for jack-up rigs, incautiously enhances the potential for a second major oil drilling incident during hurricane season that could further devastate the marine, coastal

and human environment and economically valuable resources of the Gulf of Mexico region.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this the 25nd day of June, 2010,

Walter D. Cruickshank
Deputy Director, Bureau of Ocean Energy Management, Regulation and Enforcement