



## Country Report: United States

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### Introduction

On 20 April 2010, BP's Deepwater Horizon drilling platform, located in the Gulf of Mexico, exploded, resulting in the loss of eleven lives and the largest oil spill in American history. This Country Report outlines the legal responses taken by the United States Government in response to the spill. This Report also summarizes the recent Supreme Court case, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, decided in June 2010. The *Stop the Beach Renourishment* case addresses the Fifth Amendment Takings Clause of the *United States Constitution* with respect to the government's beach conservation efforts. The opinion addressed the prospect of a 'judicial taking' and represented a potentially significant shift in federal takings jurisprudence.

### The Gulf Oil Spill Response

Deepwater drilling activities are regulated under the *National Environmental Policy Act*<sup>1</sup> (NEPA), the *Outer Continental Shelf Land Act*<sup>2</sup> (OCSLA) and the *Oil Pollution*

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<sup>1</sup> 42 U.S.C. § 4321 (1970).

<sup>2</sup> 43 U.S.C. § 1301 (1953).

*Act*<sup>3</sup> (OPA).<sup>4</sup> Despite these three acts, the Deepwater Horizon blowout and severity of the gulf oil spill were unanticipated by United States law.<sup>5</sup> Since the blowout, the executive and legislative branches have sought changes in drilling laws and regulations to improve governmental oversight, prevention and response.

### *Changes in Regulations*

In response to the spill, President Obama asked Interior Secretary Salazar to prepare a review of the Deepwater Horizon blowout and to report on precautions and technologies that can be required to improve deepwater drilling. The Secretary's Report recommended a series of steps, including several that could and should be implemented immediately.<sup>6</sup> Measures suggested for immediate implementation included a moratorium on drilling on tracts falling under the jurisdiction of the OCSLA, as well as additional safety requirements regarding drilling technology, design, and emergency response procedures. These safety requirements focus on the ability of drills to stop leaks in the event of an emergency and mandate certification that the appropriate parts and systems are in functioning working order. These regulations were issued in the *Notice to Lessees to Impose a Moratorium on All Drilling*<sup>7</sup> and the *Notice to Lessees on Increased Safety Measures*.<sup>8</sup>

The Interior Department's response to the Gulf oil spill has been punctuated with litigation over administrative procedure. On 28 May 2010, the Mineral Management Services (MMS), an agency within the Interior Department, issued a six-month moratorium on offshore drilling operations on new and permitted deepwater wells.<sup>9</sup> Hornbeck Offshore Services sued the Department of Interior under 5 U.S.C. § 706, claiming the ban on drilling was arbitrary and capricious and therefore invalid under the *Administrative Procedure Act (APA)*.<sup>10</sup> The court agreed, finding no logical reason for the moratorium's definition of 'deepwater well' or basis for banning all deepwater

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<sup>3</sup> 33 U.S.C. § 1001 (1961).

<sup>4</sup> See generally: O. Houck, 'Worst Case and the Deepwater Horizon Blowout: There Ought to Be a Law' (2010) 40 *ELR* 11039.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Drilling Safety Rule*, 75 Fed. Reg. 63346, 63346 (14 October 2010) (to be codified at 30 C.F.R. pt. 250).

<sup>7</sup> NTL No. 2010-N04 (30 May 2010).

<sup>8</sup> NTL No. 2010-N05 (8 June 2010).

<sup>9</sup> NTL No. 2010-N04 (30 May 2010).

<sup>10</sup> *Hornbeck Offshore Svc v. Salazar*, 696 F. Supp. 2d 627 (2010).

drilling. The court issued a preliminary injunction stopping the implementation of the moratorium.<sup>11</sup> Before the case could be fully resolved, the Department of Interior withdrew the moratorium.<sup>12</sup> Consequently, the Fifth Circuit, in an unpublished opinion, declared the issue moot.<sup>13</sup>

The Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), the federal agency that replaced the MMS within the Interior Department, issued a second moratorium via temporary suspension letters sent to each affected operator.<sup>14</sup> Additionally, the government issued a *Notice to Lessees* implementing ten new regulations.<sup>15</sup> These too were challenged under the APA.<sup>16</sup> On 12 October 2010, based on the BOEMRE report and the strengthened safety measures that had been implemented, Secretary Salazar determined that deepwater oil and gas drilling could resume.<sup>17</sup> Subsequently, the court held the legal challenge to the ban to be moot.<sup>18</sup> The regulations under the *Notice to Lessees* were also stricken down as contravening the APA because the Department of Interior failed to follow proper notice and comment procedures prior to adopting them.<sup>19</sup>

Five days before the *Ensco Offshore* case was decided, however, the Interior Department released its interim final regulation, which included virtually all of regulations from the *Safety NTL*, with the exception of the rules requiring one-time compliance.<sup>20</sup> The resultant *Drilling Safety Rule* also incorporated recommendations under the *Safety Measures Reports*.<sup>21</sup> Interior issued the regulations under the emergency rule-making process of the APA.<sup>22</sup> The *Drilling Safety Rule* took effect on

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<sup>11</sup> Ibid.

<sup>12</sup> *Hornbeck Offshore Svc v. Salazar*, 2010 WL 3825385 (C.A.5 (La.)).

<sup>13</sup> Ibid.

<sup>14</sup> *Ensco Offshore Co.*, 2010 WL 4116892.

<sup>15</sup> NTL No. 2010-NO5 (8 June 2010).

<sup>16</sup> *Ensco Offshore Co.*, 2010 WL 4116892.

<sup>17</sup> Press Release: 'Deepwater Drilling may Resume for Operators who Clear Higher Bar for Safety, Environmental Protection', 2010 WL 3973627 (D.O.I. 12 October 2010).

<sup>18</sup> *Ensco Offshore Co.*, 2010 WL 4116892.

<sup>19</sup> Ibid.

<sup>20</sup> *Drilling Safety Rule*, 75 Fed. Reg. 63346 (14 October 2010) (to be codified at 30 C.F.R. pt. 250).

<sup>21</sup> NTL No. 2010-NO5 (8 June 2010).

<sup>22</sup> Press Release: 'Salazar Announces Regulations to Strengthen Drilling Safety, Reduce Risk of Human Error on Offshore Oil and Gas Operations', 2010 WL 3799165 (D.O.I. 30 September 2010).

14 October 2010, but allows for comments until 13 December 2010.<sup>23</sup> It requires various certifications by registered professional engineers, third party certification firms, and operators. The certifications cover engineering and safety requirements, as well as the operator's knowledge of the requirements under 30 C.F.R. § 250 – *Oil and Gas and Sulphur Operations in the Outer Continental Shelf*.<sup>24</sup> The *Drilling Safety Rule* also specifies proper cementing, casing practices, and engineering systems to prevent blowouts. In addition, it strengthens oversight of the mechanisms designed to shut down the flow of oil and gas.<sup>25</sup> The *Rule* also mandates that personnel be trained in deepwater well control and associated duties, equipment, and techniques.<sup>26</sup>

Once an operator obtains BOEMRE approval, it may resume drilling. To gain approval, the operator must satisfy specified requirements of the *Drilling Safety Rule*.<sup>27</sup> BOEMRE also requires the CEOs of each drilling entity to certify compliance with the *Environmental NTL*, *Drilling Safety Rule*, and *Safety NTL* (incorporated in the *Drilling Safety Rule*). Companies must also achieve compliance with the *Safety and Environmental Management System Rule (SEMS Rule)*. BOEMRE intends to inspect each operation for compliance before approving resumption of drilling.<sup>28</sup>

The *Environmental NTL* requires companies to submit blowout scenario plans and estimates on discharges in worst case discharge scenarios, descriptions of measures taken to prevent and reduce the likelihood of blowouts, and intervention plans for if a blowout occurs.<sup>29</sup> The companies must also describe the assumptions and calculations used to make the plans as well as their reasons for adopting them.<sup>30</sup>

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<sup>23</sup> *Drilling Safety Rule*, 75 Fed. Reg. at 63346.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Fact Sheet: Enhanced Requirements to Resume Deepwater Drilling Activities* (12 October 2010) available at <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=64755>.

<sup>28</sup> *Press Release: 'Deepwater Drilling may Resume for Operators who Clear Higher Bar for Safety'*, 2010 WL 3973627 (D.O.I. 12 October 2010).

<sup>29</sup> NTL No. 2010-N06 (18 June 2010).

<sup>30</sup> *Ibid.*

The *SEMS Rule* is a final rule issued by BOEMRE on 15 October 2010.<sup>31</sup> The Rule mandates that companies implement a Safety and Environmental Management System (SEMS). Prior to the Deepwater Horizon Spill, SEMS was a voluntary program under the auspices of the *American Petroleum Institute's Recommended Practice 75*. From 1996-2009, approximately one half of drilling companies elected not to participate in SEMS.<sup>32</sup> Although never explicitly stated as such, the cost of a SEMS system (\$1,670,000 per year for high activity operations) undoubtedly played a role in the low rate of participation.<sup>33</sup> The *SEMS Rule* calls for companies to identify and manage safety hazards and environmental impacts associated with deepwater well drilling.<sup>34</sup> Unlike the *Drilling Safety Rule*, however, the *SEMS Rule* was not issued under emergency rulemaking procedures, and did not become effective until 15 November 2010.

### *Restoration Task Force*

On 5 October 2010, President Obama created a Gulf Coast Ecosystem Restoration Task Force whose mission is the restoration of the Gulf Coast ecosystem.<sup>35</sup> The President's plan is for the task force to consist of five state representatives appointed by the President, one senior official from each of the federal departments and agencies, and possibly representatives from affected Indian tribes to integrate public and private restoration efforts. To date, not all members of the Task Force have been named.<sup>36</sup> The President appointed Environmental Protection Agency Administrator Lisa Jackson to chair the Restoration Task Force.<sup>37</sup>

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<sup>31</sup> *SEMS Rule*, 75 Fed. Reg. 63610 (15 October 2010) (to be codified at 30 C.F.R. pt. 250).

<sup>32</sup> *Ibid* at 63640.

<sup>33</sup> *Ibid*.

<sup>34</sup> *Press Release*: 'Salazar Announces Regulations to Strengthen Drilling Safety', 2010 WL 3799165.

<sup>35</sup> Exec. Order No. 13554, 15 C.F.R. 190.30 (407-411) (2010).

<sup>36</sup> Administrator L. Jackson, Remarks at the Gulf Coast Ecosystem Restoration Task Force Meeting in Pensacola, Florida, As Prepared (8 November 2010), available at <http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/9cb4d15823c2606b852577d500780898!OpenDocument>. *Press Release*: 'President Obama Signs Executive Order Officially Forming Gulf Coast Ecosystem Restoration Task Force', 2010 WL 3885831 (E.P.A. 5 October 2010).

<sup>37</sup> *Ibid*.

## *Mabus Report*

On 28 September 2010, Navy Secretary Ray Mabus submitted a long-term restoration proposal to President Obama.<sup>38</sup> The *Mabus Report* is 'an aggressive plan that includes a call for dedicated funds to support the gulf coast's environmental and economic recovery'.<sup>39</sup> It recommends that the civil penalties from responsible parties be used to foster long-term recovery and restoration efforts. The President has indicated that he will follow this recommendation.<sup>40</sup> Other recommendations include a media campaign (funded by responsible parties) to restore public confidence in the region's tourism and seafood industries, and continued aid to communities, including assisting affected people with the claims process.<sup>41</sup> Acknowledging a critical need for health and human services, the *Mabus Report* also recommends that Congress authorize a Gulf Coast Recovery Council to manage funds for restoration efforts and ensure representation from critical stakeholders.<sup>42</sup>

## *Congressional Policy Shift*

Despite public outrage over the spill and the clear tie between fossil fuels and climate change, Congress remains unwilling to enact a comprehensive measure to cap greenhouse gas emissions. Instead, it has narrowed its focus from sweeping climate policy towards measures that tighten energy efficiency standards.<sup>43</sup>

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<sup>38</sup> Press Release: 'Obama Administration Moves Long-Term Gulf Plan Forward', 2010 WL 3885831 (E.P.A. 28 September 2010).

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid. See further: America's Gulf Coast: A Long Term Recovery Plan after the Deepwater Horizon Oil Spill, Restore The Gulf (2010) available at <http://www.restorethegulf.gov/release/2010/09/28/america%E2%80%99s-gulf-coast-long-term-recovery-plan-after-deepwater-horizon-oil-spill>.

<sup>43</sup> C. Hulse and D. Herszenhorn, 'Democrats Call Off Climate Bill Effort', *N.Y. Times*, (22 July 2010) available at [http://www.nytimes.com/2010/07/23/us/politics/23cong.html?\\_r=1&sq=climate%20legislation%20&st=cse&scp=4&pagewanted=print](http://www.nytimes.com/2010/07/23/us/politics/23cong.html?_r=1&sq=climate%20legislation%20&st=cse&scp=4&pagewanted=print).

## ***Stop the Beach Renourishment Inc. v. Florida Department of Environmental Protection***

In the *Stop the Beach Renourishment* case<sup>44</sup>, the Supreme Court of the United States determined that a beach restoration project in Florida did not violate the Takings Clause of the *United States Constitution*. Under the *U.S. Constitution*, a government cannot take private property without just compensation.<sup>45</sup> Under Florida law, a littoral landowner gains title to lands added to his or her property if those lands are the result of accretion, the gradual loss of water or gradual addition of land. By contrast, new lands that result from avulsion, or sudden changes to landscape, belong to the state. By adding sand to eroded beaches in order to restore the beaches, the government prevented the future addition of land to the littoral landowners' property. *Stop the Beach Renourishment, Inc.* claimed the state's actions had unconstitutionally taken the landowner's rights to those future lands. The Court ruled that the restoration projects were avulsions, and the lands consequently belonged to the state of Florida. Since the water and the added beaches do not belong to the landowner, the landowners' property rights were not violated. Consequently, state and local governments can implement restoration and conservation measures without having to compensate landowners who may benefit from future environmental degradation.

In *Stop the Beach Renourishment* case, the Supreme Court also addressed the prospect of judicial takings. Justice Scalia (joined by three Justices) decided that a judicial taking exists when a court declares a once established property right no longer exists. Justice Breyer, joined by Justice Ginsburg, agreed with the plurality's conclusion that judicial takings could exist, but opined the Court should not have reached the issue in this case.<sup>46</sup> Justice Kennedy, joined by Justice Sotomayor, questioned whether a judicial taking could exist, noting that the Due Process Clause would prevent such a taking.<sup>47</sup> Justice Kennedy also maintained that a decision, which amounted to a judicial taking would be constitutional so long as the state

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<sup>44</sup> *Stop the Beach Renourishment v. Fla. Dept. of Env'tl. Prot.*, 130 S. Ct. 2592 (2010).

<sup>45</sup> U.S. Const. amend. V.

<sup>46</sup> *Stop the Beach Renourishment*, at 2618-19.

<sup>47</sup> *Ibid*, at 2614-15.

government pays the party.<sup>48</sup> All of the justices agreed that no judicial taking existed in this case.

## **Critical Considerations**

### *Gulf Oil Spill Response*

The resulting litigation from the Department of Interior's Notice to Lessees exemplifies the hurdles faced by the government when responding to national disasters. On the one hand, the APA's arbitrary and capricious standard prevents irrational responses based on shock and fear. On the other hand, it can block necessary changes in regulation. Because both Interior Department's moratoriums were withdrawn during litigation, the issue of whether the bans were arbitrary and capricious was never fully decided. Consequently, the nature and extent of the limits on the government's response in the event of another oil spill or other environmental disaster remain unknown. More specifically, the decisions do not answer whether the newly revealed dangers associated with deepwater drilling provided the requisite support for a deepwater drilling ban.

The requirement that companies create a worst case scenario represents a significant change in drilling policy. In 1978, the Council on Environmental Quality (CEQ), which is part of the executive branch, replaced the requirement to provide 'worst case' scenarios with one requiring those that are 'reasonably foreseeable'.<sup>49</sup> This change resulted in a drastic under-estimation of the risks associated with deepwater drilling. Instead of focusing on what could happen, reports focused on the average prior spills.<sup>50</sup> This encouraged a climate of denial regarding the potential for a deepwater.<sup>51</sup> For example, emergency response systems for blow out prevention were only encouraged; they were not enforced or required.<sup>52</sup> By reinstating worst case scenarios requirements, the government can change the drilling culture's views on the risks of deepwater drilling.

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<sup>48</sup> Ibid, at 2614.

<sup>49</sup> See Houck (supra note 4).

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.



Nevertheless, the government's response leaves several questions unresolved. It remains unclear what impact (if any) the gulf oil spill will have on federal climate and energy policies. Immediately after the spill, President Obama stated he was still in favor of expanding drilling – a stance originally taken to satisfy conservatives skeptical of climate change.<sup>53</sup> However, the two moratoriums indicate a possible federal policy change from supporting expansion to limiting the growth of the offshore oil industry.

Congressional response to the spill remains uncertain. During the November 2010 elections, Republicans took control of the House of Representatives and gained a number of seats in the Senate. With the House of Representatives and Senate under control of different parties, any legislation will be harder to pass. It is unknown whether Congress will authorize the Gulf Coast Recovery Council suggested by the *Mabus Report*, and if it does, what Congress will then authorize the Council to do.

*Stop the Beach Renourishment Inc. v. Florida Department of Environmental Protection*

The Supreme Court determined that Florida's actions do not constitute a taking. Subsequently, the state of New Jersey has relied on the *Stop the Beach Renourishment* case analysis to determine property rights after the occurrence of an avulsion.<sup>54</sup> The New Jersey's Supreme Court held that adjacent landowners did not acquire property rights to newly created beaches that are the result of federally-funded beach restoration projects. The *Stop the Beach Renourishment* case may provide encouragement for states to pursue ecosystem restoration projects by eliminating the need to compensate for future land claims. The case simultaneously limited and expanded Takings jurisprudence. The Supreme Court rejected applying Takings compensation for future land claims. But, although a majority did not adopt applying judicial takings analysis to the case, six Justices agreed that judicial takings may occur and require compensation, thus opening the door to a new and potentially powerful line of takings litigation.

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<sup>53</sup> B. Walsh, 'Gulf Oil Spill: Could it Change Obama's Energy Policy?', *Time* (4 May 2010) available at <http://www.time.com/time/health/article/0,8599,1986843,00.html>.

<sup>54</sup> *City of Long Branch v. Liu*, 203 N.J. 474 (2010).