IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FOOD & WATER WATCH, INC. and KENNETH ABBOTT Plaintiffs,	§	
	§	**CIVIL ACTION NO. 10-1759**
v.	§	
KENNETH SALAZAR, SECRETARY OF THE INTERIOR and MICHAEL SAUCIER, REGIONAL DIRECTOR OF MINERALS AND MANAGEMENT SERVICE FOR THE GULF OF MEXICO Defendants.	§	**District Judge David Hittner**

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants Kenneth Salazar, Secretary of the Department of the Interior, and Michael Saucier, Regional Supervisor for Field Operations in the Gulf of Mexico Regional Office of the Minerals and Management Service ("MMS")[1] ("Defendants"), hereby respond in opposition to Plaintiffs' Motion for Preliminary Injunction ("Motion"), Docket Entry Number 2.

INTRODUCTION

Plaintiffs Food and Water Watch, Inc. and Kenneth Abbott (together "Plaintiffs") seek an injunction requiring Defendants to enforce the provisions of the

[1] Mr. Saucier was misidentified by Plaintiffs as Regional Director of MMS for the Gulf of Mexico in the Complaint.

Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 et seq.[2] and to "temporarily prohibit any operations or activities, including production, at the BP Project Atlantis Facility." Compl., ¶ 13.0(a). The Project Atlantis Facility ("Atlantis") is a "production and quarters platform," which has been producing oil since October 2007. Plaintiffs now seek to enjoin production from Atlantis based on their interpretation of various MMS record-keeping regulations, which they claim require British Exploration and Production Inc. ("BP") to maintain certain engineering documents.

Plaintiffs' request for injunction fails because they ask the Court to order Defendants to take enforcement action which is clearly entrusted to Defendants' discretion. Indeed, the Department of the Interior is currently undertaking an exhaustive investigation, at the request of Congress, to determine whether BP maintains a complete and accurate set of required engineering drawings for the BP Atlantis platform and its associated subsea components. The results of the investigation will determine whether any enforcement action (including the very relief requested by Plaintiffs—suspension of production) is appropriate. Plaintiffs' request also fails because they cannot identify a discrete agency action that Defendants are required to take under the OCSLA. Accordingly, Plaintiffs' action for mandatory

[2] Plaintiffs incorrectly refer throughout their papers to the Submerged Lands Act, 43 U.S.C. 1301 et seq.

relief requiring the agency to take specific enforcement action is not cognizable in this Court, and their Motion should be denied.

FACTUAL BACKGROUND

Located 190 miles south of New Orleans, off the coast of Louisiana on the Outer Continental Shelf ("OCS"), Atlantis is a moored, deepwater, semi-submersible oil and gas production facility producing oil and gas under a lease issued by the MMS. Declaration of Michael Saucier (hereinafter "Saucier Decl."), Ex. 1, ¶ 5. Atlantis consists of, among other things, a floating platform and subsea infrastructure. Id. ¶ 5. Atlantis' operation is governed by a detailed regulatory scheme promulgated by the Department of the Interior at 30 C.F.R. Part 250 (the "Part 250 Regulations") to govern offshore oil and gas operations on the OCS. The Part 250 Regulations, through various subparts, provide requirements relating to various aspects of designing, installing, maintaining, and obtaining the approval to operate, an offshore production facility. See, e.g., Subpart I—Platforms and Structures (30 C.F.R. §§ 250.904-250.921); Subpart B—Plans and Information (30 C.F.R. §§ 250.286-250.295), Subpart H—Oil and Gas Production Safety Systems (30 C.F.R. §§ 250.800-250.807), Subpart J—Pipelines and Pipeline Rights of Way (30 C.F.R. §§ 250.1000-250.1019). In addition, the Part 250 Regulations provide authority for the agency to enforce its regulatory requirements, including by the suspension of operations or production if

MMS determines that doing so is appropriate. See, e.g., 30 C.F.R. §§ 250.168; 250.172; 250.173.

In response to a request from Congress, the Department of the Interior is currently undertaking an exhaustive investigation of whether BP is complying with certain requirements of the Part 250 Regulations with respect to Atlantis, and whether it is maintaining required documentation necessary to ensure safe operations at that facility. Specifically, on February 24, 2010, 19 members of the House of Representatives asked the Director of MMS to conduct a full investigation into whether BP had a complete and accurate set of required engineering drawings for the BP Atlantis platform and its associated subsea components before starting production from that platform, and to report back to Congress as soon as possible. Saucier Decl., ¶ 5 & Attach. A thereto. The Representatives also asked MMS to describe how an MMS regulation that requires offshore operators to maintain certain engineering documents, but does not require that those documents be complete or accurate, is appropriately protective of human health and the environment. Id., Attach. A.

On March 26, 2010, the Director responded to the 19 House members that MMS would "conduct a full investigation of this situation" and provide a report by the end of May, 2010. Id. ¶ 6 & Attach. B thereto. The investigation was in progress when the Deepwater Horizon drilling rig exploded in the Gulf of Mexico on April 20, 2010. Id. ¶ 7. Because of that incident, the Atlantis investigation was temporarily suspended.

Id. ¶¶ 7, 8. Given the quantity of records and need for MMS to focus on responding to the Deepwater Horizon accident, the investigation is only approximately 10% completed. Id. ¶¶ 8-9, 11. MMS expects that it will complete the investigation within the next three months. Id. ¶ 11. Once the investigation is completed, MMS may take any action, as it deems appropriate in its discretion, to address any problems it identifies during the investigation. Id.

STANDARD OF REVIEW

A. Standards for Judicial Review of Agency Action

Although Plaintiffs do not invoke the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, their claims are subject to review under that statute. In particular, claims brought against the government under 43 U.S.C. § 1349(a), the citizen suit provision of the OCSLA, are reviewed under the APA. See Shell Oil Co. v. F.E.R.C., 47 F.3d 1186, 1191 n.6, 1197 (D.C. Cir. 1995) (review of OCSLA claim brought under citizen suit provision applying "the deferential standard of § 706 of the Administrative Procedure Act"). This standard of review applies because § 1349(a)(1) provides for judicial review, but does not prescribe standards for the review. "[W]hen a statute authorizes judicial review of agency action without providing standards for that review, [the court] look[s] to the APA." Sierra Club v. Glickman, 67 F.3d 90, 96 (5th Cir. 1995). See also Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803, 808 (8th Cir. 1998) (quoting United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963))

("[W]here Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no de novo proceeding may be held"). Further, the APA (as well as traditional principles of judicial review), generally treat enforcement decisions as immune from judicial review. See 5 U.S.C. § 701(a)(2); Heckler v. Chaney, 470 U.S. 821, 832 (1985).

B. Standard for Injunctive Relief

A preliminary injunction is an extraordinary remedy for which Plaintiffs bear the burden of proving the prerequisites by clear and convincing evidence. Granny Goose Foods, Inc. v. Bhd. Of Teamsters, 415 U.S. 423, 441 (1974). See also Anderson v. Jackson, 556 F.3d 351, 360 (5th Cir. 2009) ("Injunctive relief is 'an extraordinary and drastic remedy,' and should only be granted when the movant has clearly carried the burden of persuasion.") (quoting Holland Am. Ins. Co. v. Succession of Roy, 777 F.2d 992, 997 (5th Cir.1985)). Further "mandatory preliminary relief, which goes well beyond simply maintaining the status quo pendente lite, is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party." Martinez v. Mathews, 544 F.2d 1233, 1243 (5th Cir. 1976). Accordingly, Plaintiffs must make a "clear showing" that four factors are met, namely that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor;

and (4) an injunction is in the public interest. Winter v. Natural Res. Def. Council, Inc., 129 S.Ct. 365, 374 (2008); Valley v. Rapides Parish Sch. Bd., 118 F.3d 1047, 1051 (5th Cir. 1997). Plaintiffs "must clearly carry the burden of persuasion on each factor." United Offshore Co. v. S. Deepwater Pipeline Co., 899 F.2d 405, 408 (5th Cir. 1990) (emphasis added) (citing Miss. Power and Light Co. v. United Gas Pipeline Co., 760 F.2d 618, 621 (5th Cir.1985)).

ARGUMENT

A. Plaintiffs' Motion Fails Because They Cannot Show a Likelihood of Success On Their Claims

Plaintiffs' Motion fails on the first factor: they cannot make a clear showing that they are likely to succeed on the merits because this Court does not have subject matter jurisdiction over their claims. Because Plaintiffs must make a clear showing on each of the four factors, their Motion fails on this basis alone, see United Offshore Co., 899 F.2d at 408.[3]

Plaintiffs' Motion fails for one fundamental, preliminary reason: Plaintiffs are asking the Court to require Defendants to take discretionary enforcement action that is not mandated by statute. As a result, they cannot show a likelihood of success on their claims because the Court does not have subject matter jurisdiction over their claims.

[3] Defendants do not concede that Plaintiffs have met their burden with respect to the remaining three factors. However, given the fundamental nature of their failure to establish the first, Defendants do not address the remaining three.

Plaintiffs expressly ask the Court for an injunction "requiring Defendants to enforce the provisions of the [OCSLA]." Compl., ¶ 13.0(a). See also id., ¶ 13.0(b). However, an agency's exercise of discretion regarding an enforcement mechanism provided by statute or regulation is not subject to judicial review. Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[A]n agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)"). See also Sierra Club v. Whitman, 268 F.3d 898, 902 (9th Cir. 2001) ("the presumption of agency discretion recognized in [Heckler v.] Chaney has a long history and . . . is not limited to cases brought under the APA"); accord Sec'y of Labor v. Twentymile Coal Co., 456 F.3d 151, 160 (D.C. Cir. 2006).

This rule exists because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." Heckler, 470 U.S. at 831. As the Heckler court noted:

> An agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Id. at 831-832. The presumption against judicial review may be rebutted, but only if the statute "circumscribe[s] agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion." Id. at 834.

Plaintiffs have not, and cannot, point to any provision of OSCLA that would rebut the presumption of agency enforcement discretion. Specifically, Plaintiffs assert that Defendants are required to temporarily prohibit operations under 43 U.S.C. § 1334(a)(1)(B).[4] However, § 1334(a)(1)(B) requires only that the Secretary of the Interior issue regulations which provide for "the suspension or temporary prohibition of any operation or activity," including production, "if there is a threat of serious, irreparable, or immediate harm or damage to life." The Secretary complied with this statutory directive, issuing 30 C.F.R. § 250.172(b), which provides, in relevant part, that the Regional Supervisor:

> may grant or direct a [Suspension of Operations ("SOO")] or a ["Suspensions of Production ("SOP")]. . .[w]hen 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.

Id. (emphasis added).

The Secretary has therefore complied with the only nondiscretionary component of the OCSLA provisions for halting operations on a lease by adopting regulations that provide for suspension of operations. And, as demonstrated above, neither OCSLA

[4] Plaintiffs also invoke 43 U.S.C. § 1334(d), but make no attempt to assert that that provision mandates suspension, asserting only that cancellation of BP's lease would be "likewise proper" under that provision.

nor § 250.172(b) imposes any nondiscretionary requirement that the Defendants suspend production under any specific circumstances. Thus, OCSLA, and the regulations promulgated under it, do not circumscribe agency discretion for suspension of production decisions. See Heckler, 470 U.S. at 834 (to overcome presumption, statute must provide "meaningful standards for defining the limits of that discretion"). The decision whether to suspend production is therefore one which has been "committed to agency discretion," and is not subject to judicial review. Id. It is for the agency to consider and decide as a policy matter whether to suspend production at Atlantis.

This rationale from Heckler is particularly compelling here, because MMS is presently undertaking an investigation of whether BP maintains proper documentation for Atlantis as required by the Part 250 Regulations. As described above, MMS has been engaged in this exhaustive investigation of BP's records since May 2010. Saucier Decl., ¶ 9. Its investigation encompasses an examination of whether Plaintiffs have correctly identified if there is any inadequate or incomplete documentation for Atlantis. Id. ¶ 10. Based on the results of that investigation, MMS will take any action that it deems appropriate given its findings. Id. ¶ 11. MMS is therefore in the midst of the very process of exercising its discretion that the Heckler court determined should be protected from judicial review.

For similar reasons, Plaintiffs' request is not cognizable under the APA, which, as discussed above, provides the applicable standard of review. The Supreme Court in Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64-65 (2004), held that the APA provides for judicial review of government action "only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." (emphasis in original). As discussed above, the Secretary's promulgation of 30 C.F.R. § 250.172 satisfies the agency action mandated by the OCSLA. Plaintiffs can identify no other discrete agency action that MMS was required to take under the OCSLA, and Plaintiffs are therefore improperly requesting an order mandating action MMS is not required to take.

To summarize, Plaintiffs ask the Court to order Defendants to take specific, discretionary action overseeing the operations at Atlantis, despite that absence of a statutory mandate to do so. This Court does not have jurisdiction to act on Plaintiffs' request, nor does it need to, as the agency tasked with requiring BP to safely operate its facility is currently doing so. Accordingly, Plaintiffs' Motion should be denied.

CONCLUSION

For the reasons stated above, Plaintiffs have not clearly established their entitlement to preliminary injunctive relief, and the Court should deny their Motion for Preliminary Injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION will be automatically accomplished through the Notice of Electronic Filing on:

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