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# ENVIRONMENTAL LAW & PROPERTY RIGHTS

## OBAMA ADMINISTRATION POLICY ON OFFSHORE OIL AND GAS PRODUCTION: CONSENSUS OR CONTEMPT?

By Roger J. Marzulla\*

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In March 2010, President Obama announced his support for expanded oil and gas production in the Arctic and the Gulf of Mexico.<sup>1</sup> But on April 20, 2010, explosions and fires destroyed the Mobile Offshore Drilling Rig Deepwater Horizon approximately 50 miles from the Mississippi River Delta, killed eleven people aboard the rig, and injured many others. Millions of barrels of oil flowed into the Gulf of Mexico from the damaged well for months, until the well was finally sealed on September 19, 2010. Upwards of \$6 billion was spent in cleanup costs, billions more in income were lost, and BP Exploration and Production, Inc. created a \$20 billion fund to pay for losses suffered by individuals and businesses in the Gulf.

The Gulf oil spill has left the government's offshore oil and gas policy in serious disarray and varying from one agency to another. On the one hand, the Department of Justice in its December 15, 2010 enforcement lawsuit against BP<sup>2</sup> alleges that BP caused last year's Gulf oil spill through gross negligence (and possibly criminal acts as well). On the other hand, citing systemic problems with the offshore program that have nothing to do with BP, the Secretary of Interior has almost entirely shut down the drilling program.<sup>3</sup> And now, taking the matter into its own hands, on May 11, 2011, the House of Representatives approved and sent to the Senate legislation that would compel the Secretary to speed up the program by approving or disapproving Gulf of Mexico drilling permit applications within 30 days, effectively knocking out the moratorium.<sup>4</sup>

In short, the Administration's policy seems to depend on whether the official in question thinks the Gulf oil spill is the tragic result of a careless rig operator or the inevitable consequence of a risky production program. No one can say for sure whether at this time the Administration favors or opposes offshore energy production.

### I. *UNITED STATES V. BP EXPLORATION & PRODUCTION, INC., ET AL.*

In December 2011, the United States filed suit against the well owners (BP, Anadarko, and Mitsui) and the drilling rig owner (Transocean) in federal district court in New Orleans, Louisiana, alleging that the fault for the Gulf oil spill rests squarely on the shoulders of BP and its partners. The government's complaint states:

On information and belief, the Deepwater Horizon Spill was proximately caused by one or more of the following: acts, joint acts, omissions, fault, negligence, gross negligence, willful misconduct, and/or breach of federal safety and/or operating and/or construction regulations by Defendants BP, Anadarko Exploration, Anadarko

Petroleum, MOEX, one or more of the Transocean Defendants, and/or their respective agents, servants, employees, crew, contractors and/or subcontractors with whom said Defendants had contractual relationships.<sup>5</sup>

The government's complaint goes on to allege that, in violation of federal regulations, each defendant failed "to take necessary precautions to keep the Macondo Well under control," and "to use the best available and safest drilling technology . . . ."<sup>6</sup>

The Justice Department has also established a Deep Water Criminal Task Force, headquartered in New Orleans, to consolidate the various criminal investigations of the Gulf oil spill that have been going on since June 2010. Although no indictments have yet been handed up, the duration and intensity of the investigation suggests that individuals and companies involved in the Deepwater Horizon incident are likely to face charges that their criminal acts led to the disaster.

The Justice Department's theory in aggressively pursuing these particular companies in civil and criminal proceedings is that they were bad actors—and not that the offshore oil and gas program is flawed. These prosecutions thus suggest that the offshore drilling program established by Congress is, in fact, supported by the Administration.

### II. THE MORATORIUM

In sharp contrast to the Justice Department's accusation that BP and its partners carelessly operated one well (the Deepwater Horizon), the Interior Secretary concluded that all of the companies drilling all of the wells—the entire federal offshore drilling program itself—posed an unreasonable threat and must be shut down. So, less than a month after the Deepwater Horizon explosion, Secretary Salazar ordered a moratorium on all new offshore drilling in the Gulf, stating that:

offshore drilling of new deepwater wells poses an unacceptable threat of serious and irreparable harm to wildlife and the marine, coastal, and human environment . . . . 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.<sup>7</sup>

In response, a number of oil patch service companies sued in federal district court and obtained a preliminary injunction against the moratorium. Interior cancelled the moratorium<sup>8</sup> but four days later announced a second moratorium, which, although it was also officially lifted, has resulted in a de facto moratorium on deep water drilling that continues to the present day.

Citing "the Secretary's undisputed public statements of determination to ban deepwater drilling out of his concern for systemic dangers,"<sup>9</sup> the district court found him in civil

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\*Partner, Marzulla Law, LLC.

contempt of the preliminary injunction, stating:

The Court concludes that the plaintiffs have established the government’s civil contempt of its preliminary injunction Order by evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.<sup>10</sup>

On May 10, 2011, the district court ordered Interior to process pending drilling applications within 30 days.<sup>11</sup> So far, however, Secretary Salazar has refused to back down and it remains to be seen whether Interior’s de facto moratorium will continue in force.

From Interior’s point of view, then, it is the offshore drilling program and not the operation of the Deepwater Horizon that is problematic. So, Interior’s policy is decidedly anti-offshore drilling at this time.

### III. CONGRESS GETS INTO THE ACT

Meanwhile, the House of Representatives on May 11, 2011 passed a bill that would require the Secretary of Interior to take action on every deep water application (including those already pending) within 30 days.<sup>12</sup> Supporters of the bill claim that the de facto moratorium punishes the Gulf region for BP’s alleged misdeeds and that 12,000 jobs have been eliminated because of the moratorium. During this same period, seven deep water and five shallow water rigs have left the Gulf of Mexico in the past year for other regions of the world.

### IV. WINNERS AND LOSERS—OR ONLY LOSERS?

Despite an injunction and a finding of contempt, the Administration seems committed to its de facto moratorium on Gulf oil and gas drilling. At the same time, the Administration is energetically pursuing BP, Transocean, Anadarko, and Mitsui as culprits in last year’s Gulf oil spill. The risk of the Administration’s pursuit of these two mutually inconsistent policies is that the moratorium will collapse for lack of evidence to support the Secretary’s decision to indefinitely delay drilling, while the defendants in the litigation will throw back at the government the same rationale the Secretary has used to support it—that deep water drilling is risky, and accidents are bound to happen. Whichever side prevails, however, one thing is sure: it will impact those who rely on the Gulf oil industry for their livelihood and all of us who depend on the energy it produces.

### Endnotes

- 1 John M. Broder, *Obama to Open Offshore Areas to Oil Drilling for First Time*, N.Y. Times, Mar. 31, 2010, at A1, available at <http://www.nytimes.com/2010/03/31/science/earth/31energy.html>.
- 2 Compl., *United States v. BP Exploration & Production, Inc.*, Case No. 10-4536 (E.D. La., filed Dec. 15, 2010) [hereinafter “Compl.”].
- 3 *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 696 F. Supp. 2d 627, 638–39 (E.D. La. 2010).
- 4 H.R.1229, 112th Cong. (2011).
- 5 Compl. ¶ 69.
- 6 Compl. ¶ 49.

- 7 *Hornbeck*, 696 F. Supp. 2d at 631 (quoting the Secretary’s Memorandum of May 28, 2010).
- 8 *Hornbeck Offshore Servs., LLC v. Salazar*, 396 Fed. Appx. 147, 147–48 (5th Cir. 2010).
- 9 *Hornbeck*, 2011 U.S. Dist. LEXIS 13786, at \*11–12.
- 10 *Id.* at \*12–13 (internal quotation marks and citation omitted).
- 11 *ENSCO Offshore Co. v. Salazar*, 2011 U.S. Dist. LEXIS 49875 (E.D. La. May 10, 2011)
- 12 H.R.1229, 112th Cong. (2011).

