

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

BP EXPLORATION & PRODUCTION INC.)
et al.,)
))
Plaintiffs,)
))
v.)
))
GINA McCARTHY, in her official capacity)
as Administrator, United States)
Environmental Protection Agency, et al.,)
))
Defendants.)
))

No. 4:13-cv-2349

**THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND
NORTHERN IRELAND’S
MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
IN SUPPORT OF BP’S MOTION FOR SUMMARY JUDGMENT**

The Government of the United Kingdom of Great Britain and Northern Ireland moves for leave to file the attached brief as amicus curiae in support of BP Exploration & Production Inc. et al.’s Motion for Summary Judgment. Her Majesty’s Government believes that its perspective may be of benefit to this honorable Court.

The issue before the Court—whether the Environmental Protection Agency (EPA) has properly disqualified and suspended the rights of certain companies to contract with the United States Government—implicates the rights of one of the United Kingdom’s largest companies and affects jobs and pensions of workers in the United Kingdom, the United States, and elsewhere. Her Majesty’s Government submits this amicus brief to highlight the larger policy concerns that underlie the issues of this case with a hope of safeguarding the broader economic and business environments from potentially adverse effects.

Further, Her Majesty's Government is concerned that EPA's actions in disqualifying and suspending BP Exploration & Production Inc. and 20 other affiliates arguably risk destabilizing the regulatory environment in which businesses must operate. Businesses weighing whether to accept responsibility and to implement swift corrective actions in times of crisis may be dissuaded from such a path if regulators do not take this into account when subsequently issuing sanctions or use a company's acceptance of responsibility as a basis for other arguably punitive actions. Administrative regularity is a fundamental principle of the rule of law that requires sanctions to be both proportional and constrained by the plain language of their underlying statute or regulation.

Accordingly, Her Majesty's Government respectfully requests that the Court grant this motion and accept the attached brief for filing.

Respectfully submitted,

BAKER BOTTS L.L.P.

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COUNSEL FOR THE GOVERNMENT OF THE
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CERTIFICATE OF SERVICE

On December 2, 2013, I electronically submitted the foregoing document to the clerk of the court for the U.S. District Court, Southern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel of record electronically or by any other manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Scott Janoe
J. Scott Janoe

CERTIFICATE OF CONFERENCE

Counsel for her Majesty's Government conferred with counsel for BP Exploration & Production, Andrew Bloomer, who stated that his clients do not oppose this motion.

Counsel for her Majesty's Government conferred with counsel of record for the U.S. Environmental Protection Agency, Angeline Purdy of the U.S. Department of Justice. Ms. Purdy stated that EPA reserves its position pending further review.

/s/ Scott Janoe
J. Scott Janoe

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

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BP EXPLORATION & PRODUCTION INC.)
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GINA McCARTHY, in her official capacity)
as Administrator, United States)
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No. 4:13-cv-2349

**BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

STATEMENT OF COUNSEL

Counsel for amicus curiae the Government of the United Kingdom of Great Britain and Northern Ireland affirms that no party, or counsel for any party, authored any part of this brief in whole or in part, and that no payment for the preparation or submission of this brief was made by anyone other than amicus curiae.

/s/ Scott Janoe

J. Scott Janoe

*Counsel for the Government of the United Kingdom
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STATEMENT OF INTEREST

The Government of the United Kingdom of Great Britain and Northern Ireland has a substantial interest in the just application of laws to all companies participating in the global marketplace, especially those headquartered within its borders. The issue before the Court—whether the Environmental Protection Agency (EPA) has properly disqualified and suspended the rights of certain companies to contract with the United States Government—implicates the rights of one of the United Kingdom’s largest companies and affects jobs and pensions of workers in the United Kingdom, the United States, and elsewhere.

More generally, EPA’s action implicates the rights of all companies, regardless of nationality, that transact business with the U.S. Government. For instance, government contracts form a substantial portion of many companies’ annual revenue and production. Decisions which exclude participants from such a broad and important sector have the potential to negatively impact the economies to which they contribute. Benefits to government, to the companies involved (and their employees and shareholders), and the wider economy are jeopardized when administrative sanctions exceed the scope permitted by law and thereby go beyond what the parties could reasonably have foreseen in such circumstances. It is the view of Her Majesty’s Government that EPA’s disqualification and suspension of multiple BP entities may have been excessive.

Her Majesty’s Government, therefore, respectfully submits the following brief in the hope that its perspective may be of benefit to this honorable Court. It asks only that the law as written be applied, discretion be exercised reasonably, and that potentially unreasonable and adverse implications for international and United Kingdom interests thereby be avoided.

INTRODUCTION

Her Majesty's Government recognizes the grave consequences of the *Deepwater Horizon* oil spill and understands the need for the various branches of the U.S. Government to take firm action. Indeed, the United Kingdom would similarly take firm action in such circumstances. In doing so, however, regulators should apply the law fairly and predictably lest their actions erode global public trust in the institutions and individuals involved. In this case, Her Majesty's Government is concerned that these reasonable standards have not been met.

EPA disqualified BP Exploration & Production Inc. (BPXP) from transacting any business with the U.S. Government. EPA also imposed equivalent sanctions on 20 other BP entities, including BPXP's parent corporation BP p.l.c., headquartered in the United Kingdom, and BP affiliates in Australia and Singapore among others. It did so even though these affiliates were in no way implicated in the *Deepwater Horizon* incident. Her Majesty's Government is concerned that such a broad sanction can and will have serious and unjustified economic consequences. Moreover, by creating a process under which any corporate affiliate anywhere in the world can be suspended from transacting business with the government regardless of culpability, EPA risks creating a powerful disincentive to cooperation in times of crisis. Predictability of administrative processes and the respect for good-faith bargaining are core values of both the rule of law and our shared legal heritage. Corporations may think twice before agreeing to accept responsibility, to perform remedial work, or to negotiate a plea agreement if such efforts are not taken into account when the time comes to mete out other sanctions.

ARGUMENT

Implications of the application of the power to disqualify and to suspend businesses

Her Majesty's Government appears before this Court as *amicus curiae* not to address any substantive point of environmental law or liability. Her Majesty's Government instead requests

that the Court grant to BPXP, and the other BP entities targeted by EPA, the right to be subject only to lawful and proportionate enforcement by administrative agencies.

A. EPA's actions may create harmful regulatory uncertainty.

Every corporation depends on predictable and reliable governmental enforcement of the law. In turn, the global economy increasingly depends on fair and impartial governmental enforcement of both private agreements and public rules. Her Majesty's Government submits this brief to highlight the larger policy concerns that underlie the issues of this case with a hope of safeguarding the broader economic and business environments from the potential adverse effects of EPA's actions. Rather than delve deeply into the details of U.S. law, Her Majesty's Government instead will focus on how both forms of enforcement here foreseeably give rise to these concerns.

1. Disqualifications should be temporary and limited to violating facilities.

Her Majesty's Government understands EPA's statutory disqualification determination relied upon a conclusion that the regulated "facility" where the Clean Water Act (CWA) violation occurred was BPXP's *headquarters* in Houston, Texas. In fact the events at issue occurred at a facility hundreds of miles away in the Gulf of Mexico, the *Deepwater Horizon* rig. As discussed in BP's Motion for Summary Judgment, the statute provides that EPA may disqualify only the specific facility at which a CWA violation giving rise to a conviction occurred. In the view of Her Majesty's Government, discarding this essential limitation may create an unpredictable standard under which the agency can impute conduct at any facility back to any corporate headquarters anywhere in the country and potentially disqualify any facility anywhere in the world that is connected to that headquarters.

Moreover, Her Majesty's Government understands that a disqualification is designed to be a temporary measure, lasting only until "the condition giving rise to [an underlying CWA] conviction has been corrected." 33 U.S.C. § 1368(a). That is a common-sense timing limitation. There is an obvious government interest in stopping continuing violations. However, the ability to deal with potentially important business partners once the infirmity has been remedied is also important. Businesses can also rely on this principle; they know that a facility that causes a CWA violation may be effectively quarantined from government contracting pending resolution.

2. Suspensions should be temporary and corrective in focus, not wide-ranging and punitive.

Her Majesty's Government understands that under federal regulations, a suspension of companies from all government contracting and transactions is authorized only when "[i]mmediate action is necessary to protect the public interest." 2 C.F.R. § 180.700. And, like disqualifications, suspensions are "for a temporary period," pending resolution of any ongoing violations. *See* 2 C.F.R. § 180.715(e). Such a high standard protects governmental interests without leaving businesses in serious doubt about when they may be subject to suspension and when that suspension should be lifted. As set out in BP's pleadings, the U.S. Government itself has affirmed that BPXP has made its operations safer and less likely to generate violations. (*See* BP Brief at 4). In fact, the U.S. Government has continued to do business with BPXP and other BP entities, including awarding new BPXP deepwater leases in the Gulf of Mexico. (*Id.*)

Thus, even if it *might* have been reasonable in the immediate aftermath of the *Deepwater Horizon* incident for BPXP to have been suspended, Her Majesty's Government questions whether initiating and continuing a suspension years after the incident, and immediately after BPXP entered into a plea agreement with the U.S. Government accepting responsibility and agreeing to take wide-ranging remedial actions, is appropriate. Her Majesty's Government

believes that the suspension of 20 other BP entities without clear evidence that they had culpability for the *Deepwater Horizon* incident or that they posed any meaningful risk of causing other, similar incidents may also not have been justifiable.

Also in this regard, Her Majesty's Government notes that the federal regulations limit EPA's role, providing that suspension is not available "for the purposes of punishment." 2 C.F.R. § 180.125(c). Punishment comes through other mechanisms—here consolidated in BPXP's plea agreement with the Department of Justice (DOJ) and approved by the federal court presiding over BPXP's criminal case. In the view of Her Majesty's Government, businesses should be able to rely on that division of responsibility, with EPA's role focused on determining whether a company is sufficiently responsible for purposes of government contracting.

3. EPA's actions risk significant economic harm.

Her Majesty's Government believes that economic harm may flow from EPA's actions, both in the U.S. and in the U.K. Her Majesty's Government understands that BP directly employs more than 23,000 employees in the U.S. and supports more than 260,000 total jobs. Further, between 2008 and 2012, BP invested more than \$55 billion in the oil, gas and renewable energy sector in the U.S. In 2012 alone, Her Majesty's Government understands that BP spent \$5.5 billion on salaries and benefits for U.S. workers, including pensions and other benefits. Finally, BP invests approximately \$100 million each year in U.S. universities to fund research and other related activities.

BP's economic activity in the United Kingdom is similarly robust. Her Majesty's Government understands that BP employs more than 16,000 U.K. nationals; paid £841 million in taxes in the U.K. in 2012; paid over £3.3 billion in dividends to its investors in 2012, of which approximately £1 billion was paid into U.K. pensions; and invests £150 million each year in U.K. universities to fund research activities. Her Majesty's Government believes that restricting

BP's work in the U.S. and for the U.S. Government has the potential to negatively impact significant investment activities, employment, and pensions.

B. EPA may not have fully taken into account BPXP's response to the *Deepwater Horizon* incident and its implementation plan.

Her Majesty's Government is concerned that EPA disqualified BPXP, and suspended it and 20 other BP entities, after considering only the negative facts outlined in its plea agreement and ignoring positive ones. Chief among these ignored facts was the U.S. Government's own recognition that BPXP has undertaken reforms (some of which were demanded by EPA itself) to eliminate pre-*Deepwater Horizon* risks. Her Majesty's Government understands that administrative agencies are required to consider the entire record in deciding such cases. *See, e.g., El Paso Elec. Co. v. FERC*, 201 F.3d 667, 671 (5th Cir. 2000). It is unclear if EPA did so here.

1. BPXP acted promptly and responsibly to address the harms caused by the *Deepwater Horizon* incident.

As outlined in BP's brief, BPXP worked with governmental agencies both in responding to the spill and in shouldering its legal responsibilities for it. (*See* BP Brief at 3-4.) After the incident, BPXP mobilized more than 400 responders on more than 40 vessels. As the remediation efforts continued, that number grew to more than 48,000 responders on more than 6,500 marine vessels. (BP Brief, Tab 1 at 14). BPXP also adopted a collaborative process with every level of government to assess and restore damage to natural resources, entering into more than 160 cooperative assessment agreements costing approximately \$600 million, and then committed to an unprecedented, and voluntary, \$1 billion early restoration agreement. (BP Brief, Tab 1 at xv).

2. BPXP developed and is implementing steps designed to prevent future incidents.

As part of its plea agreement, BPXP created an implementation plan that puts in place a number of corrective measures, including the creation of an onshore, real-time drilling monitoring center that measures and tracks operational parameters at each BPXP well in the Gulf of Mexico. (BP Brief, Tab 15 at 10). Additionally, BPXP agreed to a third-party Process Safety Monitor who reviews, evaluates, and provides recommendations for the improvement of BPXP's process safety and risk management procedures in the form of written reports to the DOJ. (BP Brief, Tab 15 at 1-6). BPXP also agreed to collaborate with other members of industry and members of the academic community to develop new technologies to enhance operational safety with respect to deepwater drilling. (*Id.* at 12). Finally, BPXP also agreed to appoint a third-party Ethics Monitor to review and make recommendations about BP's Code of Conduct and its implementations, and a third-party Auditor to verify compliance with the remedial order. (*Id.*)

As outlined in BP's brief, officials with numerous government agencies have acknowledged that BPXP has effectively implemented these changes. The Director for the Department of the Interior's Bureau of Safety and Environmental Enforcement concluded that, in a comparison of the safety records of offshore operators, BPXP is "in close to the top crew." (BP Brief at 4.) Similarly, the Co-Chairman of the national Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling observed that BPXP is "scrupulous about applying new rigorous standards of oversight." (*Id.*). Her Majesty's Government would invite the Court to consider whether these elements of the background were sufficiently weighed in the balance during EPA's decision making.

3. EPA may not have taken BPXP's response to the *Deepwater Horizon* incident and implementation plan into account in deciding not to reverse its decision.

Her Majesty's Government understands that the U.S. Government acknowledged BPXP's efforts and repeatedly confirmed that BPXP had undertaken extensive remedial measures to mitigate risks to the environment and the public. Nor did EPA directly dispute this. EPA's decision against BPXP and others came months after meetings and conversations between BP and EPA in which these actions were discussed, but does not appear to have taken them into account.

In July of 2013, EPA declined to reverse its statutory disqualification, a decision that Her Majesty's Government understands was premised in part on EPA's view that the condition giving rise to the violation had yet to be corrected. EPA acknowledged that in reaching its decision to continue the disqualification, it had discounted the information BPXP presented prior to EPA's initial decision in November 2012, which included details about BPXP's immediate response actions. (BP Brief, Tab 23, at 15). Her Majesty's Government is concerned that EPA does not appear to have taken into account either BPXP's immediate response or BPXP's implementation plan, which resulted from its plea bargain and is a condition of its probation. (BP Brief, Tab 23 at 15).

C. EPA's actions may create regulatory and administrative uncertainty that can harm the economy and thwart corporate cooperation in times of need.

Her Majesty's Government wants U.K. companies to be at the forefront of solutions whenever they are involved in problems—and not just in the United Kingdom, but anywhere in the world. When Her Majesty's Government must respond to problems or exigencies within the United Kingdom, it expects that businesses involved in those problems will be forthcoming and cooperative, regardless of their nationality. Her Majesty's Government is concerned that EPA's

actions, if upheld, could undermine the corporate culture of responsibility all responsible governments have sought to foster.

EPA's actions in disqualifying and suspending BPXP and 20 other affiliates arguably risk destabilizing the regulatory environment in which businesses must operate. Businesses weighing whether to accept responsibility and to implement swift corrective actions in times of crisis may be dissuaded from such a path if regulators do not take this into account when subsequently issuing sanctions or use a company's acceptance of responsibility as a basis for other arguably punitive actions. Administrative regularity is a fundamental principle of the rule of law that requires sanctions to be both proportional and constrained by the plain language of their underlying statute or regulation. It is Her Majesty's Government's belief that EPA's actions in this case may be inconsistent with this principle and diminish the likelihood of businesses accepting responsibility and cooperating fully in the future.

CONCLUSION

Her Majesty's Government respectfully hopes that its perspective as set out in the foregoing brief will be of benefit to this honorable Court in reaching its decision on BPXP's motion for summary judgment. Her Majesty's Government respectfully submits that this Court should grant BPXP's motion for summary judgment. Doing so would, in the respectful opinion of Her Majesty's Government, uphold the law as written, and avoid the potentially adverse implications to international and United Kingdom interests that we have outlined in this brief.

Dated:

December 2, 2013

Respectfully submitted,

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On December 2, 2013, I electronically submitted the foregoing document to the clerk of the court for the U.S. District Court, Southern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel of record electronically or by any other manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Scott Janoe

J. Scott Janoe