The Outer Continental Shelf Lands Act Revisited: The Status of the *Hornbeck* Case and Recent Legislation.

Drew F. Cohen*

**Introduction: Drill, Baby, Drill! v. Hush, Baby, Hush!**

In the dog days of summer 2008, “Drill, Baby, Drill!” resolutely punctuated the thick air at every Republican stump speech. Popularized by then Republican Vice Presidential candidate Sarah Palin, the refrain became the Grand Old Party’s call to arms for increasing domestic production of oil while resisting the Democrat’s push for increased reliance on renewable energy resources.\(^1\) The slogan lost steam in the months following President Obama victory over Arizona Senator John McCain, but it has recently resurfaced; reconstituted as a fairly different sort of rallying call for opponents of offshore drilling: “Hush, Baby, Hush!”\(^2\) Although quieted, the ‘Drill, Baby, Drill’ camp may still ultimately win out this summer.

Indeed, in recent months President Barack Obama and Congress have been roundly criticized for their response to the April 20 Deepwater Horizon rig explosion in the Gulf of Mexico (the “Gulf”) that triggered one of the worst environmental disasters in U.S. history.\(^3\) Among some of the harshest critics of the Administration’s response to the disaster were those who disagreed with the President’s decision to place a blanket six-month moratorium on offshore drilling operations in the Gulf. Owners and operators of vessels, shipyards, and supply service companies which support offshore drilling activities in the Gulf’s Outer Continental Shelf have since challenged the suspension alleging that it ran afoul of the federal Outer Continental Shelf Lands Act (the “OSCLA”) – the same statute which the Secretary of Interior argued empowered him to issue the suspension.

**The Moratorium & Its Potential Impact**

On April 30, 2010, in response to the damage caused by the Deepwater Horizon drilling platform explosion and resultant oil spill, President Obama ordered Kenneth Salazar, the Secretary of the Interior, to review the “safety of oil and gas exploration and production operations on the outer continental shelf” and issue a report in 30 days.\(^4\) The subsequent recommendations “identif[ied] an initial set of safety measures that can and will be implemented as soon as practicable.”\(^5\) In the meantime, the Secretary recommended a moratorium on wells drilled using floating rigs that were operating 500 feet from the coastline in the Gulf. President Obama heeded the Secretary’s warning and on May 30 directed the Bureau of Ocean Energy, Regulation, and Enforcement to issue a six-month moratorium on “drilling [any] new water well” and to cease “spudding any new deepwater wells.”\(^6\) Although wells currently drilling and producing oil were unaffected by the decree, thirty-three government permitted exploratory oil rigs were forced to halt operations.\(^7\)

Louisiana Governor Bobby Jindal was quick to criticize the President’s decision: “This ill-advised and ill-considered moratorium… creates a second disaster for our economy, throwing thousands of hardworking folks out of their jobs and causing real damage to many families.”\(^8\) The local economies, already experiencing sharp declines in mainstay industries such as tourism, fishing, shrimping and oyster exports, have become
increasingly dependent on direct and indirect jobs created by offshore drilling. The now idle exploratory oil rigs employ over 8,000 people who earn $57.7 million per month in wages. Should the exploratory oil rigs decide to relocate, the critics contend, the ripple effect would be felt throughout the local economy impacting an estimated 32,000 jobs supported by the oil rig employees. In essence, “[o]il and gas production is quite simply elemental to Gulf communities.”

Understanding the Moratorium in the Context of the OSCLA

The Outer Continental Shelf Lands Act (“OSCLA”) was signed into law on August 7, 1953. Despite the lack of publicity, the statute forcefully asserted, for the first time, exclusive federal jurisdiction over the Continental Shelf – an area located primarily along the Atlantic and Gulf coasts equal to almost one-tenth the size of the continental United States. Congress immediately recognized the economic value and national importance of the submerged land at stake. Around the time the bill was signed into law it was said that “[t]he mineral resources and food potential of [the Continental Shelf]… make its acquisition more important to the nation than the Louisiana Purchase.” Instead of having a patchwork of competing state laws governing the area, Congress decided that federal jurisdiction would best “provide for the development of its vast mineral resources” through leases to private developers.

Subsequently, Congress tasked the United States Department of the Interior (the “DOI”) with the responsibility of administering sections of the OCSLA “relating to the leasing of the outer Continental Shelf” and for enacting “such rules and regulations as may be necessary to carry out such provisions.” Since 1978, courts have considered the OSCLA to have established “four distinct statutory stages to developing an offshore oil well: (1) formulation of a five year leasing plan by the Department of the Interior; (2) lease sales; (3) exploration by the lessees; (4) development and production.” Using a competitive bidding system, the Secretary typically awards five-year oil and gas leases to the highest bidder. If the Department “finds that such longer period is necessary to encourage exploration and development in areas because of unusually deep water or other unusually adverse conditions” it can opt to extend the initial lease term to ten years.

Under certain circumstances, the Secretary of the Interior may suspend a lessee’s drilling activities. Pursuant to the OSCLA, the Secretary may prescribe regulations “for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit… if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment.” To permanently cancel a lease the Secretary may initiate a hearing. After the hearing, the lease may be cancelled if the Secretary finds that the (1) “continued activity pursuant to such lease or permit would probably cause serious harm or damage to life”, property, any mineral, national security or defense, or to the environment; (2) “the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time;” and (3) “the advantages of cancellation outweigh the advantages of continuing such lease or permit force.”

In accordance with this directive, the DOI authorized Regional Supervisors in the Bureau of Ocean Energy Management, Regulation, and Enforcement, a subdivision of the DOI, to suspend offshore drilling activities in the event that such “activities pose a
threat of serious, irreparable, or immediate harm or damage. This would include a threat to life (including fish and other aquatic life), property, any mineral deposit, or the marine, coastal or human environment.”23 The Regional Supervisors can also order a suspension of activities – called a “Suspension of Operations” or “SOO” -- “[w]hen necessary for the installation of safety or environmental protection equipment.”24

**Injunctive Enjoinment of the Moratorium: Hornbeck Offshore Services v. Salazar**

The DOI issued a six-month moratorium on offshore drilling activities in the Gulf under the auspices of the OSCLA. In response, owners and operators of vessels, shipyards, and supply service companies which support offshore drilling activities in the Gulf’s Outer Continental Shelf challenged the suspension alleging that the moratorium was not permitted by the OSCLA. In *Hornbeck Offshore Services v. Salazar*,25 the case that has garnered the most media attention, Plaintiffs’ complaint was based on “the effect of the general moratorium on their oil service industry business, on the local economy, and puts in play the issue of the robustness of a Gulf-wide industry and satellite trades.”26 The district court ultimately agreed and issued a preliminary injunction enjoining the moratorium.27

The *Hornbeck* Court was particularly critical of the DOI’s Report (the “Secretary’s Report”) which resulted in the order to suspend offshore drilling activities.28 The Secretary’s findings were so general that the “Court was unable to divine or fathom a relationship between the findings and the immense scope of the moratorium.”29 Moreover, the court found that the report failed to discuss alternatives to a blanket suspension, set a timeline for implementing the proposed changes and “patently lack[ed] any analysis of the asserted fear of threat of irreparable injury or safety hazards posed by the thirty-three permitted rigs…reached by the moratorium.”30

A finding by the court that the report was “arbitrary and capricious” significantly weakened the Government’s case, since the OSCLA seems to suggest that SOOs should be individually tailored. In particular, the OSCLA authorizes a suspension of “all or any part of a lease or unit area.”31 The regulations further stipulate that “[t]he Regional Supervisor will set the length of the suspension based on the condition of the individual case involved.”32 The *Hornbeck* Court interpreted this language to mean that the OSCLA “contemplate[s] an individualized determination” for each SOO.33 As a result, the court invalidated the agency’s carte blanche suspension of offshore drilling suggesting the DOI examine the policies and safeguards of each lessee separately.34 The ruling concluded that the moratorium was not narrowly tailored enough to “justify the immeasurable effect on the plaintiffs, the local economy, the Gulf region, and the critical present-day aspect of the availability of domestic energy in this country.”35

**Moving Forward: Hornbeck & the Deepwater Horizon’s Impact on the OSCLA**

The district court’s decision in *Hornbeck* was appealed on June 24 to the U.S. Court of Appeals for the Fifth Circuit. On July 8, a three-judge panel issued a 2-1 decision denying the Obama Administration’s request to stay the district court ruling.36 This decision is temporary, however, pending a further review to determine whether the injunction should become permanent.37 The outcome will likely impact the fate of other similar complaints regarding the legality of the six-month moratorium.38
In anticipation of a possible backlash from decisions like *Hornbeck* and in response to the general public’s distain for how Washington oversaw the Deepwater Horizon oil spill, Congress has introduced legislation to restrict offshore drilling and give the OCSLA more teeth. H.R. Bill 5657 would amend the OCSLA to better protect the outer Continental Shelf’s marine and coastal environment by prohibiting oil and gas activities altogether in “important ecological areas.”³⁹ The proposed legislation also includes a series of rigid guidelines that the Secretary would have to adhere to before issuing leases.⁴⁰ Another House bill, H.R. 5459, and a companion bill in the Senate, S. 3346, would increase the maximum civil liability for noncompliance with such Act or any term of a lease, license, or permit issued from $20,000 to $75,000 per day and increase the criminal penalties from $100,000 to $10,000,000.⁴¹ Finally, “The SAFEGUARDS Act of 2010,” would amend the OCSLA to “modernize and enhance the Federal Government’s response to oil spills [and] to improve oversight and regulation of offshore drilling.”⁴² The SAFEGUARDS Act would require the President to update the National Contingency Plan every five years, directing the Secretary of Interior to develop additional regulations for leaseholders, and giving the Coast Guard additional responsibilities in the event of another oil spill. ⁴³

**The Hornbeck** Court recognized that the “Deepwater Horizon oil spill [was] an unprecedented, sad, ugly and inhuman disaster” yet it still dissolved the Administration’s moratorium on offshore drilling.⁴⁴ In response, it appears that Congress is seeking to amend the OCSLA to provide the President and the Secretary more authority to restrict future oil and gas leases and permits. With powerful interests on both sides influencing the offshore drilling debate, it is too soon to determine whether, ‘Drill, Baby, Drill’ or ‘Hush, Baby, Hush,’ will be chanted from the rooftops.

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* Drew F. Cohen is a third-year law student at the George Washington University School of Law and a senior editorial board member of the George Washington Journal of Energy and Environmental Law (“JEEL”). He can be reached at dfcohen@law.gwu.edu.


⁵ Id.


10 Id.


12 43 U.S.C. §§ 1331 et seq.


15 SEN. REP. No. 411, 83d Cong. 1st Sess. 2 (1953).


19 Id. § 1337(b)(2).

20 Id. § 1334(a)(1)(B).

21 Id. § 1334(a)(2)(A).


23 30 C.F.R. § 250.172(b).

24 Id. § 250.172 (c).


26 Id. at 632.

27 Id. at 639.

28 See id. at 631 (“The report makes no effort to explicitly justify the moratorium…”)

29 Id. at 637.

30 Id.

31 30 C.F.R. § 250.168.

32 Id. § 250.170(a).

33 *Hornbeck Offshore Servs.*, 696 F.Supp.2d at 368.

34 See id.

35 Id. at 369.

36 *Hornbeck Offshore Servs. v. Salazar*, No. 10-30585 (5th Cir. July 8, 2010).

37 Id.

38 See e.g. Complaint, *Ensco Offshore Co. v. Salazar*, No. 2:10 CV 01941 (E.D. La. July 9, 2010) (alleging, among other charges, that the six-month moratorium on deepwater drilling in the outer Continental Shelf violated the OSCLA).


40 Id.


42 Secure All Facilities to Effectively Guard the United States Against and Respond to Dangerous Spills Act of 2010, H.R. 5677, 111th Cong. (2010).

43 Id.

44 *Hornbeck Offshore Servs.*, 696 F.Supp.2d at 368.