Westlaw Journal
ENVIRONMENTAL
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 32, ISSUE 8 / NOVEMBER 9, 2011

Expert Analysis

Regulation of Offshore Drilling After the BP Spill: Has the Government Played by the Rules?

By Adam Feinberg, Esq.,
Miller & Chevalier

The sinking of the offshore drilling rig Deepwater Horizon in April 2010 was tragic in many regards. Eleven men lost their lives. Roughly 5 million barrels of oil leaked into the Gulf of Mexico, damaging wildlife and thousands of miles of coastline and requiring that huge portions of the Gulf be closed to commercial and recreational activities. Unfortunately, the government's response to these events has also been tragic. The government initially imposed an overbroad moratorium on nearly all deepwater drilling in the Gulf of Mexico.

After that moratorium was struck down by a federal court, the government defiantly re-imposed the same flawed moratorium. It then denied the court an opportunity to review the second moratorium by replacing it with new drilling requirements that were both insufficiently articulated and issued in violation of the Administrative Procedure Act, resulting in another four-and-a-half months of a *de facto* moratorium.

These actions unnecessarily inflicted grave harm on the national domestic oil and gas supply, on the economy of the Gulf Coast region and on the long-term safety of deepwater drilling. As harmful as these effects have been, this article addresses separate, but no less important, transgressions by the government: its failures to follow the rule of law.

THE GOVERNMENT'S DEEPWATER DRILLING MORATORIUM

Ten days after the April 20, 2010, well blowout and ensuing explosion on the Deepwater Horizon, President Obama directed Interior Department Secretary Ken Salazar to conduct a review of the incident and to issue a report within 30 days on how to improve the safety of offshore oil and gas exploration and production operations. The resulting report offered an initial set of safety measures. The report was peer-reviewed by seven experts identified by the National Academy of Engineering. The Interior Department consulted with several other experts who also had been identified by the NAE. The report made no mention of any sort of moratorium.

Nevertheless, Salazar, in an executive summary added after the report was completed, recommended a six-month moratorium on deepwater drilling in the Gulf of Mexico. He offered no rationale for this recommendation. The executive summary stated that the "recommendations contained in this report have been peer-reviewed by seven experts indentified by the National Academy of Engineering."[1] These experts, however, had not seen the executive summary, had not reviewed the recommendation for a six-month moratorium and had not recommended such a moratorium.

After learning of the moratorium, eight experts who either peer-reviewed or consulted on the report stated that they did "not agree with the six-month blanket moratorium on floating drilling."[2] Moreover, these experts had concluded that such a moratorium "will not measurably reduce risk further and ... will have a lasting impact on the nation's economy which may be greater than that of the oil spill."[3]

Indeed, even if a court strikes down an agency decision as arbitrary and capricious, the agency is permitted to take up the issue again and to reach the same outcome, provided its new reasoning is not arbitrary and capricious.

On June 22, 2010, a federal court preliminarily enjoined the moratorium, finding that it violated the APA. *Hornbeck Offshore Servs. v. Salazar*, 696 F. Supp. 2d 627, 638 (E.D. La. 2010). Under the APA, agency decisions are to be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this APA standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfr. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 [1962]).

The court in *Hornbeck* found that the Interior Department had violated the APA because it "failed to cogently reflect the decision to issue a blanket, generic, indeed punitive, moratorium with the facts developed during the thirty-day review." *Hornbeck*, 696 F. Supp. 2d at 638.

THE GOVERNMENT'S SECOND BITE AT THE APPLE

In general, an agency is free to revisit one of its actions. Indeed, even if a court strikes down an agency decision as arbitrary and capricious, the agency is permitted to take up the issue again and to reach the same outcome, provided its new reasoning is not arbitrary and capricious. *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947). There are, however, several important limitations that are designed to ensure that an agency is engaged in reasoned decision making when it looks at a problem for a second time.

First, if an agency wants to reconsider an action that is already subject to judicial review, the agency should ask the court to remand the matter to the agency or to hold the case in abeyance. *See Anchor Line Ltd. v. Fed. Mar. Comm'n,* 299 F.2d 124, 125 (D.C. Cir. 1962); *see also Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 324-25 (5th Cir. 2009). The reason for this request is so that an agency cannot use its ability to reconsider its own actions as a device for avoiding judicial review.

Second, if an agency is going to reconsider a decision, it must "deal with the problem afresh" by engaging in a new, reasoned decision-making process. *Chenery Corp.*, 332 U.S. at 201. The agency is not permitted to reach a preordained result before carefully reviewing the matter a second time. There is a "danger that an agency, having reached a particular result, may become so committed to that result as to resist engaging in any genuine reconsideration of the issues.

The agency's action on remand must be more than a barren exercise of supplying reasons to support a pre-ordained result." *Food Mktg. Inst. v. Interstate Commerce Comm'n*, 587 F.2d 1285, 1290 (D.C. Cir. 1978); *see also Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 105 (2d Cir. 2006) ("Any effort by the [agency] to pursue a 'strategy' to justify a foreordained [result] would be incompatible with a reviewing agency's mandate to use its expertise to come to a reasoned decision.").

Unfortunately, the government's second look at the moratorium on deepwater drilling violated all of these rules. The same afternoon that the first moratorium was enjoined, Salazar issued a press release announcing that he would "issue a new order in the coming days that eliminates any doubt that a moratorium is needed, appropriate, and within our authorities."[4] The next day, Salazar testified at a congressional hearing that he intended "to make sure that the moratorium does, in fact, stay in place."[5]

A week later, on June 29, 2010, the Interior Department reopened its administrative record on the moratorium and spent the next two weeks purportedly studying the issue. On July 12, 2010, Salazar issued a directive imposing a second moratorium on deepwater drilling that was materially identical to the first.

In the process, the Interior Department committed numerous violations of the administrative law. It never asked the court for a remand. It announced an intent to re-impose the moratorium immediately after the injunction, despite the fact that it had not yet begun any new decision-making process. This defiance eventually led a federal court to hold the Interior Department in civil contempt. *Hornbeck Offshore Servs. v. Salazar*, No. 10-1663, 2011 WL 454802, *3 (E.D. La. Feb. 2, 2011). In addition to these procedural infirmities, the second moratorium also contained several substantive problems.

Given the procedural and substantive flaws, it is not surprising that an APA challenge was brought against the second moratorium.

SUBSTANTIVE FLAWS IN THE SECOND MORATORIUM

Like the first one, the second moratorium seemed to be based more on politics than science. For example, six of the seven experts who peer-reviewed the Interior Department report in May 2010 and two additional experts who consulted on the report developed their own recommendations, which were presented to Salazar and other department officials in June 2010. These experts described four discrete ways in which a six-month moratorium would actually increase safety and environmental risks associated with deepwater drilling:

- It would stop drilling operations at an unplanned point in the middle of the process (possibly when a hydrocarbon zone would be exposed) that must be resumed at a later date; this is inherently more risky than a continuous drilling operation.
- It would lead to the export of the best rigs to other countries.
- It would lead to a loss of experienced drilling personnel.
- Because the United States would have to import more oil to make up for the eventual loss of domestic oil production caused by the moratorium, it would result in increased traffic in oil tankers, which have historically been responsible for more of the oil spilled in U.S. waters than have offshore platforms and pipelines.

These concerns were not even mentioned in the Interior Department's analysis of the second moratorium, despite the fact that they had been presented to officials at the highest levels of the department just several weeks earlier.

Another problem with the second moratorium is that it was facially inconsistent, in that it barred some drilling activities that were safer than activities that were allowed to continue. Both the Interior Department's in-house experts and the experts identified by the NAE performed detailed analyses of the risks of various types of deepwater drilling activities, such as drilling a development well into a known reservoir, drilling an exploration well into an unknown reservoir, completing a well and performing a workover of a well.

All of the experts agreed, for example, that drilling a development well was as safe, if not safer, than performing a workover. Nonetheless, the Interior Department barred the drilling of development wells because they purportedly "pose[d] an unacceptable level of risk" while at the same time allowing workover activities because they were "low risk."[6] The experts identified by the NAE who were still consulting with the Interior Department in June 2010 recommended that both activities be allowed because of their low risk.

Although it is not surprising that the government would impose new requirements in the aftermath of a major incident such as the Deepwater Horizon tragedy, it took an inordinately long time for the Interior Department to do so.

A third glaring flaw in the second moratorium is that it applied equally to the drilling of both oil and gas wells, even though the government's own analysis concluded that "the risk that a leak from a natural gas reservoir will cause a major environmental disaster is significantly less than from a predominantly oil-bearing reservoir" and that the risk of another major oil spill was "negligible" for gas development wells.[7]

THE GOVERNMENT'S THIRD BITE AT THE APPLE

Given the procedural and substantive flaws, it is not surprising that an APA challenge was brought against the second moratorium. But before the court "could rule on these issues, and on the very date additional briefing to the court was due, the government lifted the second moratorium" on Oct. 12, 2010. *Ensco Offshore Co. v. Salazar*, No. 10-1941, 2010 WL 4116892, *2 (E.D. La. Oct. 19, 2010).[8]

Again, however, the Interior Department's actions were problematic. For starters, the department again failed to ask the court for a remand before reconsidering an agency action under judicial review.

More importantly, the department immediately announced that, despite the purported lifting of the moratorium, deepwater drilling would not be permitted to resume for some time. In particular, the very memorandum describing the decision to lift the moratorium also contained several new requirements that operators had to meet before any deepwater drilling could resume.

Further, some of these new requirements had not yet been fully articulated by the government. For example, Salazar's Oct. 12, 2010, memorandum stated that no operator could resume deepwater drilling operations until it could demonstrate that containment resources would be available promptly in the event of a deepwater blowout.

However, Salazar offered no indication of what type of containment resources would suffice. All he said was that the Interior Department "has a process underway regarding the establishment of an enforceable mechanism relating to the availability

of blowout containment resources, and I expect that this mechanism will be implemented in the near future."[9] Since this mechanism had not yet been created, there was seemingly no way for an operator to comply.

Although it is not surprising that the government would impose new requirements in the aftermath of a major incident such as the Deepwater Horizon tragedy, it took an inordinately long time for the Interior Department to do so. More troubling, the government imposed the moratorium in part so that it could create and implement new safety requirements.

By the time the moratorium was lifted, almost six months had passed since the incident. Yet the Interior Department was still contemplating what some of the basic requirements would be, such as those related to containment resources. That should have been addressed during the lengthy moratorium. *See W. Coal Traffic League v. Surface Transp. Bd.*, 216 F.3d 1168 (D.C. Cir. 2000).

In part because of these new, ever-changing requirements, it took more than four-and-a-half months after the formal lifting of the moratorium Oct. 12, 2010, before the first deepwater drilling operation was allowed to resume in late February. Even at that point, deepwater drilling permits were issued at a slow pace, and most of those were permits to resume previous operations, not to drill new wells.

The U.S. District Court for the Eastern District of Louisiana found these delays to be unreasonable and ordered the government to act on certain permit applications at a faster pace. *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).

STEALTH RULEMAKING

The APA requires federal agencies to adopt rules pursuant to a regularized notice and comment process. *See* 5 U.S.C. § 553(b), (c). Another problem with the Interior Department's post-spill regulation of deepwater drilling is that it has repeatedly failed to follow this process. Instead, it has imposed new substantive requirements through informal announcements, such as "notices to lessees" and agency guidance documents.

For example, shortly after the Deepwater Horizon incident, the department's Mineral Management Service issued a notice to lessees titled "Increased Safety Measures for Energy Development on the OCS," NTL No. 2010-N05, which imposed 10 new safety measures. Regardless of the merits of these new measures, the government should have engaged in notice-and-comment rulemaking before imposing them.[10] Because it failed to do so, the Eastern District of Louisiana found NTL-05 to be unlawful. *Ensco Offshore Co. v. Salazar*, 2010 WL 4116892, *5 (E.D. La. Oct. 19, 2010).

The Interior Department has continued to violate the APA procedures for imposing new substantive rules. For instance, the new requirement regarding containment resources was announced by Salazar Oct. 12, 2010, in an informal memorandum. Perhaps if the government had clearly and formally articulated the containment requirement as required by the APA, industry and agency personnel would have understood them more quickly.

Instead, after the moratorium was supposedly lifted in October 2010, the Bureau of Ocean Energy Management, Regulation and Enforcement (the new name of the Mineral Management Service) caused substantial confusion among industry officials and its own staff by repeatedly issuing notices to lessees and other informal guidance documents containing new requirements regarding environmental assessments, oil spill response plans and a host of other topics.

THE EFFECTS OF THE GOVERNMENT'S ACTIONS

Although the government's formal moratorium was lifted a year ago, deepwater drilling activity has still not recovered. Some rigs have moved overseas, and it is unclear when or whether they will return. The government projected that the moratorium will end up decreasing production in the Gulf of Mexico by tens of millions of barrels of oil and hundreds of billions of cubic feet of gas.

The government also projected that the decreased production will lead to an increase in the price of oil and gas and will cause the federal government to lose close to $2 billion in direct and indirect tax and royalty revenue in fiscal year 2011 alone. It projected the loss of more than 23,000 jobs in the Gulf of Mexico region and that oil and gas industry spending in that region will be reduced by more than $10 billion. The actual impacts are probably higher because deepwater drilling activity did not resume until months after the moratorium was lifted in October 2010 and still is not back to pre-Deepwater Horizon levels.

These harms are difficult to stomach in light of the government's failure to justify them based on the facts and science involved. They are even less tolerable considering the government's failure to respect the rule of law and to follow the proper administrative procedures. Presumably, BOEMRE will find it necessary to impose additional requirements from time to time. If it does so, it should consider not only the substance of those requirements, but also the manner in which it imposes them.

Experience has shown that the results of administrative actions are more effective when the proper procedures are followed so that regulatory action is transparent, so that experts may weigh in on the debate, so that the regulated industry can comprehend and comment on new requirements and so that federal courts may rein in agency action that violates the law.

NOTES

[1] U.S. Dep't of the Interior, Increased Safety Measures for Energy Development on the Outer Continental Shelf (May 27, 2010), *available at* http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=33598

[2] Letter from Kenneth E. Arnold, Nat'l Acad. of Eng'g, to Louisiana Gov. Bobby Jindal *et al.* (June 8, 2010), *available at* http://landrieu.senate.gov/mediacenter/upload/10.06.08_Letter.pdf.

[3] *Id.*

[4] Press Release, U.S. Dep't of the Interior, Secretary Salazar's Statement Regarding the Moratorium on Deepwater Drilling (June 22, 2010), *available at* http://www.doi.gov/news/pressreleases/Secretary-Salazars-Statement-Regarding-the-Moratorium-on-Deepwater-Drilling.cfm.

[5] *Hearing before the Interior, Env't & Related Agencies Subcomm. of the S. Appropriations Comm.*, 111th Cong. (June 23, 2010) (testimony of Ken Salazar, Secretary, U.S. Dep't of the Interior).

[6] Decision Memorandum, from Ken Salazar, Secretary, U.S. Dep't of the Interior, to Michael R. Bromwich, Director, Bureau of Ocean Energy Mgmt., Regulation & Enforcement (July 12, 2010) at 18, *available at* http://www.doi.gov/deepwaterhorizon/upload/Salazar-Bromwich-July-12-OCS-FINAL.pdf; U.S. Dep't of the Interior, Q's and A's, New Deepwater Drilling Suspensions

(July 12, 2010) at Q & A 5, *available at* http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=38349.

7 Decision Memorandum from Michael R. Bromwich, Director, Bureau of Ocean Energy Mgmt., Regulation & Enforcement, to Ken Salazar, Secretary, U.S. Dep't of the Interior (July 10, 2010) at 11; Memorandum from Walter Cruickshank, Deputy Director, Bureau of Ocean Energy Mgmt., Regulation & Enforcement, to Tommy Beaudreau, Senior Adviser to the Director, Bureau of Ocean Energy Mgmt., Regulation & Enforcement (June 30, 2010) at 5.

8 The author was lead counsel for plaintiffs in the *Ensco* case.

9 Decision Memorandum, from Ken Salazar, Secretary, U.S. Dep't of the Interior, to Director, Bureau of Ocean Energy Mgmt., Regulation and Enforcement (Oct. 12, 2010), *available at* http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=64767.

10 The APA permits an agency to skip some of these procedures if the agency finds good cause for doing so and provides a written statement of the reasons therefore when the rules are issued. *See* 5 U.S.C. § 553(b). BOEMRE never sought to use this provision in connection with NTL-05.

Adam Feinberg, chair of the litigation department and member of the executive committee at **Miller & Chevalier** in Washington, focuses on complex federal litigation, often against the U.S. government, and on government investigations. He has litigated numerous False Claims Act and other civil fraud, federal taxation, administrative law and government contracts cases in federal courts throughout the country. He also represents clients in connection with government investigations, including those related to procurement fraud, health care fraud and the Foreign Corrupt Practices Act.