

Court Enjoins Offshore Drilling Moratorium; New Ban Expected

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On June 22, 2010, Judge Martin L.C. Feldman of the United States District Court for the Eastern District of Louisiana issued an opinion enjoining, on a preliminary basis, enforcement of the ban on deepwater offshore drilling that U.S. Secretary of the Interior Ken Salazar announced on May 28, 2010, based on what he found to be insufficient support in the administrative record for so sweeping an action. The impact of Judge Feldman's ruling may be short-lived, however, as later the same day, Secretary Salazar announced plans for a new moratorium order with stronger justification.

The Ruling

In *Hornbeck Offshore Services, L.L.C. v. Salazar*, Civ. Action No. 10-1663 (E.D. La., case filed June 7, 2010), several offshore service providers and companies supporting those businesses sought to have the moratorium order declared invalid and, pending final resolution of the case, enjoin its implementation. Judge Feldman ordered expedited briefing, heard oral argument on June 21 and issued a 22-page opinion the next day granting the plaintiffs' request for a preliminary injunction.

Judge Feldman first reviewed the report that Secretary Salazar made to President Obama on May 27, 2010, the moratorium announcement issued the next day, and the Notice to Lessees that the Minerals Management Services (MMS) sent on May 30, 2010. In the judge's view, Secretary Salazar's report, which the subsequent announcement and notice cited as the basis for the moratorium, "patently lacks any analysis of the asserted fear of threat of irreparable injury or safety hazards posed by the thirty-three permitted rigs also reached by the moratorium." He concluded that "the Court is unable to divine or fathom a relationship between the findings and the immense scope of the moratorium." He went on to say that "the blanket moratorium, with no parameters, seems to assume that because one rig failed and although no one yet fully knows why, all companies and rigs drilling new wells over 500 feet also universally present an imminent danger." Judge Feldman therefore ruled that it was likely plaintiffs would prevail on their allegation that this conclusion was arbitrary and capricious if based on the rationales cited in the administrative actions and concluded that the government's rationales could not "justify the immeasurable effect on plaintiffs, the local economy, the Gulf region, and the critical present-day aspect of the availability of domestic energy in this country."

In his opinion, Judge Feldman acknowledged "the senseless deaths of eleven crew members, the horrible losses of their families and loved ones, many injured workers, a broken pipe on the sea floor that continues to spew endless gushes of crude oil into the Gulf, and oil muck that has spread across thousands of square miles and persists in damaging sensitive coastlines, wildlife, and the intertwined local economies" and that "a suspension of activities directed after a rational interpretation of the evidence could outweigh the impact on the plaintiffs and the public." He made clear that his ruling was based on the insufficiency of the record to support the blanket moratorium and the impact on the economy and the energy industry.

Appeal

Robert Gibbs, President Obama's press secretary, announced almost immediately that the administration would appeal Judge Feldman's ruling. This appeal would go before a three-judge panel of the United States Court of Appeals for the Fifth Circuit, which is headquartered in New Orleans and includes judges residing in Texas, Mississippi and Louisiana. Either Judge Feldman or the Fifth Circuit may stay the injunction pending the appellate court's decision. Given the significance of the case, the government very likely will move for, and the Fifth Circuit will grant, an expedited argument schedule. The losing party could ask the full 16-judge court sitting en banc to reconsider the panel's decision, and after or without that step could seek review in the United States Supreme Court. Both rehearing en banc and certiorari at the Supreme Court are discretionary.*

A New Moratorium

Late on June 22, the Department of the Interior issued a statement from Secretary Salazar reacting to the *Hornbeck* ruling. Apparently mindful of Judge Feldman's leaving open the door for a moratorium to be valid, or at least not subject to preliminary injunctive relief, if sufficiently supported, Secretary Salazar stated, "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." Issuance of a new moratorium could moot the *Hornbeck* case but likely would be contested as well.

If the Moratorium Is Enjoined

Even if application of a broad moratorium is enjoined, either temporarily or permanently and whether through the *Hornbeck* case or a challenge to the new order Secretary Salazar has promised, the Department of the Interior and its Bureau of Ocean Energy Management, Regulation, and Enforcement (BOE) — the new name for the MMS — still have broad authority over drilling and operations in federal waters. Drilling rigs and operating procedures are regularly inspected, and one can expect that the administration will assure BOE's inspection process will be more thorough than before the recent spill. An operator must obtain a permit, and accordingly submit information, at several steps in the process of drilling and completing a well; again, one can expect BOE to inquire in more depth into supporting information and not act as quickly to approve permits. MMS/BOE required new information on safety measures and blowout scenarios in Notice to Lessees issued June 8 (NTL-2010-N05) and June 18 (NTL 2010-N06), and additional requirements in other areas may be forthcoming. That could include revisiting spill recovery plans — a necessary element of obtaining a permit — the adequacy of which has been called into question by the recent calamity. All of this could result in a *de facto* moratorium, or at least dramatic slowdown, short of issuing new regulations or orders. Whether such actions (or inaction) could be challenged successfully will depend on the specific actions and circumstances.

* The Fifth Circuit also could decide to hear the case en banc without a decision by a panel, although that is very rare. In an even rarer procedural move, the government could seek certiorari before judgment in the Supreme Court of the United States. The Supreme Court will grant immediate review, bypassing the federal court of appeals, only if "the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. Rule 11. The cases where the Court has used this extraordinary power are indeed extraordinary, e.g., *United States v. Booker*, 543 U.S. 220 (2005) (constitutionality of criminal sentencing guidelines); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (validity of Iranian claims tribunal and settlement to release hostages); *United States v. Nixon*, 418 U.S. 683 (1974) (President Nixon's claim of executive privilege in Watergate trials); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (President Truman's seizure of the steel industry).

According to media reports, Judge Feldman disclosed ownership of stock in some companies affected by the moratorium in the latest report he filed. That could lead to a challenge to his ruling based on conflict of interest.