

**August 05, 2010**

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## Secretary of the Interior Issues Second Drilling Moratorium

By **Michael P. Pearson** and **Amanda L. Shaw**

On May 30, 2010, the Bureau of Ocean Energy Management, Regulation and Enforcement ("BOEM") (formerly the Minerals Management Service), issued NTL No. 2010-N04 (the "Deepwater Drilling Moratorium NTL")<sup>1</sup>, which placed a six-month moratorium on drilling new deepwater<sup>2</sup> wells on the Outer Continental Shelf ("OCS"). In response, several plaintiffs, mostly comprised of individuals and businesses that provide services to OCS drilling operations, filed suit in the United States District Court for the Eastern District of Louisiana seeking declaratory and injunctive relief against the Department of the Interior ("DOI") and the BOEM. The plaintiffs also sought a preliminary injunction against the implementation of the Deepwater Drilling Moratorium NTL, which was granted on June 22, 2010. As expected, the DOI immediately filed with the United States Court of Appeals for the Fifth Circuit an appeal of the order granting the plaintiffs' motion for a preliminary injunction. In addition, the DOI filed a motion to stay enforcement of the preliminary injunction pending resolution of the appeal based on the merits of the case.

On July 8, 2010, the Fifth Circuit denied the DOI's motion to stay the preliminary injunction against the enforcement of the deepwater drilling moratorium in the case styled *Hornbeck Offshore Services, L.L.C. v. Salazar*, Civ. No. 10-30585 (5th Cir. July 8, 2010) (*per curiam*) (Dennis, J., dissenting, in part). According to the Fifth Circuit, the DOI failed to demonstrate a likelihood that deepwater drilling activities would resume pending the court's ruling on the appeal. As a result, there was no showing of a likelihood of irreparable injury if the stay were not granted. The court, however, welcomed the Secretary of the Interior to seek emergency relief if any deepwater drilling actually commenced or was likely to commence prior to the ruling on the appeal. The court also ordered an expedited hearing on the merits of the appeal, which is currently scheduled for August 30, 2010.

On July 12, 2010, the Secretary of the Interior released a Decision Memorandum (the "Decision Memorandum")<sup>3</sup>, which specifically superseded the Deepwater Drilling Moratorium NTL. The Decision Memorandum directs the BOEM to withdraw the suspension letters issued to OCS operators pursuant to the Deepwater Drilling Moratorium NTL and, for the period ending November 30, 2010, to (i) issue new suspension letters to all operators who conduct drilling operations on the OCS using a subsea blowout preventer ("BOP") or a surface BOP on a floating facility, and (ii) cease approval of pending and future permits to drill where the operator contemplates using a subsea BOP or a surface BOP on a floating facility.

It is important to note that the Decision Memorandum appears to impact OCS operators conducting drilling operations that were not affected by the Deepwater Drilling Moratorium NTL. Water depth is no longer the benchmark for determining whether the drilling moratorium applies. Rather, the new moratorium applies to *all* operators conducting OCS operations using subsea BOPs and surface BOPs placed on floating facilities, regardless of the water depth.<sup>4</sup> As such, OCS operators conducting drilling operations using a subsea BOP or a floating facility in waters less than 500 feet in depth are currently subject to the new drilling moratorium imposed by the Decision Memorandum. In contrast, although numerous additional safety requirements must be met, certain drilling operations that were previously suspended pursuant to the Deepwater Drilling Moratorium NTL may no longer be subject to the drilling moratorium. The new drilling moratorium is in effect until November 30, 2010. The term of the new drilling moratorium could be modified, however, if the Secretary of the Interior determines that the health and environmental risks at the core of the Decision Memorandum have been adequately addressed or by a subsequent order of the court in pending litigation related to the drilling moratorium.

The litigation that could potentially impact the current drilling moratorium includes the *Hornbeck* case (discussed above) and a case recently filed in the United States District Court for the Eastern District of Louisiana styled *Ensco Offshore Company v. Salazar*, Civ. No. 10-1941 (E.D. La. July 9, 2010). In its original complaint, Ensco Offshore Company asserted claims against the DOI related to the Deepwater Drilling Moratorium NTL that were similar to the claims asserted by the plaintiffs in the *Hornbeck* case. Since the Fifth Circuit's July 8, 2010, action in the *Hornbeck* case and the issuance of the Decision Memorandum, the DOI has taken the position that the *Hornbeck* case is moot because the Deepwater Drilling Moratorium NTL has been rescinded and replaced with the new drilling moratorium. In response, on July 20, 2010, Ensco amended its complaint, alleging that the Decision Memorandum's imposition of a second drilling moratorium is a "thinly-veiled and impermissible attempt to rectify procedural and substantive problems with the original moratorium." Obviously, the current state of permissible OCS drilling operations remains extremely unsettled.

If you have any questions or would like further information on these topics, please contact one of our Jackson Walker attorneys below for additional assistance.

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<sup>1</sup> See full notice at <http://tinyurl.com/2g5sjgm>

<sup>2</sup> The Deepwater Drilling Moratorium NTL defined "deepwater" as water depths greater than 500 feet.

<sup>3</sup> In the Decision Memorandum, the Secretary of the Interior asserts that the DOI is and will continue to comply with the injunction issued in the *Hornbeck* case. However, the DOI appears to take the position that evidence and guidelines set forth in the Decision Memorandum constitute a *new* drilling moratorium. The DOI claims that the new moratorium is warranted as a result of recently discovered risks associated with deepwater drilling operations that have been identified during the investigation of and ongoing remediation efforts related to the BP oil spill. The Decision Memorandum outlines a number of factors that appear to counter the deficiencies pointed out

by the court in the *Hornbeck* case. See full Decision Memorandum at <http://tinyurl.com/2e8pshc>

<sup>4</sup> Unlike the Deepwater Drilling Moratorium NTL, which defined “deepwater” as water depths greater than 500 feet, the second memorandum defines “ ‘deepwater drilling’ with reference to the type of blowout prevention equipment used in the deepwater drilling operation.”

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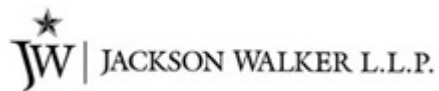
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