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The Moratorium and the Damage Done: Offshore Drilling After the Gulf of Mexico Drilling Moratorium and Whether Moratoria Should Continue to be Used

*Amanda Hale**

TABLE OF CONTENTS

I.	Offshore Drilling: A Double-Edged Sword	410
II.	The Implementation of the Offshore Drilling Moratorium	412
III.	Banning the Moratorium: <i>Hornbeck Offshore Services LLC v. Salazar</i>	415
IV.	The Lasting Effects of the Moratorium on Offshore Oil Companies: Seahawk Drilling and ATP Oil & Gas	416
V.	Offshore Drilling After Deepwater Horizon	419
	A. The Spill Called into Question Longstanding MMS Shortcomings	420
	B. A Failure to Pass New Legislation	422
VI.	Why Moratoria?	425
VII.	A Change in the Way Moratoria are Used	428
	A. If There Had to be a Moratorium, Perhaps it Should Have Only Applied to BP	428
	B. A Compelling Reason and a Specific Goal	431
	C. Moratoria Should No Longer be Utilized to Temporarily Suspend the Actions of an Entire Industry	432
	Conclusion.....	433

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I. OFFSHORE DRILLING: A DOUBLE-EDGED SWORD

For the first time ever, America's oil and gas industries are out-producing Russia's.¹ Saudi Arabia remains the world's largest producer of oil; however, America is now the second major player.² This increase in production is due to new technologies in the areas of both hydraulic fracturing and offshore drilling.³ The offshore drilling industry is expanding and will probably continue to expand due to all the untapped land under oceans.⁴ American dependence on oil is not likely to wane anytime soon, but "[t]he U.S. cannot achieve oil independence from land-based resources alone, and thus feels pressure to drill deep in the ocean where there are promising large oil reserves, despite the technological difficulties."⁵ Americans need oil on a daily basis, but the oil companies' practices often give rise to backlash from environmentalists and government protection agencies; offshore drilling is a double-edged sword.⁶

On April 20, 2010, a British Petroleum (BP) offshore drilling unit known as Deepwater Horizon exploded in the Gulf of Mexico, releasing roughly five million barrels of oil into the ocean.⁷ The explosion and spill

1. Daniel Gilbert & Russell Gold, *U.S. Is Overtaking Russia as Largest Oil-and-Gas Producer*, WALL STREET J., Oct. 2, 2013, <https://perma.cc/P5ZA-HQDY>; Rebecca M. Bratspies, *A Regulatory Wake-Up Call: Lessons from BP's Deepwater Horizon Disaster*, 5 GOLDEN GATE U. ENVTL. L.J. 7, 12 (2011) ("The Gulf of Mexico produces a quarter of the total U.S. oil production, or roughly 500 million barrels of oil per year.").

2. Gilbert & Gold, *supra* note 1; *see generally* Thomas Eastment & Adam White, *We Need to Lift Permanently the Moratorium on Offshore Oil and Gas Leasing*, TRENDS (A.B.A.), Jan./Feb. 2009, at 6-7 (explaining how allowing offshore drilling reduces the United States' dependence on foreign oil).

3. Gilbert & Gold, *supra* note 1; Emily Gertz, *Can Offshore Drilling Really Make the U.S. Oil Independent?*, SCIENTIFIC AMERICAN (Sept. 12, 2008), <https://perma.cc/9A6Z-VRFN>.

4. Lauren Hunt Brogdon, *A New Horizon?: The Need for Improved Regulation of Deepwater Drilling*, 37 COLUM. J. ENVTL. L. 291, 294 (2012).

5. Hari M. Osofsky, *Multidimensional Governance and the BP Deepwater Horizon Oil Spill*, 63 FLA. L. REV. 1077, 1083 (2011); Eastment & White, *supra* note 2, at 6 ("Energy lies at the intersection of national security, environmental protection, and economic health.").

6. *See* Elise C. Powers, *Big Oil, Big Consequences, and the Big Unknown: Exploring the Legal, Regulatory, and Environmental Impact of the Gulf Oil Spill*, 74 ALB. L. REV. 475, 479 (2011).

7. Gaia J. Larsen, *Skewed Incentives: How Offshore Drilling Policies Fail to Induce Innovation to Reduce Social and Environmental Costs*, 31 STAN. ENVTL. L.J. 139, 140 (2012); Bratspies, *supra* note 1, at 31 ("Deepwater Horizon

gave rise to public demand for government intervention to prevent similar disasters from occurring again in the future.⁸ The profits that oil companies stand to make are largely concentrated with the oil companies themselves, whereas the costs of spills “spread across a wide swath of society and the environment.”⁹ In response to the spill, on May 28, 2010, President Obama implemented a moratorium, or temporary suspension, on all offshore drilling.¹⁰ The moratorium and the safeguards that followed were controversial and initially caused financial setbacks for the entire American oil industry.¹¹ Some of these problems continue to this day.¹²

was considered among the most technologically advanced drilling platforms in the world.”); Ryan Linsner, *Ensuring Adequate Compensation to the Victims of the Deepwater Horizon Explosion: Who Says You Can’t Teach an Old Dog New Tricks?*, 45 J. MARSHALL L. REV. 515, 516-17 (2012) (explaining how the Gulf of Mexico wound up absorbing more than 206 million gallons of oil because of the spill); Roger J. Marzulla, *Obama Administration Policy on Offshore Oil and Gas Production: Consensus or Contempt?*, 14 ENGAGE 49, 49 (Feb. 2013) (In an effort to clean up, over \$6 billion was spent.); *Moratorium*, BLACK’S LAW DICTIONARY (8th ed. 2004) (Moratorium is defined as “[t]he suspension of a specific activity.”).

8. See Brogdon, *supra* note 4, at 297. *But see* Brogdon, *supra* note 4, at 309 (explaining how when oil industry accidents occur, “regulators are under no statutory obligation to modify their procedures in light of problems revealed by the accident”).

9. See Bratspies, *supra* note 1, at 55 (pointing out that privatizing gains and socializing losses gives rise to perverse incentives).

10. COLIN READ, BP AND THE MACONDO SPILL 3 (2011); Bratspies, *supra* note 1 (“Deepwater oil production began in the Gulf of Mexico in 1979 with Shell’s Cognac Field located in 1014 feet of water, then a record depth.”).

11. Mark A. Latham, *Five Thousand Feet and Below: The Failure to Adequately Regulate Deepwater Oil Production Technology*, 38 B.C. ENVTL. AFF. L. REV. 343, 353 (2011); *see e.g.*, *The Obama Administration Is Slowly Reissuing Offshore Drilling Permits*, INSTITUTE FOR ENERGY RESEARCH (Mar. 23, 2011), <https://perma.cc/9X4V-SZP2> (“Because of the moratorium and de facto moratorium, the United States lost an estimated 110,000 barrels per day in 2010 and 250,000 barrels per day in 2011 in the Gulf of Mexico.”).

12. Ken Silverstein, *Obama’s Offshore Energy Policy Could Rescue Oil and Gas Explorers*, FORBES (July 28, 2014, 8:15 AM), <https://perma.cc/6J3Y-RAFX>. Since taking office January 20, 2017, President Donald Trump has attempted to reverse some of the environmental regulations that were put into place during the Obama administration. Ben Lefebvre, *Oil and Gas Allies to Trump: Slow Down*, POLITICO (Aug. 25, 2017, 5:11 AM), <https://perma.cc/P76K-8AUM>. This article was written pre-Trump and focuses on actions taken by the Obama administration after Deepwater Horizon.

This article focuses on how government-implemented edicts can abruptly and adversely affect myriad companies and even lead some into bankruptcy.¹³ The implementation of moratoria and the discretion used in issuing them can create new and challenging problems. Part II discusses how the moratorium following the spill was implemented, as well as an overview of the economic nightmare that the moratorium caused for both Gulf Coast areas and the offshore drilling industry.¹⁴ Part III addresses the first lawsuit that questioned the legitimacy of the moratorium.¹⁵ Part IV focuses on how the moratorium and its aftermath forced Seahawk Drilling and ATP Oil & Gas into bankruptcy and analyzes the lasting effects of the moratorium on these two major offshore drilling companies.¹⁶ Part V examines what changes, if any, have been made to the offshore drilling industry since the spill and subsequent moratorium.¹⁷ Part VI addresses how other moratoria have been utilized in the past, both in the offshore drilling arena and in other industries.¹⁸ Finally, Part VII provides three recommendations concerning the use of moratoria in the United States.¹⁹ Included in this section is a brief discussion of how the industry may have suffered less if the moratorium had merely been applied to BP's operations. This is followed by two additional recommended changes for government-implemented moratoria.

II. THE IMPLEMENTATION OF THE OFFSHORE DRILLING MORATORIUM

Over the years, presidents and Congress have had differing opinions concerning drilling for oil, but one consistency is the idea that the Department of the Interior (DOI) is tasked with considering the possible detrimental consequences when dealing with leases to drill wells.²⁰ After the explosion, former Secretary of the DOI, Kenneth Salazar, submitted a report to President Obama conveying his approval of a moratorium on

13. *ATP Files for Bankruptcy. Blames Drilling Moratorium (USA)*, OFFSHORE ENERGY TODAY (Aug. 18, 2012), <https://perma.cc/5PT3-R7V4>; *Seahawk Drilling Seeks Bankruptcy, To Sell Assets*, USA TODAY (Feb. 12, 2011, 5:32 PM), <https://perma.cc/3ZAG-LT34>.

14. *See infra* Part II.

15. *Hornbeck Offshore Services LLC v. Salazar*, 696 F. Supp. 2d 627 (2010); *infra* Part III.

16. *See infra* Part IV.

17. *See infra* Part V.

18. *See infra* Part VI.

19. *See infra* Part VII.

20. Michael A. Livermore, *Patience is an Economic Virtue: Real Options, Natural Resources, and Offshore Oil*, 84 U. COLO. L. REV. 581, 614 (2013).

offshore drilling, and Obama directed Salazar to stop all drilling on the Outer Continental Shelf for six months.²¹ In total, the moratorium put a stop to thirty-three rigs.²² But one of the biggest problems was that even after the moratorium was lifted, the government continued to treat the offshore drilling companies as though the moratorium were still in effect.²³

In reference to the harm that the lack of permits caused, Louisiana Senator Mary Landrieu stated, “I have repeatedly said that the administration’s excruciatingly slow release of oil and gas permits will cause job losses How many more rigs have to leave and how many more businesses have to close before it realizes the havoc the de facto moratorium is wreaking on the Gulf Coast?”²⁴ From 2008 to 2011, it was estimated that the Gulf Coast states lost 60,000 jobs because of the moratorium, which would not allow any new drilling permits in the area.²⁵ Three months after the spill, the deepwater permits had fallen “71[%] from their historical monthly average of 5.8 permits per month.”²⁶ By July 2011, the new average was 1.7 new permits per month.²⁷ A year after the

21. U.S. DEP’T OF THE INTERIOR, INCREASED SAFETY MEASURES FOR ENERGY DEVELOPMENT ON THE OUTER CONTINENTAL SHELF (May 27, 2010), <https://perma.cc/2C3B-H3UN>; Noelle Straub, *Obama to Extend Deepwater Drilling Moratorium*, N.Y. TIMES, May 27, 2010, <http://www.nytimes.com/gwire/2010/05/27/27greenwire-obama-to-extend-deepwater-drilling-moratorium-8011.html?pagewanted=all>.

22. Charlie Savage, *Drilling Ban Blocked; U.S. Will Issue New Order*, N.Y. TIMES, June 22, 2010, http://www.nytimes.com/2010/06/23/us/23drill.html?_r=0.

23. Randy Stillely, *A Preventable Bankruptcy in the Gulf of Mexico*, WASH. POST, Mar. 23, 2011, <https://perma.cc/TT6E-UEXC>; see, e.g., Ryan Dezember, *U.S. to Issue More Gulf Drilling Permits*, WALL STREET J., Mar. 22, 2011, <http://online.wsj.com/articles/SB10001424052748704461304576216563662728054> (explaining how it was months before oil companies received permits to drill because of the new demands placed on the industry in an effort to prevent similar accidents); see also *The Obama Administration Is Slowly Reissuing Offshore Drilling Permits*, *supra* note 11 (“On February 28, 2010, BOEMRE issued its first deepwater permit since the BP oil spill in April 2010 to Noble Energy Inc., allowing the company to resume work on a well that it had already drilled to 13,000 feet.”).

24. Amanda Carey, *Seahawk Becomes First Gulf of Mexico Drilling Company to File Bankruptcy Due to Offshore Drilling Moratorium*, THE DAILY CALLER (Feb. 15, 2011, 10:41 AM), <https://perma.cc/B2AC-MTVM>.

25. Rob Bluey, *One Year After Oil Spill Was Stopped, Drilling Permits Down Sharply*, THE DAILY SIGNAL (July 15, 2011), <https://perma.cc/2KHX-LREL>.

26. *Id.*

27. *Id.*

spill, only eleven deepwater permits had been issued.²⁸ The House of Representatives passed a bill on May 11, 2011, which required the Secretary of Interior to make a decision on every deepwater application within thirty days of its filing.²⁹ The people of the Gulf region, including all of the employees who lost their jobs, viewed this “de facto moratorium” as a punishment to the entire Gulf region.³⁰

One of the biggest hindrances offshore companies faced after the ban was lifted was the new requirement of proving that the company could contain a spill should it occur.³¹ This requirement tasked companies with supplying specific data about their plans of preparedness in order to receive a permit—information that none of the companies had ever prepared. Only upon successfully proving that they could contain an oil spill could companies apply for a permit.³² Exxon Mobil Corporation was the first company to create and have its plan approved to receive a permit for its lease.³³ In response to the moratorium and the financial problems it caused, several dozen companies filed suit against Salazar, which led to a court-ordered lifting of the moratorium.³⁴

28. Steve Hargreaves, *Offshore Drilling: Slow Comeback After BP*, CNN MONEY (Apr. 20, 2011), <https://perma.cc/DHJ8-UZYJ>.

29. See Marzulla, *supra* note 7.

30. *Id.* (explaining how the incident was completely caused by a mistake on BP’s behalf, and the company has at least taken some responsibility for its actions; for instance, a \$20 billion fund was put in place to pay businesses and individuals who suffered losses in the Gulf).

31. Richard Thompson, *Two Years After Moratorium Lifted, Many Expect Gulf Oil Production to Soon Exceed Pre-Spill Levels*, NOLA (Oct. 23, 2012), <https://perma.cc/NZG8-GLFY>; See Bratspies, *supra* note 1, at 19 (This was of particular importance because it took BP eighty-seven days to stop the leak.); *id.* at 30 (Before this new requirement, the MMS had allowed drilling to continue if the company merely determined that a spill was “unlikely.”); see also Brogdon, *supra* note 4, at 305 (explaining how before the spill, MMS regulations merely covered basic elements of a well’s design).

32. Chris Kahn, *Oil Spill Containment System Unveiled By Oil Companies*, HUFFINGTON POST (May 25, 2011), <https://perma.cc/G5G5-7HNM>; Bratspies, *supra* note 1, at 18 (“When the Macondo well blew out, BP had no plan for how to stop the flow of oil from the well and no equipment with which to do it.”).

33. See Kahn, *supra* note 32.

34. *Hornbeck Offshore Services LLC*, 696 F. Supp. 2d 627.

III. BANNING THE MORATORIUM: *HORNBECK OFFSHORE SERVICES LLC*
V. SALAZAR

The DOI is in charge of offshore rig leasing, but its decision-making is subject to judicial scrutiny.³⁵ In the first lawsuit filed in an attempt to lift the ban, Hornbeck Offshore argued that the government's issuing of a moratorium was "arbitrary, capricious, [and] an abuse of discretion."³⁶ Hornbeck sought an injunction to ban the enforcement of the moratorium because it was interfering with and detrimentally affecting the offshore oil industry's business.³⁷ A district court enjoined the enforcement of the ban, and on June 22, 2010, it lifted the moratorium.³⁸ Judge Feldman stated, "[T]he blanket moratorium, with no parameters, seems to assume that because one rig failed and although no one yet fully knows why, all companies and rigs drilling new wells over 500 feet also universally present an imminent danger."³⁹

The DOI appealed the injunction to the Fifth Circuit Court of Appeals.⁴⁰ The government requested to stay the decision to enjoin the ban, but a three-judge panel denied the request.⁴¹ In response to the Fifth Circuit's ruling, Representative Pete Olson from the 22nd District of Texas stated that such a "blanket moratorium" harms the economy and negatively impacts the energy supply.⁴² He "urge[d] the Administration to take this latest ruling to heart and forgo any additional attempts to decimate the deep water offshore drilling industry."⁴³

Obama issued a second moratorium, which was promptly challenged.⁴⁴ In a Policy Brief concerning judicial oversight, Kyle G. Bates described that "[b]y replacing the May 20th moratorium with a practically identical one, and then testifying in an open Senate hearing that the moratorium was still

35. See Livermore, *supra* note 20, at 618.

36. *Hornbeck Offshore Servs. LLC*, 696 F. Supp. 2d at 634; other companies that had an interest in offshore drilling joined Hornbeck in the lawsuit.

37. *Id.* at 632.

38. *Id.* at 639.

39. See Livermore, *supra* note 20, at 622; *Hornbeck Offshore Services LLC*, 696 F. Supp. 2d at 638; Savage, *supra* note 22.

40. *Hornbeck Offshore Services LLC v. Salazar*, 396 Fed. App'x 147 (5th Cir. 2010).

41. Tom Doggett & Jeremy Pelofsky, *Court Refuses Stay in Deepwater Drilling Case*, REUTERS (July 8, 2010, 7:54 AM), <https://perma.cc/6YMM-VW39>.

42. *Olson Applauds Fifth Circuit Ruling on Offshore Drilling Moratorium*, REPRESENTATIVE PETE OLSON (July 9, 2010), <https://perma.cc/96KQ-BGFC>.

43. *Id.*

44. See Latham, *supra* note 11.

in effect, Salazar expressed clear intent to frustrate the court's ability to meaningfully rule on the merits by allowing the injury to continue."⁴⁵ The second ban was lifted before its validity was decided.⁴⁶ Even though the outcome was a win for offshore drilling companies, the moratorium left severe damage in its wake. Arguably, two of the biggest offshore drilling companies at the time, Seahawk Drilling and ATP Oil & Gas, suffered the worst damage.⁴⁷

IV. THE LASTING EFFECTS OF THE MORATORIUM ON OFFSHORE OIL COMPANIES: SEAHAWK DRILLING AND ATP OIL & GAS

"Pursuant to the Bankruptcy Code (specifically including, but not limited to, 11 U.S.C. § 362), a debtor is afforded certain protection against its creditors."⁴⁸ Seahawk Drilling and ATP Oil & Gas, two Houston-based companies, filed for protection against their creditors, both blaming the moratorium for their bankruptcies.⁴⁹ Seahawk Drilling was the first offshore drilling company to file for Chapter 11 bankruptcy.⁵⁰ The Minerals Management Service (MMS) found that the moratorium would, in fact, last longer than six months, which would be injurious to the industry since it is an industry that relies on equipment and leases that are

45. Kyle G. Bates, *Uncharted Waters: How Hornbeck Offshore Services, LLC v. Salazar Highlights Core Problems with Judicial Oversight of Agency Behavior*, 5 LEGIS. & POL'Y BRIEF 173, 186 (2013).

46. See Latham, *supra* note 11.

47. See *Seahawk Drilling Seeks Bankruptcy, To Sell Assets*, *supra* note 13; Christopher Helman, *As Oil Company Files for Bankruptcy, CEO Blames Obama*, FORBES (Aug. 18, 2012, 9:43 AM), <https://perma.cc/2D9F-V33W>.

48. *In re ATP Oil & Gas Corporation, Case No. 12-36187*, KURTMAN CARSON CONSULTANTS, <https://perma.cc/E6AN-TWQZ> (last visited Jan. 12, 2018).

49. See *Seahawk Drilling Seeks Bankruptcy, To Sell Assets*, *supra* note 13; Helman, *supra* note 47; Spencer R. Burrows, *An Oil Spill and Exceptions to the Mootness Doctrine: Hornbeck v. Salazar Erroneously Decided?*, 18 HASTINGS W.-NW. J. ENV'T'L L. & POL'Y 407, 424 (2012) (explaining how "the collateral consequences of the first moratorium extend not only to the plaintiff drilling companies, but also to all members of the public, both directly and indirectly affected").

50. See Carey, *supra* note 24.

only useful for a limited amount of time.⁵¹ The shortage of drilling permits led to ATP's loss of business.⁵²

Former Seahawk CEO Randy Stilley stated, "The decision by regulators to arbitrarily construct unnecessary barriers to obtaining permits they had traditionally authorized has had an adverse impact not only on Seahawk, but on the sector as a whole."⁵³ After filing for bankruptcy protection, Seahawk sold nearly all of its assets to Hercules Offshore, Inc. for \$105 million.⁵⁴ Because of the massive asset sale to Hercules, Seahawk continued to serve its customers and function without interruption.⁵⁵

ATP resumed drilling in the Gulf of Mexico in the spring of 2012, but it lost so much money that it could not recover during the interim between the spill and the time in which it could begin to drill again.⁵⁶ Paul Bulmahn, founder and chairman of ATP, blamed the Obama Administration's "illegal ban" for his company's implosion.⁵⁷ Because of the ban on drilling, money stopped coming in, but ATP still had all of its expenses to pay, such as rig contracts and interest payments.⁵⁸ ATP's net loss in 2010 was \$349 million.⁵⁹ In 2012, ATP had \$3.64 billion in assets and \$3.49 billion in liabilities.⁶⁰ Since ATP had a heavy rig concentration in the Gulf of Mexico, the impact of the moratorium was devastating.⁶¹

51. Edward W. Thrasher, *Cleaning Up the Muck: A Takings Analysis of the Moratorium on Deepwater Drilling Following the BP Oil Spill*, 77 BROOK. L. REV. 1285, 1295 (2012).

52. See Carey, *supra* note 24.

53. *Seahawk Drilling Announces Sale of Assets to Hercules Offshore*, PR NEWswire (Feb. 11, 2011), <https://perma.cc/KKW6-H26N>.

54. *Id.*

55. *Id.*; Stilley, *supra* note 23 (explaining that Hercules was able to stay in business due to income from operations outside of the Gulf of Mexico).

56. Marie Baudette & Stephanie Gleason, *Drilling Moratorium Leads ATP to Chapter 11*, GCAPTAIN MARITIME & OFFSHORE NEWS (Aug. 18, 2012), <https://perma.cc/94SB-W8TF>.

57. See Helman, *supra* note 47; see also *In re ATP Oil & Gas Corp.*, Case No. 12-36187 (Isgur), No. 440 (Bankr. S.D. Tex. Sept. 20, 2012); see also *ATP Oil & Gas Corp. v. The United States*, Fed. Cl. 12-379C (2013). Bulmahn (ATP) brought suit against the United States seeking \$68 million in damages for the moratorium for putting a halt to deepwater drilling for nearly a year and damaging his company.

58. See Helman, *supra* note 47.

59. *Id.*

60. See Baudette & Gleason, *supra* note 56.

61. *Id.*

On June 14, 2012, ATP brought a suit against the United States in the U.S. Court of Federal Claims.⁶² ATP's claims arose from contracts with the U.S., as it acted through the DOI, MMS, Bureau of Ocean Energy Management (BOEMRE), Salazar, and Michael Bromwich, the former Director of BOEMRE.⁶³ ATP alleged that when the DOI suspended all offshore drilling activities, it breached the active oil and gas leases that the DOI had previously issued to ATP.⁶⁴ The complaint alleged that ATP relied on the leases, and thereby suffered significant damages (in excess of \$68 million), including the termination of rig contracts, increased costs, and delayed production, as a direct result of the breach.⁶⁵

On August 17, 2012, ATP also filed for Chapter 11 bankruptcy protection.⁶⁶ Prior to the ban, ATP spent \$800 million on a Gulf of Mexico production platform, which was ready to begin production in 2010, but the ban unfortunately forced ATP to stop its project.⁶⁷ Still, after the ban was lifted, ATP was unable to produce oil from its six wells in the Gulf of Mexico.⁶⁸ The exploitation of those wells would have greatly increased ATP's shareholder value and income and would have prevented ATP from filing for bankruptcy.⁶⁹ In an official statement, the company noted, "In addition, these incremental cash flows would have mitigated or prevented the need to enter into many of the financings ATP has closed since the imposition of the moratoria—financings that require relatively high rates of return and monthly payments."⁷⁰

62. ATP Oil & Gas v. United States, 2012 Ct. Fed. Cl. No. 12-379C.

63. *Id.*

64. *Id.*; 28 U.S.C. § 1491(a)(1) (The subject matter jurisdiction is pursuant to 28 U.S.C. § 1491(a)(1), which provides:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.)

65. ATP Oil & Gas, 2012 Ct. Fed. Cl. No. 12-379C.

66. See Helman, *supra* note 47.

67. *Id.*

68. See ATP Files for Bankruptcy. *Blames Drilling Moratorium (USA)*, *supra* note 13 (explaining that ATP had to file for bankruptcy because of "the imposition beginning in May 2010 of the moratoria on drilling and related activities in the Gulf of Mexico"); Baudette & Gleason, *supra* note 56.

69. See ATP Files for Bankruptcy. *Blames Drilling Moratorium (USA)*, *supra* note 13.

70. *Id.*

During the six months the moratorium was in effect, significant changes were made to the offshore drilling industry. The following section provides an overview of the status of the offshore drilling industry for the rest of Obama's tenure, and how it might have been different had the oil spill at Deepwater Horizon never occurred.

V. OFFSHORE DRILLING AFTER DEEPWATER HORIZON

There are obvious concerns about whether offshore oil can be procured in a manner that is safe for the environment. The moratorium that was enacted as an emergency response to one of the worst oil spills in the history of drilling has proven to be extremely controversial.⁷¹ Further, there are no laws in place to stop the government from implementing additional bans on the offshore drilling industry, as well as on other industries, in the future.⁷² The oil spill was a horrible accident, environmentally and economically, but the implementation of a six-month moratorium was not fruitful. In the months that followed the spill, President Obama cited concerns about future oil spills in the Gulf of Mexico and used the opportunity to publicly scold BP, but in effect, the entire offshore drilling industry, as well as the American economy, was harmed.⁷³

The industry has evolved since the spill, but the moratorium itself had little effect on improving industry practices and is viewed by some critics today as more of a political move by the Obama administration.⁷⁴ In her article, *A New Horizon?: The Need for Improved Regulation of Deepwater Drilling*, Lauren Hunt Brogdon adds, "Unfortunately, appropriately protective regulations directed at the oil industry are usually only implemented after a high-profile accident inflicts catastrophic and

71. Erik Milito, *Offshore Drilling Is Safer*, FORBES (Apr. 25, 2014, 1:23 PM), <https://perma.cc/777J-WD8S>; Savage, *supra* note 22.

72. See generally Kathryn A. Watts, *Regulatory Moratoria*, 61 DUKE L.J. 1883 (2012) (explaining that issuing moratoria is a tool Presidents have in their presidential toolbox).

73. Jeff Mason, *Obama to Keep Drilling Moratorium for 6 Months-aide*, REUTERS (May 27, 2010 7:59 AM), <https://perma.cc/HT4K-E4L5>; Bratspies, *supra* note 1 (explaining how "[a]ll of the major oil companies have a stake in the deep waters of the Gulf of Mexico"); Brogdon, *supra* note 4, at 297-98 (explaining how, ironically, just weeks before the spill, Obama "announced plans to expand oil and natural gas exploratory efforts in the Atlantic Ocean and eastern Gulf of Mexico").

74. Interview with Russell Gold, Energy Reporter, Wall Street Journal, in Lubbock, Tex. (Sept. 23, 2014).

irreparable harm to human health, the environment, or the nation's economy."⁷⁵ Changes have been made since the spill, but these modifications could have all been made with or without the moratorium.

A. The Spill Called into Question Longstanding MMS Shortcomings

In the United States, both the Coast Guard and the DOI monitor offshore drilling.⁷⁶ Prior to the spill, the MMS—which polices the safety of offshore rigs—shared an office with the DOI's oil leasing program.⁷⁷ This situation created the potential for conflict.⁷⁸ While the MMS and the DOI were working together, the MMS wanted more regulation and the DOI's oil leasing program wanted less regulation.⁷⁹ "Inspectors were routinely treated to golf tournaments, hunting trips, fishing expeditions, sporting tickets and other expensive 'perks' by the oil companies MMS was supposed to be regulating."⁸⁰ MMS had the dual task to both regulate and promote offshore drilling.⁸¹ After the spill, Obama divided the MMS into two divisions but kept Secretary Salazar in charge of both.⁸²

A failing blowout preventer caused the Deepwater Horizon spill.⁸³ Not surprisingly, the MMS had no "established minimum capabilities for blowout preventers or testing protocols."⁸⁴ Without fear of government

75. See Brogdon, *supra* note 4.

76. See Osofsky, *supra* note 5, at 1088.

77. Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209, 222 (2012); READ, *supra* note 10, at 209 (explaining how MMS was the only agency in charge of inspecting and overseeing drilling activities in the Gulf of Mexico).

78. See Steinzor, *supra* note 77.

79. *Id.*

80. See Bratspies, *supra* note 1, at 53.

81. *Id.* at 26-27.

82. See Steinzor, *supra* note 77 (On October 1, 2011, the MMS was divided into the Bureau of Safety and Environmental Enforcement (BSEE) and the Bureau of Ocean Energy Management (BOEM).); BUREAU OF OCEAN ENERGY MANAGEMENT, <https://perma.cc/6ZFA-PZL7> (last visited Jan. 15, 2018); Bratspies, *supra* note 1 (Before the division, the MMS had been "responsible for supervising all exploration and extraction of gas and mineral resources on federal lands, including offshore drilling in the Gulf of Mexico.").

83. Bratspies, *supra* note 1, at 32.

84. *Id.*; READ, *supra* note 10, at 213 ("Various people have called into question whether this lack of oversight was in deference to expertise, due to incompetence or a too-cozy relationship between regulators and Big Oil, or the product of outright corruption of the regulatory process.").

sanctions, there was little incentive for companies to spend money to develop absolutely safe technologies.⁸⁵ Generally, the oil industry would rather invest in new extraction technologies than in safety, especially if it is not being forced to invest in safety.⁸⁶

Another key problem with the way the MMS oversaw potential leases was that after receiving a request for a drilling permit, the MMS was on a strict deadline, to the extent that it was required to determine whether a permit would be awarded within thirty days of the request date.⁸⁷ “The agency is forced by this artificially short deadline to make critical decisions on the basis of more-generic documents prepared for earlier stages of the leasing process, rather than on site-specific information prepared specifically with regard to the particular wells under consideration.”⁸⁸ It became well-known to lessees in the industry that the MMS did not have an adequate amount of time to conduct a thorough investigation into the environmental impacts should the proposed rig leak.⁸⁹

There were major structural issues with the way offshore drilling was being regulated by the government.⁹⁰ A lack of regulation can easily lead to environmentally risky behavior on the drilling front.⁹¹ Secretary Salazar thought that the Deepwater Horizon spill illuminated the need to evaluate whether safe drilling practices were being developed in order to deal with the unique challenges deepwater drilling poses.⁹² To that end, Salazar created a Safety Oversight Board⁹³ which evaluated the effectiveness of the BOEMRE and found there were not enough BOEMRE engineers to review all of the Gulf of Mexico permit applications that were routinely being filed.⁹⁴ There were only fifty-five inspectors to cover the roughly 3,000 offshore platforms subject to inspection in the gulf.⁹⁵ Further, there was no formal system of regulations or even a handbook for the inspectors

85. See Bratspies, *supra* note 1, at 43.

86. *Id.* at 55.

87. *Id.* at 42.

88. *Id.*

89. *Id.*

90. *Id.* at 27.

91. *Id.*

92. See Latham, *supra* note 11, at 351.

93. *Id.* at 359.

94. *Id.* at 360; READ, *supra* note 10, at 209 (explaining that MMS changed its name to BOEMRE two months after the deepwater accident; BOEMRE is in charge of issuing industry-wide drilling safety obligations).

95. See Latham, *supra* note 11, at 361.

of the platforms.⁹⁶ BOEMRE attempted to implement industry-wide safety regulations such as “a requirement to certify compliance with existing regulations, signed by the operator’s chief executive officer; submission of detailed information about blowout preventers in use; retention of blowout preventer records; [and] third-party verification of blowout preventer fitness.”⁹⁷ Although the efforts of BOEMRE were a step in the right direction, BOEMRE initially had problems carrying out adequate solutions while dealing with restructuring issues of its own.⁹⁸

Salazar also established the Ocean Energy Safety Advisory Committee as an advisory committee made up of engineering scientific experts who can provide guidance on improving the safety of offshore drilling and response to spills.⁹⁹ Also, the Bureau of Safety and Environmental Enforcement (BSEE) was formed after the MMS was reorganized post-spill.¹⁰⁰ The Director of the BSEE, Brian Salerno, stated that as of spring 2014, “25 of the 33 BP Deepwater Horizon Commission recommendations have been acted upon or are in the process of being addressed.”¹⁰¹

B. A Failure to Pass New Legislation

The DOI has taken many steps to improve oversight of the offshore oil industry, but until the legislature passes new regulations, these steps are moot.¹⁰² During the Obama administration, Congress proposed, but did not pass, measures to ensure that an event like the Deepwater Horizon oil spill never happens again.¹⁰³ California Representative George Miller

96. *Id.* at 360.

97. *Id.* at 353.

98. *Id.* at 353-54 (explaining how “[t]he same judge who enjoined the first moratorium found that the new drilling safety obligations issued by the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) were invalid under the Administrative Procedure Act”).

99. *See* Osofsky, *supra* note 5, at 1089.

100. *See* Milito, *supra* note 71.

101. *Id.*

102. *See* Bratspies, *supra* note 1, at 60.

103. *See* Powers, *supra* note 6; *see also* Bryan Walsh, *The BP Oil Spill, One Year On: Forgetting the Lessons of Drilling in the Gulf*, TIME (Apr. 20, 2011), <http://content.time.com/time/health/article/0,8599,2066233,00.html> (explaining that the biggest hurdle in making government changes in the area of oil and gas is Congress, “which has largely failed to enact any legislation addressing the problem”); *see also* Shiva Polefka, *Three Years After Deepwater Horizon, Congress Has Failed To Improve Drilling Safety*, THINKPROGRESS (Apr. 20,

drafted legislation to prohibit BP from drilling for oil “in the outer continental shelf” for five to seven years.¹⁰⁴ Miller, the former U.S. House Natural Resources Committee chairman, noted BP’s “pattern of ‘dangerous, lethal behavior’ in its refineries, pipelines, and drilling rigs in the United States.”¹⁰⁵ Miller thinks BP’s offshore drilling operations should be stopped in an effort to protect the economy, the health of workers, and America’s coastlines.¹⁰⁶ This legislation was in line with the recommendation provided by the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling,¹⁰⁷ but unfortunately, this Offshore Worker Whistleblower Protection Act did not make it through the Senate.¹⁰⁸ The latest action on it was July 8, 2013, when it was referred to the Subcommittee on Workforce Protections.¹⁰⁹ Unfortunately, the bill’s text was later focused on protections for whistleblowing oil workers and had moved away from anything concerning safety regulations.¹¹⁰

In another congressional effort, the House approved deepwater drilling reforms, but the Republicans, who also threatened to filibuster these reforms in the Senate, voted them down.¹¹¹ There were initially seventy-five bills introduced in Congress after the spill, but none of them focused on

2013, 6:54 PM), <https://perma.cc/NV4U-ZK59> (showing how even three years later, Congress still has not passed any legislation pertaining to the accident).

104. Brad Johnson, *George Miller: Ban BP From US Drilling*, THINKPROGRESS (July 2, 2010, 10:30 PM), <https://perma.cc/88HZ-RJE3>.

105. *Id.*

106. *See id.*

107. *Id.*; Polefka, *supra* note 103 (Obama selected a panel of experts to make up the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling. The Commission’s final report “revealed the irresponsible practices of BP and its contractors, uncovered a lack of federal oversight, and provided a comprehensive set of policy reforms that would make the offshore energy industry safer.”); Brogdon, *supra* note 4, at 300 (The Commission’s report is probably the most comprehensive report the executive branch has ever issued concerning both the causes and consequences of Deepwater Horizon.); Bratspies, *supra* note 1, at 10 (The Report identified the poor choices BP made, days before the spill, and the day of the spill.). Brogdon, *supra* note 4, at 302 (explaining that the overall cause of the blowout was “failure to contain hydrocarbon pressures in the well”); *id.* at 304 (The Commission also determined that “‘root causes’ of the Deepwater Horizon spill were ‘overarching management failures by industry’ and ‘regulatory failures’ by government agencies.”).

108. *See* Johnson, *supra* note 104.

109. Offshore Oil and Gas Worker Whistleblower Protection Act of 2013, H.R. 1649, 113th Cong. (1st Sess. 2013).

110. *Id.*

111. *See* Johnson, *supra* note 104.

technical requirements.¹¹² Instead, they pertained to liability for damages to humans, economies, and the environment.¹¹³ “While a public call for new legislation and corresponding legislative proposals immediately followed the Deepwater Horizon spill, no law directly addressing prevention of similar disasters was adopted.”¹¹⁴ Salazar recognized that the Deepwater Horizon oil spill underscored the need to reassess whether practices that were implemented for drilling operations in the past needed to be improved to account for different challenges that deepwater drilling poses.¹¹⁵ From the non-governmental side, the oil and gas industry began working on a comprehensive offshore operations review even before the Gulf of Mexico cleanup had been completed.¹¹⁶ Industry experts worked with regulators from the DOI to develop new recommendations for standards in the field.¹¹⁷

Erik Milito is a director of upstream and industry operations at the American Petroleum Institute.¹¹⁸ He stated that one of the most important issues that needed to be addressed was how to more quickly respond to an oil leak.¹¹⁹ Containment companies that were established after the spill have new technologies for handling spills at the wellhead.¹²⁰ After the spill, more than 100 of the American Petroleum Institute’s industry standards have been made into federal regulations.¹²¹ Further, the oil and gas industry created the Center for Offshore Safety (COS).¹²² The COS’s mission is to “work with independent third-party auditors and government regulators to create an industry-wide culture of continuous safety improvement.”¹²³ It is unclear whether all of these changes would have occurred if it were not for the moratorium, but it seems more likely that they were in direct response to the spill and not in response to the moratorium.

112. See Brogdon, *supra* note 4, at 311.

113. *Id.*

114. *Id.* at 310.

115. See Larsen, *supra* note 7, at 151.

116. See Milito, *supra* note 71.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

VI. WHY MORATORIA?

In *Youngstown Sheet & Tube Co. v. Sawyer*, the United States Supreme Court held that only Congress, and not the president, had the power to take over steel production because steel production is directly related to commerce.¹²⁴ It is the most important case regarding executive power limits.¹²⁵ In 1952, President Truman signed Executive Order 10,340, which gave the federal government control of eighty percent of the steel mills.¹²⁶ The order was an attempt to prevent the nation's steelworkers from striking because they wanted an increase in wages, which could potentially morph into a national steelworker strike.¹²⁷ By placing the steel mills under federal control, the President was also trying to ensure that there would be plenty of steel available for the war.¹²⁸

Due to the national emergency at the time, President Truman felt as though the executive order was valid, but the Court disagreed; even such a state of emergency does not authorize presidents to sign such orders.¹²⁹ *Youngstown* presents a slightly different issue than the offshore drilling moratorium because it concerned an executive order; the offshore drilling moratorium was an example of President Obama entrusting an agency head, Salazar, with the decision to put a halt to an entire industry with a moratorium, which President Obama then approved.¹³⁰ Presidents always oversee how agencies perform their functions.¹³¹ Even though an executive order is administratively different than an agency-requested moratorium, the intended result of the executive order in *Youngstown* was similar to the outcome of the Deepwater moratorium, and the respective courts struck down both the executive order and the moratorium.

Moratoria have been used in many contexts.¹³² They are generally “used by administrative agencies as a common means to ‘preserve the status quo while formulating a more permanent . . . strategy.’”¹³³ A

124. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

125. John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 382 (2010).

126. *Id.*

127. *Id.* at 382-83.

128. *Id.* at 383.

129. *Id.*

130. *Id.* at 382; U.S. DEP'T OF THE INTERIOR, *supra* note 21; Straub, *supra* note 21.

131. *See* Duncan, *supra* note 125, at 336.

132. *See* Thrasher, *supra* note 51, at 1312 (explaining that moratoria have been used for the death penalty, the killing of marine life, and oil and gas).

133. *Id.*

moratorium was imposed in 2008 in an effort to improve the economy when many believed there was a national foreclosure crisis.¹³⁴ The stock market fell by more than fifty percent, and because of the mortgage foreclosures, the housing market nearly imploded.¹³⁵ After the Great Depression, foreclosure moratoria were enacted by either making the foreclosure process more complicated with the addition of steps or by forcing a judicial stay of foreclosure proceedings.¹³⁶ The Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation were companies sponsored by the government in an attempt to stabilize mortgage lending in the U.S.¹³⁷ In 2008, after multiple accounting scandals, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation were placed under the government's control and were subjected to moratoria.¹³⁸ The hope was that if there were a moratorium, there would be fewer foreclosures.¹³⁹ Other major lending companies followed in suit with their own moratoria, which essentially led to the effect of a federal moratorium on lending.¹⁴⁰

A second example of an emergency moratorium occurred on the heels of the 2005 hurricane season.¹⁴¹ The McCarran-Ferguson Act empowers states to adopt emergency moratoriums.¹⁴² Various insurance departments in Alabama, Mississippi, Florida, and Louisiana implemented emergency regulations and moratorium statutes in an attempt to prevent market withdrawals.¹⁴³ If any large insurance company were to pull out of the area, then the homeowner insurance marketplace would suffer locally.¹⁴⁴ "By preventing market withdrawal, these states may potentially jeopardize the continued solvency and viability of regional and national insurance

134. Benjamin A. Bauer, *We Don't Live Here Anymore: A Critical Analysis of Government Responses to the Foreclosure Crisis*, 37 N. KY. L. REV. 121, 122 (2010).

135. *Id.*

136. *Id.* at 123.

137. *Id.*

138. *Id.* at 124.

139. *Id.* at 152 (explaining that despite moratoria efforts, the "foreclosure tsunami" continued partly due to a lack of lenders who could not respond to the modification requests).

140. *Id.* at 124.

141. Steven Plitt & Daniel Maldonado, *When Constitutional Challenges to State Cancellation Moratoriums Enacted After Catastrophic Hurricanes Fail: A Call for a New Federal Insurance Program*, 27 BYU J. PUB. L. 41, 43 (2012).

142. *Id.* at 61.

143. *Id.* at 42.

144. *Id.*

companies, which may affect citizens of non-hurricane-affected states, and their respective state guaranty funds.”¹⁴⁵

Hurricane Andrew led to the bankruptcy of multiple insurance companies due to the policyholders’ claims exceeding the reinsurance that had been set aside for claims.¹⁴⁶ These bankruptcies gave rise to insurance companies wanting to withdraw from southern Florida, but the Florida Department of Insurance issued an emergency moratorium on cancelling or not renewing homeowner policies for people residing in coastal counties.¹⁴⁷ This state-imposed effort attempted to stabilize the marketplace for residential homeowner’s insurance after Hurricane Andrew.¹⁴⁸

Another moratorium was implemented during President George H.W. Bush’s presidency.¹⁴⁹ A ten-year moratorium, through an Executive Order, was passed in order to prevent the exploration and development of oil and natural gas in the Outer Continental Shelf.¹⁵⁰ President Clinton extended this moratorium, which was in place as an attempt to protect the coasts, for two more years.¹⁵¹ Some federal lands, like national parks or wilderness areas, have been set aside through congressional or presidential designations instead of through moratoria, but the effect is the same.¹⁵² “Moratoria imposed by Congress and the executive have at different times provided an important part of the legal backdrop to offshore oil development.”¹⁵³ These are examples of moratoria that had finite goals in mind, but the implementation of the moratorium after Deepwater was not under the guise of the improvement of anything. The section that follows contains an analysis of why the government should have only implemented a moratorium on BP, rather than on the entire offshore drilling industry.

145. *Id.*

146. *Id.* at 48-49.

147. *Id.* at 49.

148. *Id.* at 49-50.

149. Kim Harb, *The Legal and Policy Dilemma of Offshore Oil and Gas Development*, 19 NAT. RESOURCES & ENV’T. 23, 23 (2004).

150. *Id.*

151. *Id.*

152. *Id.* at 26-27.

153. *See* Livermore, *supra* note 20, at 615.

VII. A CHANGE IN THE WAY MORATORIA ARE USED

A. If There Had to be a Moratorium, Perhaps it Should Have Only Applied to BP

After the Deepwater spill, BP's history of safety breaches was called into question.¹⁵⁴ Historically, BP's safety record is detestable, having been the cause of multiple high-profile incidents.¹⁵⁵ BP has invested more money than any other company into drilling in the Gulf of Mexico, but of all the oil companies, it has the worst safety record.¹⁵⁶ BP currently holds more leases in the Gulf of Mexico than any other company.¹⁵⁷

In the past, BP caused many disasters.¹⁵⁸ In 1988, 167 people died when the Piper Alpha rig exploded.¹⁵⁹ In 1999, Amoco, a corporation which had a nearly equally bad safety record, merged with BP.¹⁶⁰ Obviously, when BP absorbed Amoco, it took on the same problems Amoco had been dealing with, while still facing all of the issues BP already had.¹⁶¹ In 2001, eleven workers were killed on a platform off the coast of Brazil.¹⁶² Four years later, BP's Thunder Horse rig capsized in the Gulf.¹⁶³ Before selling it, BP's biggest refinery was in Texas City, Texas.¹⁶⁴ When it exploded in 2005, fifteen workers died and more than 180 were injured.¹⁶⁵ BP had committed over 300 safety violations and was fined \$21.3 million.¹⁶⁶ Investigators discovered that the accident could have been avoided with routine maintenance, but BP had been trying to

154. See READ, *supra* note 10, at 91.

155. See Bratspies, *supra* note 1, at 54.

156. *Id.* at 13, 22.

157. *Id.* at 13.

158. See *Deepwater Drilling*, *supra* note 10.

159. Terry Macalister, *Oil Industry Defends its Safety Record*, THE GUARDIAN (Dec. 12, 2005, 7:53PM), <https://perma.cc/H8UX-2Y6E>.

160. See *id.*

161. See *id.*

162. *Id.*

163. Bratspies, *supra* note 1, at 14.

164. See *id.* at 22.

165. *Id.*

166. *Id.*

reduce costs and cut corners to the detriment of the company and the health of its employees.¹⁶⁷

It is easy to point fingers at the regulators for being ill-prepared and ill-equipped to handle such an important and technologically complicated task, but the training given to rig operators must also be considered.¹⁶⁸ Offshore employees train on simulators, but they are insufficiently prepared for emergencies, considering all of the different systems aboard oil rigs and the different ways emergencies can occur.¹⁶⁹ After the Texas City incident, BP instituted changes in order to improve the safety shortcomings that were part and parcel of the blast, such as making a single common management system that defined the safety rules and safety training for all refineries.¹⁷⁰

Later in 2009, BP was fined \$87.7 million for committing 709 various violations in Texas City.¹⁷¹ BP was also forced to pay a \$20 million criminal fine because of a poorly maintained Alaskan pipeline, which led to 300,000 gallons of crude oil spilling into Prudhoe Bay.¹⁷² This, too, was followed by a promise from BP to improve its ways, yet BP still lags behind other oil companies in safety requirements.¹⁷³ A BP refinery in Toledo, Ohio was found to have made willful safety violations and fined \$3 million.¹⁷⁴ In total, BP committed 862 Occupational Safety and Health Association violations between 2007 and 2010, which made up ninety-seven percent of the total violations committed by the entire oil and gas industry in that time period.¹⁷⁵ The commonality that existed after the government investigated each BP incident was a poor safety culture.¹⁷⁶ BP is the biggest oil and gas producer in the nation, yet according to

167. Jan Mouawad, *For BP, A History of Spills and Safety Lapses*, N.Y. TIMES, May 8, 2010, http://www.nytimes.com/2010/05/09/business/09bp.html?pagewanted=all&_r=0.

168. See generally Brogdon, *supra* note 4, at 325-26 (explaining how critics spend much less time discussing the training of rig workers compared to the time spent complaining about the failures on the part of regulators).

169. *Id.* at 327.

170. See Mouawad, *supra* note 167.

171. See Bratspies, *supra* note 1, at 22.

172. *Id.* at 23.

173. See Mouawad, *supra* note 167.

174. *Id.*

175. See Bratspies, *supra* note 1, at 23.

176. *Id.* at 25.

RiskMetrics energy research, BP's environmental, safety, and health records are worse than many of the major oil companies' records.¹⁷⁷

There was no one single equipment, procedural, or human failure that gave rise to the Deepwater disaster.¹⁷⁸ Following the spill, the U.S. House Committee on Energy and Commerce found "BP repeatedly chose risky procedures in order to reduce costs and save time and made minimal efforts to contain the added risk."¹⁷⁹ Even in 2010, after the numerous problems BP had encountered with spills, BP essentially assumed that there was little risk of a spill, and MMS took that at face value.¹⁸⁰ Rebecca M. Bratspies believes that "MMS downplayed the risk of blowouts as negligible and easily addressed by modern technology."¹⁸¹ To be fair, before Deepwater Horizon, this understanding was simply the standard; Conoco, Chevron, Shell, and Exxon filled out their lease applications with similar assumptions.¹⁸² All major oil companies were unprepared to respond to major spills.¹⁸³ Even with the cleanup effort after the spill, BP used the same technology that had been deemed inadequate twenty years earlier during the cleanup of the Exxon Valdez spill.¹⁸⁴

One recommendation for how moratoria should be implemented in the future is that the government should only be able to implement a moratorium that applies solely to the tortfeasor. It is obvious from assessing the effects of Deepwater Horizon how detrimental a moratorium can be for an entire industry merely because of the mistakes of one company. In this particular case, BP was the sole tortfeasor, yet all the other offshore drilling companies suffered as a result of the six-month shut down, as well as the various economies that depended on offshore drilling.¹⁸⁵ Should the government make sweeping decisions because of

177. See Mouawad, *supra* note 167.

178. See READ, *supra* note 10, at 124.

179. *Id.* at 115, 125 (explaining how the committee found that the five contributing factors to the blowout were well design, centralizers, cement bond log, mud circulation, and lockdown sleeve, but BP's investigative taskforce discovered eight breaches of protocol).

180. See Bratspies, *supra* note 1, at 46.

181. *Id.* at 44.

182. *Id.* at 46-47.

183. *Id.* at 47.

184. *Id.* at 49.

185. See Marzulla, *supra* note 7 (BP has seen its fair share of lawsuits stemming from the spill. One of the most important lawsuits is the December 15, 2010 lawsuit the DOJ filed against BP alleging gross negligence); Baudette & Gleason, *supra* note 56 (explaining how "the moratorium adversely affected all companies involved in deepwater drilling in the Gulf of Mexico"); see Latham,

the actions of one company? As Judge Feldman noted, “If some drilling equipment parts are flawed, is it rational to say all are? Are all airplanes a danger because one was? All oil tankers like Exxon Valdez?”¹⁸⁶ Just because one company failed to follow correct protocol does not mean that all of the companies in the industry are likely to do the same. To avoid upsetting the economy in the future, the way moratoria are utilized and implemented should be scrutinized and altered, and holding the tortfeasor at fault by applying a moratorium only to the tortfeasor is one approach that could be adopted.

B. A Compelling Reason and a Specific Goal

A second recommendation concerning how and when moratoria should be issued is that the process of issuing a moratorium must be formalized. If the government refuses merely to put a halt to the operations of the company at fault for a disaster of this size, then there needs to be formalized rules concerning the underlying reasons behind a moratorium, as well as formalized rules concerning the length of time it can be effective. There are currently no rules or stipulations concerning the length of moratoria that the head of a government agency can request to be put into effect by the president; it is completely up to the president’s discretion.¹⁸⁷ In a system in which so many other governmental actions are subject to the checks and balances of other entities, this is strikingly odd. Further, courts have already held that making a decision like this under the guise of an emergency action will not be deemed legitimate.¹⁸⁸

Since there is currently no set length for moratoria, then there is nothing in place that could prevent heads of agencies in the future from implementing moratoria that last even longer than six months. There is hardly any precedent for how long a normal moratorium ought to last, so this fact, coupled with a complete lack of rules and hardly any oversight, is a recipe for disaster.¹⁸⁹ Legislation should be passed with a formal set of rules that must be followed if and when the head of a government agency recommends that a moratorium be issued. Two things that ought to be required are a compelling reason and a specific goal. Unless there is

supra note 11, at 364 (explaining how it is unclear whether BP has enough money to compensate all the entities for damages which resulted from the spill, and it is clear that it was negligence on BP’s part).

186. See Thrasher, *supra* note 51, at 1296.

187. See *supra* text accompanying note 130.

188. See *supra* text accompanying note 39; see *supra* Part VI.

189. See Thrasher, *supra* note 51, at 1312.

a compelling reason to issue one (and merely an emergency situation is not a compelling reason), with a stated specific goal, the government should refrain from issuing moratoria. Congress ought to provide agency heads with established rules concerning moratoria because currently there are none. Also, perhaps Congress could require that more people, besides the head of an agency and the president, be involved in the decision-making process to implement a moratorium.

C. Moratoria Should No Longer be Utilized to Temporarily Suspend the Actions of an Entire Industry

A third and final recommendation is that Congress should prevent the government from being able to issue moratoria altogether. This suggestion is simply that there should be no more industry-wide moratoria, possibly in any industry. The potential for economic chaos seems so much stronger than does the possibility of any improvement that could occur during a ban. Industry-wide improvements do not happen quickly; it is evident that essentially all of the offshore drilling improvements could have been made without a moratorium.¹⁹⁰ Opponents of this recommendation may view it as hamstringing the power of federal agencies, but it is obvious that the current way agencies utilize moratoria is ineffective. Supporters of the post-Deepwater moratorium argued it “was necessary because the government simply could not risk the possibility of another spill,” yet there had not been any similar Gulf of Mexico blowouts since 1969; there was little reason to believe that another spill would happen anytime soon after Deepwater.¹⁹¹ Salazar felt as though he had to act quickly, “but the broad and dramatic oil-drilling moratorium, and its subsequent detrimental impact on the oil industry in the Gulf, illustrates the dangerous potential of reactive government regulation that forces innocent parties to bear a burden more rightly placed on others.”¹⁹² Broad sweeping solutions such as moratoria can rarely take full account of all the externalities that might be created, which causes collateral damage to both the industry and the economy.¹⁹³

190. See *supra* text accompanying notes 74-75.

191. See Thrasher, *supra* note 51, at 1291, 1321.

192. *Id.* at 1289.

193. See Bauer, *supra* note 134, at 160.

CONCLUSION

There is a problem with how easily and loosely moratoria are implemented. This article proposes three recommendations that could be implemented through legislative action to ensure that entire industries do not suffer because of a poorly proposed industry-wide ban. Heads of U.S. federal agencies should be more mindful of harmful outcomes that could result because of a rash ban, which will likely be lifted anyway. To this end, there must be legislation in this area. These moratoria need only apply to the tortfeasor; there needs to be a compelling reason for the moratorium with stated end goals, or federal agencies should simply lose the power entirely to issue a moratorium. Any of these three options is superior to the current state of moratoria implementation.

Blanket moratoria “paint with too large of a brush.”¹⁹⁴ The government should be more intentional with its power to halt an entire industry. Shutting down an entire industry for six months is entirely too long, especially considering that multiple corporations were forced to file for bankruptcy as a result of the shutdown. Any mandatory pause placed on oil companies is not only bad for the oil companies, but more importantly, it is bad for the economy.¹⁹⁵ Whether one company or multiple companies are to blame for a catastrophic environmental breach, it is in the United States’ best interest for the government *not* to be able to shut down an entire industry for any period of time, while in the interim giving rise to bankruptcies and widespread economic hardship. The ability to implement moratoria is a powerful and potentially deleterious government function, and it should not be used to harm any industry, especially an industry that is so vital to the American economy.

194. *Id.* at 157.

195. *See, e.g.*, Tyler Priest, *Should the U.S. Expand Offshore Oil Drilling?*, WALL STREET J., Apr. 14, 2013, <https://www.wsj.com/articles/SB10001424127887324020504578398610851042612> (“Annual federal proceeds from offshore leases have ranged as high as \$18 billion in recent years, second only to income taxes as a revenue source.”).