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Offshore Drilling: Increase Access, Reduce the Risk, and Stop Hurting American Companies

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Abstract
Given the challenges still facing the U.S. economy, the government needs to move aside and let private industry do what private industry does best: create jobs and increase our oil supply to help lower the price at the pump. And yet the Obama Administration remains committed to strangling America's economic revival by doing everything in its power to prevent companies that obtain offshore leases from actually drilling and producing oil—a fact evidenced by a new lawsuit just filed in the U.S. Court of Federal Claims by an independent U.S. oil and gas company. Congress should act now to open access and reduce the onerous regulatory risk that characterizes U.S. offshore drilling policy. Such reform would provide companies the certainty they need to expand job creation and increase America's energy supply.

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Oil companies are not only eager to drill off America's coasts—they are enthusiastic about creating jobs and bringing more oil to the world (and the American) market, which, in turn, will help lower gas prices.

Indeed, for evidence of oil companies' appetite for economic growth, one need look no further than the Department of the Interior's recent $1.7 billion lease sale in the central Gulf of Mexico.

But while this sale was a positive development for American energy production, the Obama Administration is doing everything in its power to prevent companies that obtain offshore leases from actually drilling and producing oil—a fact evidenced by a new lawsuit recently filed in the U.S. Court of Federal Claims by an independent U.S. oil and gas company.

Preparing for Growth

By March 2010, ATP Oil & Gas Corporation had obtained oil leases and necessary permits to drill in the Gulf of Mexico. In fact, after installing state-of-the art drilling and processing equipment, ATP was poised to double its oil production.

This massive increase in production was made possible, in part, by

TALKING POINTS

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- The Obama Administration is doing everything in its power to prevent companies that obtain offshore leases from actually drilling and producing oil—a fact evidenced by a new lawsuit just filed in the U.S. Court of Federal Claims by an independent U.S. oil and gas company.
- Congress should act now to open access and reduce the onerous regulatory risk that characterizes U.S. offshore drilling policy.
- Such reform would provide companies the certainty they need to expand job creation and increase America's energy supply.

the ATP Titan—a platform in 4,000 feet of water in the Gulf of Mexico that was designed to allow ATP to safely drill deeper into already-penetrated oil reservoirs. The first, and only, deepwater platform built entirely in America by a U.S. labor force, the Titan was constructed over the course of three years, creating a number of much-needed jobs in the process. And while the Titan's price tag was steep—ATP secured $1.5 billion in financing from J.P. Morgan—the ability to safely and securely drill into already-penetrated oil reservoirs promised to produce a steady stream of oil and revenue for the company, thereby allowing ATP to pay back this enormous investment.

On April 20, 2010, however, America's offshore drilling industry was thrown in chaos when, while drilling an exploration well into an unknown reservoir, the BP-operated Deepwater Horizon rig exploded. This explosion occurred when BP was drilling a wildcat well with a dynamically positioned, semi-submersible rig, in formations never before explored—an operation that, according to ATP, is completely distinct from development drilling into already-penetrated reservoirs, a process where complete information is available about every aspect of the area being explored, from pressure gradients to rock properties.

But in the aftermath of the BP explosion, the Obama Administration arbitrarily ordered the entire deepwater industry to cease drilling, issuing two industry-wide moratoria on drilling activities and barring consideration of new permits. Even though ATP not only had no connection to the BP rig or any of the equipment being used there, but was proposing to drill in an entirely different area of the Gulf than where the BP disaster occurred, the Titan operation was shut down.

ATP's Litigation and the Cost to the American Economy

Development of offshore oil and gas takes years of operational and financial planning. As illustrated by ATP's Titan project, labor and equipment must be secured far in advance of actual drilling, and enormous investments are required before a single dollar is earned through production of oil and gas. While the government's moratorium curtailed ATP's ability to generate revenue, it did not reduce ATP's costs or expenses. In fact, for ATP—which had already borrowed $1.5 billion and spent years preparing to drill these deepwater wells and constructing the safety-redundant Titan platform—the nightmare had just begun: In addition to the expensive ATP Titan platform, the company was burdened with paying for two other drilling rigs idled by the government's arbitrary moratoria.

As a result of the government's actions, ATP filed suit in federal court. In *ATP Oil & Gas Corporation v. U. S.*, ATP alleges that the Interior Department:

> Improperly and illegally suspended all deepwater offshore drilling activities and imposed two illegal moratoria on the deepwater drilling permit application process and then unreasonably and unlawfully delayed the issuance of drilling permits after the lifting of the formal moratoria.

Essentially, ATP is asserting that the government breached its offshore leases with ATP by violating the Administrative Procedure Act in two ways: 1) by issuing overbroad moratoria; and 2) by manipulating seven experts from the National Academy of Engineering (NAE) to bolster a recommendation for the moratoria.

ATP's prospects for legal vindication appear strong: All seven of the NAE experts denied supporting moratoria recommendations and, in *Hornbeck Offshore Services v. Salazar*, a case addressing the government's first six-month moratorium, the court concluded that "a White House official had changed" the report on which the moratorium was based "which created the misleading appearance of scientific peer review." ATP also says the government "breached the implied covenant of good faith and fair dealing" under the leases that ATP paid the government when it prevented ATP from exploring, drilling, and producing oil.

Furthermore, in *Hornbeck Offshore Services*, a federal district court concluded that the government's first six-month moratorium was "arbitrary and capricious" and, therefore, illegal, and found the government in contempt for issuing a second moratorium after the court had ordered the first one dissolved.[1] As a result of the Administration's defiant behavior, taxpayers ended up paying more than half a million dollars in attorneys' fees awarded to the plaintiffs.

In another case involving ATP and other oil industry vendors, the same federal court in Louisiana also found that the Interior Department acted unlawfully by unreasonably delaying the processing of

1. *Hornbeck Offshore Services v Salazar*, Case No. 10-1663 (E.D. LA. February 2, 2011).

drilling permits in *Ensco Offshore Company v. Salazar*.[2] The court held that the Outer Continental Shelf Lands Act (OCSLA), in addition to the Administrative Procedure Act, "establishes a nondiscretionary duty on the Department of the Interior to act on OCSLA drilling permit applications within a reasonable time." Yet, despite this duty, the court determined that the Obama Administration had "unreasonably delayed" action on nine different permit applications from the various companies that had sued Ken Salazar, the Secretary of the Department of the Interior.[3]

An Assault On Growth

ATP's lawsuit provides a revealing glimpse into the capital-intensive oil and gas industry where unfair and illegal actions by a government agency—or a Cabinet official like Ken Salazar—can cost companies (and the U.S. economy) enormous sums of money. Drilling a well in water deeper than 500 feet typically costs over $75 million and a deepwater drilling rig can cost in excess of $500,000 per day to operate. It takes an average of eight years to progress from initial discovery to the production stage; the end cost of developing and producing an offshore oil field over its productive life can reach into the billions of dollars.

Since the government imposed the investment-destroying moratoria on the deepwater industry, ATP has continued its struggle to reestablish its developments. ATP had six deepwater wells derailed by the moratorium and more than $1.2 billion in potential revenue was thwarted without reason by the Obama Administration. While the revenue spigot was turned off by President Obama's executive fiat, the flow of costs and expenses remained wide open not just for ATP, but for many other businesses that depended on the offshore development of the Gulf of Mexico.

In an attempt to remain economically viable, ATP has secured licenses in the Levant Basin in the Mediterranean Sea. Rather than creating U.S. jobs while developing oil in American waters for the American market, ATP, as a result of the Obama Administration's arbitrary regulatory policies, was forced to move its operations overseas.

ATP's litigation is an attempt to hold the Administration accountable for its arbitrary and unreasonable actions, but the suit is also a distraction from what should be the main objective of the company: bringing more oil and gas to the market to lower energy prices and creating jobs for the American economy. Even in the most rosy of economic times, the government should be seeking to assist companies like ATP; given the current economic climate and the lack of any substantive environmental concerns, such assistance should be automatic.

The State of the Gulf and Regulatory Uncertainty

Yet, even apart from ATP's lawsuit, Gulf oil production and the regional economy remain fragile. The Gulf of Mexico accounts for nearly 30 percent of America's oil production and while production fell in 2011 compared to 2010,[4] there has been some modest improvement in Gulf production. The IHS-Petrodata Weekly Rig Count that tracks the usage of offshore platform drilling rigs indicates that the fleet utilization rate for the Gulf of Mexico was 66 percent, up from 55 percent a year ago and 48 percent in January 2011.[5] Still, these rates are dramatically lower than those in other areas of the world. For example, South America's fleet utilization rate is 81 percent; Europe/Mediterranean Sea, 91 percent; West Africa, 84 percent; Middle East, 85 percent; and Asia/Australia, 83 percent.[6]

One of the primary culprits behind this continued lag in Gulf production is obvious: the regulatory risk companies incur when attempting to explore and drill. As demonstrated by the ATP lawsuit, the glacial pace at which the Obama Administration considers permits is unnecessarily delaying drilling projects. Although federal law requires the Department of the Interior to accept permit applications and review them promptly in a given time frame,[7] the agency routinely takes longer than necessary with no

2. *Ensco Offshore Co. v. Salazar*, Case No. 10-1941 (E.D. LA. May 20, 2011).
3. Ibid.
4. Energy Information Administration, "Federal Offshore--Gulf of Mexico Field Production of Crude Oil," June 28, 2012, http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=mcrfp3fm1&f=a (accessed August 3, 2012).
5. IHS-Petrodata Weekly Rig Count, July 27, 2012,http://www.ihs.com/products/oil-gas-information/drilling-data/weekly-rig-count.aspx (accessed August 3, 2012).
6. Ibid.
7. Outer Continental Shelf Lands Act of 1953, 43 U.S.C. 1331–1356, as amended.

repercussions. The time to obtain approval for an exploration and drilling plan increased significantly after BP's Macondo well blowout—a delay that has made it extremely difficult for companies to plan for projects.[8]

No New Access in the New OCS Plan

The recent lease sale in the Central Gulf of Mexico was a welcoming sign (especially since the Administration delayed part of the sale in 2010), but the new five-year leasing plan for 2012–2017 is extremely disappointing. The Administration failed to unlock the Atlantic and Pacific coasts, as well as the Eastern Gulf of Mexico and areas off Alaska's coast. As a result, a meager 15 percent of America's territorial waters are available for oil and gas exploration. The Minerals Management Service estimates that 101 billion barrels of oil and 480 trillion cubic feet of natural gas of proven reserves and undiscovered resources are awaiting exploration in the Outer Continental Shelf (OCS). Opening these areas would generate hundreds of thousands of new jobs, generate hundreds of billions of dollars in government revenue, and bring more oil to the world market, thereby lowering gas prices.[9]

Congress Should Open Access, Reduce Risk

Opening access and reducing the onerous regulatory risk would give companies the certainty they need to expand job creation and increase energy supplies. Specifically:

- **Congress should require the Department of the Interior to open all of America's territorial waters for leasing, exploration, and drilling.** The Offshore Petroleum Expansion Now (OPEN) Act of 2012, for instance, would replace President Obama's 2012–2017 Outer Continental Shelf Oil & Gas Leasing Program with a much more robust plan that opens areas in the Atlantic, Pacific, Gulf of Mexico, and off Alaska's coast.

- **Congress should require the Department of the Interior to honor the permit deadlines (as required by law) unless the Interior finds specific and significant faults with the application.** If Interior concludes that the permit application is not complete, it should outline specific steps the applicant could take to complete it. If Interior does not find fault with the application before the deadline expires, the permit application should be considered accepted upon expiration of the deadline so that companies can proceed with exploration and drilling.

- **Congress should reform liability caps for oil spills.** Given the fact that uncapped tort liability yields frivolous lawsuits, removing the cap entirely without implementing a new system would subject covered industries to artificially high costs. Congress should reform liability caps in a way that accurately assigns risk and liability to those companies engaged in covered activities.[10]

- **Congress should ultimately transition the permitting process to state regulators, who are best able to balance economic growth and environmental protection.** The permitting process needs to be taken out of the hands of Washington bureaucrats who report to a President hostile to oil and gas production—a Chief Executive who can arbitrarily stop such energy development across the nation by executive fiat.

Given the challenges still facing the U.S. economy, the government needs to move aside and let private industry do what private industry does best: create jobs and, regarding gas, help lower the price at the pump.

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8. Bernard L. Weinstein, "The Outlook for Energy Production in the U.S. Gulf of Mexico: How the Regulatory Risk Premium is Restraining Production," Maguire Energy Institute, Southern Methodist University, May 2012, http://www.noia.org/website/download.asp?id=53442 (accessed August 3, 2012).
9. Wood Mackenzie Energy Consulting, "Energy Policy at a Crossroads: An Assessment of the Impacts of Increased Access versus Higher Taxes on U.S. Oil and Natural Gas Production, Government Revenue, and Employment," June 24, 2011, http://www.scribd.com/doc/58894728/An-Assessment-of-the-Impacts-of-Increased-Access-versus-Higher-Taxes-on-U-S-Oil-and-Natural-Gas-Production-Government-Revenue-and-Employment (accessed August 3, 2012).
10. For a comprehensive solution to offshore oil spill liability, see Nicolas D. Loris, Jack Spencer, and James Jay Carafano, "Oil Spill Liability: A Plan for Reform," Heritage Foundation *Backgrounder* No. 2446, August 2, 2010, http://www.heritage.org/research/reports/2010/08/oil-spill-liability-a-plan-for-reform.