

Throwing the Baby Out with the Oil Spill:

The Battle Between the Federal Government and Those Affected by the Moratorium

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Sometimes the only thing worse than an unplanned disaster is an overreaction meant to be the solution. The events following the BP Oil Spill could be considered one of these instances. The events leading to the spill and the Federal Government's reaction set the stage for a battle between the Government and those affected by its decisions.

The economies of the states along the Gulf Coast and the livelihoods of their residents are heavily affected by the oil and gas industries. This became apparently clear on April 20, 2010. On this fateful day, the whole economy of the Gulf South was put in jeopardy. This was done, not only by the tragic accident at the *Deepwater Horizon* drilling rig, but also by the immediate actions taken by the Federal government as a result of the accident.

On this date, there was an explosion on the *Deepwater Horizon* offshore drilling rig in the Gulf of Mexico. The explosion and resulting fire destroyed the rig. Two days later it eventually sank. The explosion was caused by “an uncontrolled flow of water, oil mud, oil, gas, and other materials came out of the drilling riser and possibly the drill pipe.”¹ 11 people died as a result.

The destruction of the *Deepwater Horizon* caused a leak on the seafloor. Crude oil gushed from this leak at an extreme rate. The leak continued to spew oil

¹ Deepwater Horizon Study Group, *Final Report on the Investigation of the Macondo Well Blowout*, (2011)

into the Gulf for almost 3 months. In this time, approximately 5 million barrels of oil spread across thousands of square miles in the Gulf of Mexico killing wildlife and coating the coast.²

Many attempts were made to stop the leak. This included closing the pipe rams with Remotely Operated Vehicle (ROV) intervention, closing off the end of the drill pipe on the sea floor, capturing oil spewing from the broken riser with a box-like containment device, capturing oil spewing from the riser end with an insertion tube, capturing oil spewing from the BOP top by installing a capture device called a Top Hat, injecting heavy mud into the BOP, bolting on a sealing cap with a BOP above, pumping heavy kill mud into the well, pumping cement following the kill mud to permanently seal off the flow paths, and drilling two relief wells to provide bottom kill capability.³ Even with all of these attempts it still took almost 3 months to stop the leak.

The oil spill in itself caused irreparable harm to the ecology and economy of the Gulf Coast. However, the damage to the people of the Gulf had not yet concluded. The hasty reaction of the Federal government added to the plight of the Gulf South. The affects were not limited exclusively to the coast itself but also

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Jeremy Repanich, *The Deepwater Horizon Spill by the Numbers*,

<http://www.popularmechanics.com/science/energy/coal-oil-gas/bp-oil-spill-statistics>

³ Deepwater Horizon Study Group, *Final Report on the Investigation of the Macondo Well Blowout*, (2011)

farther inland. Ten days after the explosion, President Obama ordered a review of the accident. The Department of the Interior was to issue a report within 30 days on how to improve the safety of offshore oil and gas exploration and production operations. They published their report on increased safety measures for energy development on the outer continental shelf” on May 27, 2010, referred to as the “Safety Measures Report”. The report resulted in many recommendations for an initial set of safety measures; and Ken Salazar, the Secretary of the Department of the Interior (DOI), also added a suggestion for a six-month moratorium.⁴

This moratorium became the focal point for the battle over the future of the Gulf Coast’s economy. The Federal Government, through the DOI, implemented the moratorium with complete disregard to the side effects it would have on the Gulf Region. The oil and gas companies fought back to try and minimize the duration and adverse effects of the moratorium.

However, it should be noted that the same experts that helped with the original report did not agree with Salazar about the moratorium. A group of the named experts expressed their concerns about the negative effects that a

⁴ Dept. of Int., *Increased Safety Measures For Energy Development On The Outer Continental Shelf*, (2010).

moratorium would have in a letter to Governor Jindal, Senator Landrieu, and Senator Vitter.⁵

The moratorium was a six-month suspension of exploratory drilling at 33 deepwater wells in the Gulf of Mexico. These wells were ones that were at least 500 feet deep. The White House put a hold on their operations while a commission investigated ways to improve safety in their operations (and all deep water drilling operations). This moratorium was a blanket moratorium over all offshore drilling. It did not differentiate the difference between wells for oil and ones for natural gas.

The Federal Government based their authority to implement the moratorium on the Outer Continental Shelf Land Act (OCSLA) and was enforced by the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE).⁶ The moratorium was officially ordered the day after the Safety Measures Report was released in a memorandum to MMS. It ordered the suspension of all deep-water drilling in the Gulf of Mexico, whether pending, current, or approved. MMS implemented the moratorium on May 30, 2010, in Notice to Lessees No. 2010 N04 (NTL4) sent to the oil-and-gas lessees.

⁵ Ltr. from Kenneth E. Arnold, PE, NAE, to Gov. Bobby Jindal, *The Primary Recommendation in the May 27, 2010 report, "INCREASED SAFETY MEASURES FOR ENERGY DEVELOPMENT ON THE OUTER CONTINENTAL SHELF" Given by Secretary Salazar to The President Misrepresents Our Position*, (Oct. 2008).

⁶ The DOI renamed the Minerals Management Service (MMS) the BOEMRE in DOI Secretarial order No. 3302 (June 18, 2010).

Over the course of the summer of 2010, the MMS issued a multitude of substantial requirements and regulations for drilling on the Outer Continental Shelf (OCS).⁷ These changes substantially increase the economic cost of the lessees' performance under the lease. They also modified how the worst-case discharges for Oil Spill Response Plans (OSRPs) are calculated. This directly increased the amount of Oil Spill Financial Responsibility (OSFR) the lessees must demonstrate, making it economically impractical for the lessees to obtain a bond on order to demonstrate the needed OSFR.

The Federal Government's reasoning for the moratorium is based on President Obama's directive to the DOI to report on "what, if any, additional precautions and technologies should be required to improve the safety of oil and gas exploration and production operations on the outer continental shelf."

This was a direct reaction of the leak from the Macondo oil well that resulted from the destruction of the *Deepwater Horizon* oil rig and the failure of the blowout preventers (BOP). The sinking of the *Deepwater Horizon* and the subsequent leak led to 4.9 million barrels of oil pouring into the Gulf of Mexico. These "precautions and technologies" would hopefully prevent another incident the oil spill from happening again.

⁷ The MMS issued Notice to Lessees No.2010 05 (NTL5) and Notice to Lessees No.2010 06 (NTL6) in June of 2010.

At that time there were 33 other permitted wells being worked on by floating rigs in the Gulf. The Federal Government wanted to ensure that the incident with the *Deepwater Horizon* would not be repeated. Some of these recommendations were specifically made for the BOPs. These included mandatory inspection of each BOP to be used on floating drilling operations; requirement of new safety features on BOPs and related backup and safety equipment; overhaul of the testing, inspection, and reporting requirements for BOP and related backup and safety equipment to ensure proper functioning.⁸

However, included in these new regulations was a requirement for operators to submit additional information for all “Exploration Plans, Development Production Plans, and Development Coordination Documents.”⁹ Previously the lessees were only required to provide this kind of information on a case-by-case basis. These new requirements were in violation of the Code of Federal Regulations.¹⁰

On July 12, 2010, the DOI rescinded the initial moratorium. However, in the very same memorandum, they ordered BOEMRE to create another suspension on drilling permits and a second moratorium. This one was supposed to be in effect through November 30, 2010.

⁸ Dept. of Int., *Increased Safety Measures For Energy Development On The Outer Continental Shelf*, (2010). For more recommendations see Table ES-1

⁹ *Century Exploration New Orleans, Inc. v. U.S.*, 103 Fed.Cl. 70, 73 (2012).

¹⁰ 30 C.F.R. § 250.201(b) (2011).

On October 12, 2010, DOI lifted the second moratorium on the recommendation of the BOEMRE. However, the DOI ordered BOEMRE to require the CEOs of the companies that were trying to resume deepwater drilling to comply with all of the regulations that were connected to the second moratorium. This included 14,000 changes to 80 American Petroleum Institute (API) documents.¹¹

This did not end the continuous flow of regulations from the BOEMRE. They continued to issue more and more “new regulations” and “substantive edicts” to the OCS lessees, preventing any operators from acquiring permits to drill in deepwater. It took from April of 2010 until February of 2011 until a single new permit was granted.¹²

Although permits were being granted again, they were being issued at a slow pace. Also, most of these permits were for resuming previous operations. They were not for new wells. This led to rigs moving overseas and decreased production in the Gulf. This included the loss of about 23,000 jobs, \$2 billion in federal taxes,

¹¹ Century Exploration New Orleans, Inc. v. U.S., 103 Fed.Cl. 70, 73 (2012).

¹² Steve Hargreaves, *Offshore drilling: Slow comeback after BP*, http://money.cnn.com/2011/04/20/news/economy/bp_oil_spill_drilling/index.htm, (Apr. 2011).

and more than an estimated \$10 billion in oil and gas industry spending in the region.¹³

The moratorium was not the only adversity that the Gulf Region had to face in light of the BP oil spill. There was more direct damage that hit the area.

The oil in the Gulf spread from Texas to Florida; and it negatively affected businesses and citizens throughout those states. As a result, claims against BP and Transocean gushed into courts across the region. Since all of these civil actions involved very similar questions all arising out of damages resulting from the oil spill, it would seem that centralization of these claims would be more efficient.¹⁴

However, plaintiffs in two different districts moved to centralize these actions in their district. The plaintiffs in the *Cooper* and *Rodrigue* actions moved to centralize the actions in the Eastern District of Louisiana. Others tried to centralize these actions in the Southern District of Texas.¹⁵

A plethora of parties responded to the motions. Almost all of them agreed with centralizing the suits. However, the choice of location varied greatly. The responding defendants were heavily in favor of the Southern District of Texas.

¹³ Steve Hargreaves, *Offshore drilling: Slow comeback after BP*, http://money.cnn.com/2011/04/20/news/economy/bp_oil_spill_drilling/index.htm, (Apr. 2011).

¹⁴ Centralizing these claims could be done through a motion by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under 28 U.S.C.A. § 1407 may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

¹⁵ *In re: Oil Spill by Oil Rig DEEPWATER HORIZON in Gulf of Mexico, on April 20, 2010*, 2011 WL 484286 (U.S. Jud. Pan. Mult. Lit. 2011).

The plaintiffs' choices consisted of the Eastern District of Louisiana, the Western District of Louisiana, the Northern District of Alabama, the Southern District of Alabama, the Middle District of Florida, the Southern District of Florida, the Northern District of Florida, the Southern District of Mississippi, the District of South Carolina, and the Southern District of Texas.

There was a little dispute over whether the few personal injury or wrongful death actions should be included. There were also a few against centralization all together.¹⁶ However, for the most part, everyone was on board as far as centralization.

These issues on centralization were all brought up to the judicial panel on multidistrict litigation.¹⁷ The panel found that the actions brought before them shared factual issues concerning the role of the defendants concerning the cause of the explosion and spill at the *Deepwater Horizon*. They also felt that centralization would “eliminate duplicate discovery, prevent inconsistent pretrial rulings on class

¹⁶ These few claimed that there was a failure to comply with the Oil Pollution Act's present requirement under 33 U.S.C. § 2713. They also claimed that since the OPA is a strict liability statute, the only question is how much BP should pay. They felt this would be handled best on a case by case basis.

¹⁷ Pursuant to 28 U.S.C.A. § 1407 (a),” When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation”

certification and other issues, and conserve the resources of the parties, their counsel, and the judiciary.”¹⁸

The Panel also found that the personal injury/wrongful death actions should be included. The facts of these actions overlapped with the facts of the previously mentioned actions, and there would be minimal individual discovery for these actions. Similar reasoning was used with the OPA actions. In addition, “carving out OPA claims would only complicate matters, and denying centralization altogether is not a viable option.”¹⁹

Once the panel decided who was involved in the centralization, they were finally able to decide where the litigation should take place. The panel decided that the Eastern District of Louisiana would be the best place to have the litigation. The panel thought that it would be the closest thing to the geographic and psychological “center of gravity” on the docket.²⁰

The Plaintiffs and BP worked out a settlement and filed it in the Eastern District of Louisiana. The beneficiaries were separated into two classes. These were those with medical damages and those with economic and property damages.

¹⁸ *In re: Oil Spill by Oil Rig DEEPWATER HORIZON in Gulf of Mexico, on April 20, 2010*, 2011 WL 484286 (U.S. Jud. Pan. Mult. Lit. 2011).

¹⁹ *In re: Oil Spill by Oil Rig DEEPWATER HORIZON in Gulf of Mexico, on April 20, 2010*, 2011 WL 484286 (U.S. Jud. Pan. Mult. Lit. 2011).

²⁰ *In re: Oil Spill by Oil Rig DEEPWATER HORIZON in Gulf of Mexico, on April 20, 2010*, 2011 WL 484286 (U.S. Jud. Pan. Mult. Lit. 2011).

However, claims for moratoria losses are expressly reserved and are not recognized or released under the settlement agreement.²¹

Since the victims of the moratorium were not included in the settlement agreement, they had to fight their own battles in the courts. These disputes arose out of the lease agreements that the DOI and the operators of the offshore drill platforms.

These operators leased the areas where they wished to explore for possible well sites to drill for oil. When the moratoriums and regulations came out, they were unable to drill and use the areas that they were leasing for their intended purpose. This was at first because of the outright ban from the moratoriums. However, the damage continued from the ever increasing regulations and the lack of urgency that the DOI was demonstrating in issuing permits to drill.

The DOI was not fulfilling their end of the lease agreement. The operators saw this as a breach of contract and sometimes even as the unconstitutional-taking of private property under the Fifth Amendment.²²

According to the OCSLA²³ and the APA,²⁴ there is a duty on the DOI to act on OCSLA drilling permit applications within a reasonable time.²⁵ The constant

²¹ Settlement section 3.3

²² Century Exploration New Orleans, Inc. v. U.S., 103 Fed.Cl. 70, 74 (2012).

²³ 43 U.S.C. §§ 1331.

delays caused by the moratoriums and reluctance to issue permits give the operators a reasonable case at claiming that the DOI breached its duty to act in a reasonable time.

The U.S. District Court of the Eastern District of Louisiana decided that the DOI was taking too long to issue permits. They said that 30 days was a reasonable time. The DOI's rate was way beyond that and, they ordered them to increase the pace.²⁶

This delay of permits is what led to the breach of contract claims. The outright refusal to let the operators drill is what led to the Fifth Amendment taking claims. However, the DOI questioned whether both of the claims could be pursued in the same complaint or if the plaintiffs would be precluded from pursuing both. The court decided that they could.²⁷

The jury is still out on whether the delays in issuing permit along with the moratoriums will be considered breach of contract and a violation of the operator's

²⁴ 5 U.S.C. §§ 553, 706.

²⁵ *EnSCO Offshore Co. v. Salazar*, 781 F. Supp. 2d 332 (E.D. La. 2011); *EnSCO Offshore Co. v. Salazar*, 2011 WL 1790838 (E.D. La. May 10, 2011).

²⁶ *EnSCO Offshore Co. v. Salazar*, 781 F. Supp. 2d 332 (E.D. La. 2011); *EnSCO Offshore Co. v. Salazar*, 2011 WL 1790838 (E.D. La. May 10, 2011).

²⁷ *Century Exploration New Orleans, Inc. v. U.S.*, 103 Fed.Cl. 70, 83 (2012).

Fifth Amendment rights. The *Century Exploration*²⁸ and *Ensco Offshore*²⁹ cases will determine the fate of the DOI.

The fateful events that happened on the *Deepwater Horizon* offshore drilling rig on April 20, 2010, caused immeasurable economic damage to the Gulf region and the nation as a whole. This can be seen by the multitude of claims that have been filed with the BP settlement.

However, by being overly ambitious and possibly excessively zealous, the Federal Government probably worsened the problem and increased the damage done to the economy. Unfortunately, the courts are still sifting through the details, but in the end, I am confident that they will come to the conclusion that the moratoriums were unnecessary, led to the delays in permits, and did more harm than good.

²⁸ *Century Exploration New Orleans, Inc. v. U.S.*, 103 Fed.Cl. 70 (2012).

²⁹ *Ensco Offshore Co. v. Salazar*, 781 F. Supp. 2d 332 (E.D. La. 2011); *Ensco Offshore Co. v. Salazar*, 2011 WL 1790838 (E.D. La. May 10, 2011).

Table ES-1. Recommendations for Increased Safety Measures	
Recommendations	Key Components (with implementation plan)
Blowout Preventer (BOP) Equipment and Emergency Systems	<ul style="list-style-type: none"> ✦ Order re-certification of subsea BOP stacks (immediately) ✦ Order BOP equipment compatibility verification (immediately) ✦ Establish formal equipment certification requirements (rulemaking)
New Safety Equipment Requirements and Operating Procedures	<ul style="list-style-type: none"> ✦ Develop new BOP and remote operated vehicle (ROV) testing requirements (immediately) ✦ Develop new inspection procedures and reporting requirements (immediately) ✦ Develop secondary control system requirements (emergency rulemaking) ✦ Establish new blind shear ram redundancy requirements (emergency rulemaking) ✦ Develop new ROV operating capabilities (rulemaking)
Well-Control Guidelines and Fluid Displacement Procedures	<ul style="list-style-type: none"> ✦ Establish new fluid displacement procedures (immediately) ✦ Establish new deepwater well-control procedure requirements (emergency rulemaking)
Well Design and Construction – Casing and Cementing	<ul style="list-style-type: none"> ✦ Establish new casing and cementing design requirements – two independent tested barriers (immediately) ✦ Establish new casing installation procedures (immediately) ✦ Develop formal personnel training requirements for casing and cementing operations (rulemaking) ✦ Develop additional requirements for casing installation (rulemaking) ✦ Enforce tighter primary cementing practices (rulemaking) ✦ Develop additional requirements for evaluation of cement integrity (immediately) ✦ Study Wild-Well intervention techniques and capabilities (immediately)

Increased Enforcement of Existing Safety Regulations and Procedures	<ul style="list-style-type: none">✦ Order compliance verification for existing regulations and April 30, 2010, National Safety Alert (immediately)✦ Adopt safety case requirements for floating drilling operations on the Outer Continental Shelf (emergency rulemaking)✦ Adopt final rule to require operators to adopt a robust safety and environmental management system for offshore drilling operations (rulemaking)✦ Study additional safety training and certification requirements (rulemaking)
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