OBAMA DRILLING MORATORIUM OVERTURNED IN CURIOUS COURT DECISION

The breaking news this hour is the decision of Judge Martin L. C. Feldman of the Eastern District of Louisiana to grant a preliminary injunction to the moving plaintiff oil and gas interests and against the Obama Administration's six month moratorium on deepwater drilling for oil in the Gulf of Mexico.

The court's decision is here. The key ruling is:

> On the record now before the Court, the defendants have failed to cogently reflect the decision to issue a blanket, generic, indeed punitive, moratorium with the facts developed during the thirty-day review. The plaintiffs have established a likelihood of successfully showing that the Administration acted arbitrarily and capriciously in issuing the moratorium.
> …..
> Accordingly, the plaintiffs' motion for preliminary injunction is GRANTED. An Order consistent with this opinion will be entered.

The 22 page decision is quite thorough in detailing the applicable law and standards of review. The Judge Feldman proceeds to blatantly disregard and violate the very standards and law he has laid out. It is really quite remarkable. Here, from his own decision (p. 11-12), is the scope he is supposed to be operating under:

> The APA cautions that an agency action may only be set aside if it is "arbitrary, capricious, an abuse of

> discretion, or not otherwise not in accordance with law." 5 U.S.C. §706(2)(A); see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). The reviewing court must decide whether the agency acted within the scope of its authority, "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Overton Park, 401 U.S. at 415-16; see Motor Vehicle Manf. Ass'n of the U.S. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42-43 (1983). While this Court's review must be "searching and careful, the ultimate standard of review is a narrow one." Overton Park, 401 U.S. at 416; see Delta Found., Inc. v. United States, 303 F.3d 551, 563 (5th Cir. 2002). The Court is prohibited from substituting its judgment for that of the agency. Overton Park, 401 U.S. at 416. "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" State Farm, 463 U.S. at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

The key language is that an agency decision such as entered in this case can be set aside ONLY if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". And the general standard in appellate courts on administrative reviews on abuse of discretions claims is that ANY relevant evidence in the record below that could support the decision is sufficient and it must be upheld.

Shockingly, Judge Feldman then goes on, in pages 18-20 to delineate, in fine detail, just such a "rational connection" that more than constitutes a sufficient basis for the agency decision in

this matter:

> Of course, the present state of the Administrative Record includes more than the Report, the Notice to Lessees, and the Memorandum of Moratorium. It includes a great deal of information consulted by the agency in making its decision. The defendants have submitted affidavits and some documents that purport to explain the agency's decision-making process. The Shallow Water Energy Security Coalition Presentation attempts at some clarification of the decision to define "deepwater" as depths greater than 500 feet. It is undisputed that at depths of over 500 feet, floating rigs must be used, and the Executive Summary to the Report refers to a moratorium on drilling using "floating rigs." Other documents submitted summarize some of the tests and studies performed. For example, one study showed that at 3000psi, the shear rams on three of the six tested rigs failed to shear their samples; in the follow up study, various ram models were tested on 214 pipe samples and 7.5% were unsuccessful at shearing the pipe below 3000psi. How these studies support a finding that shear equipment does not work consistently at 500 feet is incomprehensible. If some drilling equipment parts are flawed, is it rational to say all are? Are all airplanes a danger because one was? All oil tankers like Exxon Valdez? All trains? All mines? That sort of thinking seems heavy-handed, and rather overbearing.
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> The Court recognizes that the compliance of the thirty-three affected rigs with current government regulations may be irrelevant if the regulations are insufficient or if MMS, the government's

> own agent, itself is suspected of being corrupt or incompetent. Nonetheless, the Secretary's determination that a six-month moratorium on issuance of new permits and on drilling by the thirty-three rigs is necessary does not seem to be fact-specific and refuses to take into measure the safety records of those others in the Gulf. There is no evidence presented indicating that the Secretary balanced the concern for environmental safety with the policy of making leases available for development. There is no suggestion that the Secretary considered any alternatives: for example, an individualized suspension of activities on target rigs until they reached compliance with the new federal regulations said to be recommended for immediate implementation. Indeed, the regulations themselves seem to contemplate an individualized determination by authorizing the suspension of "all or any part of a lease or unit area." 30 C.F.R. §250.168. Similarly, OCSLA permits suspension of "any operation or activity . . . pursuant to any lease or permit." 28 U.S.C. §1334(a)(1). The Court cannot substitute its judgment for that of the agency, but the agency must "cogently explain why it has exercised its discretion in a given manner." State Farm, 463 U.S. at 48. It has not done so.

So, in short, Feldman correctly sets the standards he must follow in his review, and then blows by and around every one of them. Feldman in one breath, and out of one side of his mouth says "the Court cannot substitute its judgment for that of the agency" and then in the next breath, and talking out the other side of his mouth does just that. Feldman may not agree with the basis for the administrative action here, he may not like it, but it is simply unfathomable

that he can say there is no supporting evidence whatsoever such that there is no “rational connection” of the agency decision to the facts. It is simply absurd.

So, and I really do not like asking or suggesting these kind of questions, ever, but here it has to be done. What else could have been behind this bunk decision? Well, for one, Judge Feldman’s disclosures indicate he is invested in and tied to Transocean and Ocean Energy concerns, among others, which certainly ought to raise a red flag. The other question I have is whether or not the government’s attorneys or staff gave some informal clue to the court that they would not be upset in the least if the court were to rule against them. There are lots of ways to accomplish this and, yes, it does occasionally occur. I have no idea or evidence that is the case here; but this is simply an inexplicable decision to the best of my experience. Something funny happened on the way to the forum, that is for sure.