IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

HORNBECK OFFSHORE SERVICES, LLC, et al. **Plaintiffs,** **v.** **KENNETH LEE "KEN" SALAZAR, in his official capacity as Secretary, United States Department of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; MICHAEL R. BROMWICH, in his official capacity as Director, Bureau of Ocean Energy Management, Regulation, and Enforcement; and BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION, AND ENFORCEMENT,** **Defendants.**	**CIVIL ACTION No. 10-1663(F)(2)** **SECTION F** **JUDGE FELDMAN** **MAGISTRATE 2** **MAGISTRATE WILKINSON**

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT OR, IN THE ALTERNATIVE, FOR A STAY OF PROCEEDINGS PENDING CIRCUIT COURT'S DECISION ON DEFENDANTS' MOTION TO VACATE THE PRELIMINARY INJUNCTION

INTRODUCTION

Defendants, Kenneth Lee Salazar, the United States Department of the Interior, Michael R. Bromwich[1] and the Bureau of Ocean Energy Management, Regulation, and Enforcement,[2]

[1] Mr. Bromwich is automatically substituted for Bob Abbey as Director of the Bureau of Ocean Energy Management, Regulation, and Enforcement pursuant to Fed. R. Civ. P. 25(d).

[2] On June 18, 2010, the Secretary of the Department of the Interior issued an order changing the name of the Minerals Management Service to the Bureau of Ocean Energy Management, Regulation, and Enforcement. See Order No. 3302, dated June 18, 2010.

("Defendants"), hereby move to dismiss Plaintiffs' First Amended Complaint ("FAC")[3] under Federal Rule of Civil Procedure 12(b)(1) because the decision challenged in the Complaint – the suspension of all pending, current, and approved deepwater drilling operations for six months pursuant to a Secretarial Directive of May 28, 2010 – has been revoked and superseded by a new decision issued today that is based on additional information, separate analysis, and a separate administrative record. Because the decision challenged in the Complaint no longer has any legal effect, there is no longer any meaningful relief this Court can award, Plaintiffs' claims are moot, and this Court therefore lacks jurisdiction over them. For the same reasons, we have simultaneously filed a motion with the Court of Appeals to vacate the preliminary injunction. To the extent that Plaintiffs believe they will suffer any injury and have cognizable claims as a result of the new decision, the proper recourse is to bring a separate challenge to the implementation of that decision in federal district court.

FACTUAL AND PROCEDURAL BACKGROUND

A. The May 28, 2010 Directive and this Court's Preliminary Injunction

Following a blowout and explosion on the Deepwater Horizon drilling platform, the President ordered the Secretary of the Interior ("Secretary") to conduct a thorough review of the incident and to report, within thirty days, on additional precautions and technologies that would improve the safety of drilling operations on the outer continental shelf (OCS). The results of the Secretary's review were set forth in a report released on May 27, 2010. Increased Safety Measures for Energy Development on the Outer Continental Shelf ("Safety Report"). The Safety

[3] Plaintiff Hornbeck Offshore Services, L.L.C. filed a Complaint in this action on June 7, 2010. Dkt. #1. An amended complaint, in which other plaintiffs joined, was filed on June 9, 2010. First Suppl. and Amended Complaint for Declaratory and Injunctive Relief ("FAC"), Dkt. #5. This Memorandum cites to the amended complaint.

Report explained that a more thorough investigation into the causes of the blowout and oil spill is ongoing but also recommended immediate implementation of a number of specific measures necessary to improve safety in offshore drilling.

Based on the findings and recommendations in the Safety Report, and further evaluation of the issue, on May 28, 2010, the Secretary directed the Minerals Management Service to issue a temporary six-month suspension of certain pending, current, and approved offshore drilling operations involving deepwater wells. Memorandum re Suspension of Outer Continental Shelf (OCS) Drilling of New Deepwater Wells, dated May 28, 2010 ("May 28 Directive") (Dkt. #7-2 at 66). MMS implemented the Secretary's May 28 Directive by sending temporary suspension letters to each affected operator and by issuing a Notice to Lessees, NTL No. 2010-N04, effective May 30, 2010 ("NTL") (Dkt. #7-2 at 68).

On June 7, Plaintiff Hornbeck Offshore Services, L.L.C. filed this action, asserting that the May 28 Directive and the NTL violated the Administrative Procedure Act ("APA") because, inter alia, the facts and evidence in the administrative record for that Directive did not support the Secretary's finding of a "threat of serious, irreparable, or immediate damage" to life or property. FAC ¶¶ 78-81. On June 9, 2010, Hornbeck and other Plaintiffs moved for a preliminary injunction. Dkt. #7. On June 22, 2010, this Court granted Plaintiffs' motion and issued a preliminary injunction enjoining the Defendants from enforcing the May 28 Directive and NTL. See Dkt. #68. The Department immediately complied with the Order by (1) notifying all Department employees that they were not to take any action to enforce the May 28 Directive and NTL and (2) notifying each operator who had received a suspension letter that "neither the NTL nor the order directing suspension of operations has legal effect on your operations at this time." See Dkt. #77.

B. The July 12, 2010 Directive

On July 12, 2010, the Secretary issued a new decision directing the suspension of certain drilling operations and the cessation of approval of pending or future applications for such drilling until November 30, 2010 ("July 12 Directive"), subject to modification if the Secretary determines that the exiting threats to life, property, and the environment have been sufficiently addressed. See Cruickshank Decl. ¶ 3, and Ex. A.[4] Interior is implementing that Directive today by issuing individual temporary suspension letters to each of the affected operators. See Cruickshank Decl. ¶ 4, and Ex. B. The July 12 Directive expressly supersedes the May 28 Directive and rescinds NTL No. 2010-N04. Ex. A at 22. Similarly, the new suspension letters rescind and supersede the temporary suspension letters that implemented the May 28 Directive. Ex. B.

With certain exceptions, the July 12 Directive suspends drilling operations that rely on subsea blowout preventers (BOP) or surface BOPs on floating facilities. Ex. A at 1, 19. The July 12 Directive expressly does not suspend certain related activities, including: production activities; drilling operations that are necessary to conduct emergency activities; drilling operations necessary for completions or workovers; abandonment or intervention operations; or waterflood, gas injection, or disposal wells. Id. at 19. The July 12 Directive also instructs the Bureau of Ocean Energy Management Regulation and Enforcement ("BOEM") to develop information about safety, blowout containment capabilities, and oil spill response capacity and provide a report to the Secretary regarding conditions for the resumption of deepwater drilling.

[4] Defendants have filed the Declaration of Walter D. Cruickshank concurrently with this Motion. References to that Declaration appear herein as "Cruickshank Decl. ¶ ___." References to the exhibits to that Declaration appear herein as "Ex. ___."

Id. at 5, 20-21. Finally, the July 12 Directive instructs BOEM to hold public meetings and outreach to gather additional information concerning the most significant issues for resuming deepwater drilling. Id.

In issuing the July 12 Directive, the Secretary analyzed information that supported the May 28 directive, as well as new information gathered since the issuance of his May 28 Directive, and addressed the concerns raised by this Court in its preliminary injunction decision.[5] The Secretary's July 12 Directive explains the unique risks associated with the suspended drilling operations and explains the need for additional safety procedures, equipment and inspection protocols to address those risks prior to the resumption of deepwater drilling. Ex. A at 7-12. Of equal importance to these drilling safety issues, the Secretary's July 12 Directive explains the need for a temporary suspension to address critical spill containment and response deficiencies. Ex. A at 12-15. Specifically, the Secretary recognized that the OCS drilling industry currently does not have the capability to stop the uncontrolled blowout of an oil well in deepwater. Ex. A at 12-13. The Secretary also recognized that there are insufficient available response resources should another deepwater spill occur while the containment and clean up efforts relating to the Macondo well continue. Ex. A at 14-16.

Taking those factors into account, the Secretary determined that it was necessary to suspend drilling operations that rely on subsea BOPs or surface BOPs on floating facilities and to cease approval of pending or future applications for such drilling until November 30, 2010. He

[5] This Court's June 22, 2010 Order found, *inter alia*, that Interior, based on the record then before the Court, (1) had failed to explain the relationship between its factual findings and the scope of the challenged suspension order; (2) had failed to analyze the safety threat posed by the rigs affected by the suspension order; (3) had failed to explain the six-month duration of the challenged suspensions; and (4) had failed to cogently explain why it exercised its discretion in the given manner. Dkt. #67 at 17, 19-21

determined that a suspension until that date was necessary in part because the Macondo well is not expected to be contained or killed until mid-August 2010, which will affect spill containment and response capabilities. Ex. A at 3. In addition, suspensions until November 30 will allow Interior time to promulgate and implement the interim rules on measures recommended in the Safety Report, to take into account reports from technical working groups that are to report within 180 days from the issuance of the Safety Report, and to receive a report based on public outreach efforts by October 31, 2010. Ex. A at 2-3, 20-21.

In making his decision, the Secretary received information from multiple sources, Ex. A at 5-6, identified and analyzed the increased risks associated with deepwater drilling, Ex. A at 7-11, and considered in detail the recommendations of the Safety Report, Ex. A at 10-12, the need for new blowout containment strategies, Ex. A at 12-13, the limited availability of containment and spill response resources if there were another spill, Ex. A at 14-16, and the economic impacts of suspension of deepwater drilling.[6] Ex. A at 16-17. The Secretary also considered and rejected three other options: no suspensions; suspensions with defined criteria to allow resumption of drilling; and various proposals recommended by industry representatives.[7] Ex. A at 17-19.

[6] As noted in the July 12 Directive, consideration of economic impacts is not required under OCSLA, but was considered as part of the Secretary's reasoned and prudent decisionmaking process.

[7] One of the Industry proposals for continued drilling operations was accepted, i.e., the July 12 Directive does not suspend the drilling of disposal wells. See Ex. A at 18.

ARGUMENT

1. Standard of Review

Upon proper motion and pursuant to Fed. R. Civ. P. 12(b)(1), a complaint, or any claims therein, may be dismissed for lack of subject matter jurisdiction. If a motion challenging jurisdiction relies on evidence outside the complaint, then the attack is "factual," and "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir. 1981). Instead, the district court "may hear conflicting written and oral evidence and decide for itself the factual issues which determine jurisdiction." Id.

A "factual attack" under Rule 12(b)(1) may occur at any stage of the proceedings, and the plaintiff continues, throughout the litigation, to bear the burden of proof that jurisdiction does in fact exist. Menchaca v. Chrysler Credit Corp, 613 F.2d 507, 511 (5th Cir. 1980); see also Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994). It is a "fundamental precept" that federal courts have limited jurisdiction, and jurisdictional limitations imposed by the Constitution or Congress must be "neither disregarded nor evaded." Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978). If the court finds that it lacks subject matter jurisdiction, then it "must dismiss the action." Fed. R. Civ. P. 12(h)(3).

2. When a Challenged Decision is Superseded by a Subsequent Decision, the Case is Rendered Moot Because There is No Longer a Live "Case or Controversy"

"The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy." Preiser v. Newkirk, 422 U.S. 395, 401 (1975). Federal courts lack jurisdiction "to give opinions upon moot questions or abstract propositions, or to

declare principles or rules of law which cannot affect the matter in issue in the case before it." Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (citations omitted). Courts have "neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them," and therefore must confine their review to "real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character." Preiser, 422 U.S. at 401 (citation and internal quotations omitted).

A plaintiff bears the burden of demonstrating the existence of a case or controversy at all stages of the litigation. Spencer v. Kemna, 523 U.S. 1, 7 (1998). In order to demonstrate this, "throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." Spencer, 523 U.S. at 7 (citation and internal quotation marks omitted) (emphasis added). A plaintiff cannot carry this burden when the challenged agency decision is revoked and superseded by a subsequent decision issued during the course of the litigation. Under such circumstances, the litigation is rendered moot because there is no effective relief that a court can grant. See, e.g., Texas Office of Pub. Util. Counsel v. FCC, 183 F.3d 393, 414 (5th Cir. 1999) (finding claims moot where superseding agency order eliminated challenged methodology and therefore, "any further judicial pronouncements would be purely advisory.") Accord Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1114 (10th Cir. 2010) (when FWS issued new, superseding biological opinion ("BO"), challenge to precursor BO was moot and court could provide "no effective relief"); Gulf of Maine Fisherman's Alliance v. Daley, 292 F.3d 84, 90 (1st Cir. 2002) ("This court has no means of redressing either procedural failures or substantive deficiencies associated with a regulation that is now defunct."); Nat'l Mining Ass'n

v. U.S. Dep't of the Interior, 251 F.3d 1007, 1011 (D.C. Cir. 2001) (partially vacating district court's decision as moot where new rules replaced challenged rules).

3. Because the Secretary has Issued a New Decision, Plaintiffs' Claims No Longer Present a Live Case or Controversy and Therefore are Moot

Plaintiffs' claims must be dismissed because the agency actions challenged in their complaint have been formally withdrawn and are of no further effect. Plaintiffs invoke the APA, which provides for review of "final agency action" and thus requires that a plaintiff's challenge be directed at a particular and discrete agency action. 5 U.S.C. § 704; see also 5 U.S.C. §§ 702, 706; Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882-883, 890-891 (1990). Here, the particular "agency actions" being challenged are the May 28 Directive and the NTL, which Plaintiffs' assert implement the Secretary's May 28, 2010 decision to suspend offshore drilling at depths greater than 500 feet for six months. FAC ¶¶ 22, 68, 79, 81. The Complaint repeatedly challenges the language and scope of the May 28 Directive, as well as the adequacy of the analysis that supports it. See, e.g., id., ¶¶ 22, 49, 50-54, 68, 79, 81. In the prayer for relief, Plaintiffs ask the Court to declare the May 28 Directive and NTL invalid and unenforceable and to enjoin their operation. FAC ¶ 92 & Relief Requested, ¶¶ 1-3. The Secretary's July 12 Directive, however, is a new "agency action" which expressly supersedes the May 28 Directive decision, rescinds the NTL, directs the revocation of old suspension letters, and directs the issuance of new suspension letters. Ex. A at 22. The challenge to the May 28 Directive and NTL is therefore now moot.

The Secretary's authority to issue the July 12 Directive and corresponding suspension letters is beyond question.[8] In issuing its preliminary injunction, this Court concluded that Plaintiffs were likely to succeed on their claim that Interior failed to adequately explain its decision in the May 28 Directive to suspend drilling in water deeper than 500 feet for six-months. Dkt. #67 at 4, 20. But the ultimate question – whether deepwater drilling as currently conducted poses a threat to life, property, or the environment that warrants a suspension of lease activities under the Outer Continental Shelf Lands Act ("OCSLA") and Interior's regulations – is within Interior's exclusive province. Thus, nothing in this Court's preliminary injunction (an interlocutory ruling) foreclosed Interior from making a new decision to carry out "the legislative policy committed to its charge" under the OCSLA. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 145 (1940) (holding that the judicial review of an administrative determination "does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge"). The OCSLA imposes on the Secretary a "continuing duty to guard all the resources of the outer Continental Shelf," see Gulf Oil Corp, v. Morton, 493 F.2d 141, 146 (9th Cir. 1974), and the Secretary has merely fulfilled that duty by reanalyzing the adequacy of safety and environmental protection standards for OCS lease operations in the Gulf of Mexico, evaluating new information, and issuing a new decision. See id. ("Because of the Secretary's continuing supervisory obligations, injunctive relief against further interference with Union's operations would be inappropriate.").

[8] Plaintiffs themselves have acknowledged that Defendants have the "right to engage in appropriate fact finding, data analysis and risk assessment followed perhaps by additional agency action . . . ." Plfs' Mem. in Supp. of Mot. to Enforce Preliminary Injunction at 2 (Dkt. #69-1). That is exactly what occurred in this case: Interior undertook a new decision-making process which culminated in the issuance of a new suspension decision.

Under these types of circumstances, where a challenged action is withdrawn by the agency, courts have consistently held that challenges to the agency decision are rendered moot. See Gulf of Maine Fisherman's Alliance, 292 F.3d at 90; Nat'l Mining Ass'n, 251 F.3d at 1011; Ctr. for Science in the Pub. Interest, 727 F.2d at 1164; see also Van Valin v. Gutierrez, 587 F. Supp. 2d 118, 120-121 (D.D.C. 2008) (rescission of final rule "completely and irrevocably eradicated the effects" of alleged violations of Halibut Act and APA). Stated differently, the May 28 Directive and NTL, which have been withdrawn and superseded, no longer provide a basis for judicial review.[9] Spencer, 523 U.S. at 18 ("[Federal courts] are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong.").[10] See also Aluminum Co. of America v. Bonneville Power Admin., 56 F.3d 1075, 1078 (9th Cir. 1995) (challenge to an agency decision is moot when current actions are being

[9] None of the established exceptions to mootness apply. Interior's new decision is subject to judicial review and thus will not "evade review" under the capable-of-repetition-yet-evading-review exception to mootness. See Weinstein v. Bradford, 423 U.S. 147 (1975). Similarly, the voluntary cessation exception does not apply because the challenged conduct—the prior suspension letters, which were based on the explanation offered and administrative record in existence at the time they were issued—is certain not to recur. See Oregon Nat. Res. Council v. Grossarth, 979 F.2d 1377, 1379 (9th Cir. 1992) (holding agency's decision to withdraw timber sale and environmental assessment analyzing its impacts to prepare an environmental impact statement was not voluntary cessation within the meaning of the exception); 13C Charles Allen Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice & Procedure §3533.7 (3d ed.) (noting that "one basis for secure prediction [of mootness] may be that the [governmental] defendants have found another means to achieve the same end, mooting a challenge to the original means whether or not there is a live challenge to the new means").

[10] Where, as here, claims are asserted based on the Administrative Procedure Act, see FAC ¶ 20, review of an agency decision is based "on the full administrative record that was before the [administrative officer] ... at the time he made his decision." Milena Ship Mgmt. Co. v. Newcomb, 995 F.2d 620 (5th Cir. 1993) (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)). Thus, in any challenge to the letters implementing the July 12 Directive, the adequacy of that decision will be determined with reference to the record before the decision-maker at that time.

undertaken pursuant to a new, superseding decision); Gulf of Maine Fisherman's Alliance, 292 F.3d at 90 (affirming dismissal of challenge to regulation as moot where later version of regulation was "based on the new data available . . . at the later time"); see also Ctr. for Science in the Pub. Interest, 727 F.2d at 1164 (review of superseded rule moot where review of new regulation would necessarily require review of new administrative record); Texas Office of Pub. Util. Counsel, 183 F.3d at 415 (a court "cannot assume jurisdiction to decide a case on the ground that it is the same case as one presented to us, when it is admitted that it is not and when it presents different issues") (quoting Ctr. for Science in the Pub. Interest, 727 F.2d at 1166 n.6) (emphasis in original).

To the extent that Plaintiffs wish to challenge the new decision, their exclusive recourse is to bring a separate challenge to the implementation of that decision in federal district court. See Fund for Animals v. Norton, 390 F. Supp.2d 12, 15 (D.D.C. 2005) ("While plaintiffs' motion is styled as one to 'enforce' the Court's . . . 2003 Order, it is in essence a challenge to the [agency's] 2004 [rule] – not the 2003 [rule] that was the subject of the [Court's] 2003 Order. . . . Consequently, the proper avenue for plaintiffs' arguments is a new lawsuit squarely challenging the validity of the 2004 [rule].").

Moreover, as a practical matter, if the case were to proceed and Plaintiffs prevailed, there would be no meaningful relief this Court could order. Plaintiffs seek a declaration that Defendants violated OCSLA by issuing the May 28 Directive and NTL and an order requiring withdrawal of the May 28 Directive and NTL. Such relief would be superfluous because the Secretary has already withdrawn those two agency actions. See North Carolina v. Rice, 404 U.S. 244, 246 (1971) (per curiam) (citation and internal quotation marks omitted) (for a lawsuit to be cognizable in federal court, it "must be a real and substantial controversy admitting specific

relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts"). Accordingly, there is no longer a real and substantial controversy, and any opinion rendered by this Court on the withdrawn May 28 Directive and NTL would constitute an improper advisory opinion. The case must be dismissed.

4. In the Alternative This Court Should Stay These Proceedings Until the Court of Appeals Has Ruled On the Pending Motion To Vacate The Preliminary Injunction

In the alternative, Defendants respectfully request that this Court enter a stay of proceedings in this litigation until the Fifth Circuit Court of Appeals has ruled on Defendant-Appellants' Motion to Vacate. The issuance of a stay pending the outcome of proceedings in another court is "a matter ordinarily within the trial court's wide discretion to control the course of litigation." In re Ramu Corp., 903 F.2d 312, 318 (5th Cir. 1990). On July 12, Defendants filed a Motion to Vacate Preliminary Injunction as Moot in the Fifth Circuit Court of Appeals. In that Motion, Defendants have asked the Fifth Circuit to vacate the preliminary injunction entered by the Court on June 22 because the Secretary's issuance of the July 12 Directive and the resulting suspension orders have caused the injunction to become moot. The Motion to Vacate explains that vacatur is required because the decision enjoined by the district court—the suspension of all pending, current, and approved deepwater drilling operations for six months—has been withdrawn and superseded by a new decision that is based on new information, separate analysis, and a separate administrative record.

Given the overlap of issues between the motion to dismiss and the motion to vacate, this Court's decision could be informed by the ruling of the Court of Appeals on the motion to vacate. Accordingly, to the extent this Court believes it would be beneficial to have the ruling of the Court of Appeals before deciding the motion to dismiss, it should stay these proceedings until

the Court of Appeals has ruled. See ACF Indus., Inc. v. Guinn, 384 F.2d 15, 19 (5th Cir. 1967) ("A stay pending the outcome of litigation between the same parties involving the same or controlling issues is an acceptable means of avoiding unnecessary duplication of judicial machinery.").

CONCLUSION

The July 12 Directive directs suspensions of operations and the cessation of approval of pending or future applications involving the use of subsea BOPs and surface BOPs placed on floating platforms on the Outer Continental Shelf in the Gulf of Mexico and Pacific regions. The decision also rescinds the May 28 Directive, which had directed the suspension of drilling operations in waters deeper than 500 feet, and which was based on a separate administrative record. Because the decision challenged by Plaintiffs' Complaint no longer exists, Plaintiffs' challenge to the withdrawn May 28 Directive and NTL should be dismissed as moot under Rule 12(b)(1). In the alternative, the Court should stay proceedings in this case until the Court of Appeals has ruled on the Defendants' pending motion to vacate the preliminary injunction.

Respectfully submitted this 12th day of July, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2010, I caused a copy of the foregoing to be served through the Court's CM/ECF System to all parties.

/s/Guillermo A. Montero__
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