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

BP EXPLORATION & PRODUCTION INC., *et al.*,	
Plaintiffs,	**No. 4:13-cv-02349**
v.	**Hon. Vanessa D. Gilmore**
GINA McCARTHY, in her official capacity as Administrator, United States Environmental Protection Agency, *et al.*,	
Defendants.	

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE AMERICAN PETROLEUM INSTITUTE, THE NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL OCEAN INDUSTRIES ASSOCIATION, ORGANIZATION FOR INTERNATIONAL INVESTMENT, AND TECHNOLOGY ASSOCIATION OF AMERICA AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. **The American Petroleum Institute (API)** represents over 550 oil and natural gas companies, leaders of a technology-driven industry that supplies most of America's energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy. **The National Association of Manufacturers (NAM)** is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and every state. **The National Ocean Industries Association (NOIA)** is the only national trade association which advocates solely on behalf of the offshore energy industry and represents more than 300 member companies dedicated to the safe development of traditional and renewable offshore energy for the continued growth and security of the United States. **The Organization for International Investment (OFII)** represents the U.S. operations of many of the world's leading global companies, which insource millions of American jobs. OFII advocates for fair, non-discriminatory treatment of foreign-based companies and guards against laws, regulations, and policies that fail to respect the separate corporate identities of its U.S.-incorporated members and their foreign-based parents or that discriminate against its members due to their corporate affiliations. **The Technology Association of America** is the leading association for the United States technology industry—the driving force behind productivity growth in the United States and the foundation of the global innovation economy.

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[1] No party's counsel authored this brief in whole or in part. No party or any party's counsel contributed money intended to fund preparing or submitting this brief. No person—other than the *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

The federal government relies heavily on the skills and expertise of amici's members to develop, produce, manufacture, and supply the nation's energy resources, communication infrastructure, consumer and commercial goods, business services, and other resources. And amici's members contract with numerous federal and state agencies to perform this vital work. Amici's members operate numerous facilities engaged in work covering all aspects of business and industry, and millions of employees work at these facilities on behalf of their employers. Many of amici's members are part of larger corporate families or engage in joint ventures with other companies that themselves are part of a larger corporate family. And each member of these corporate families (many of which also have international affiliates) may itself enter into contracts or do business with various federal and state agencies or other companies to perform a variety of work, including the production, supply, and transport of our nation's energy resources.

All of these amici have joined this brief because they are significantly concerned about the statutory overreach EPA exhibited in this case. EPA asserted the authority to declare that a Clean Water Act violation occurring at one company *facility* results in the mandatory disqualification of the corporate *headquarters* from involvement in any federal program. And according to EPA, the discretionary suspension of a company based on the improper conduct of its employees automatically results in the indefinite suspension of multiple worldwide affiliates of that company—barring the affiliates from entering into a contract with any government agency or working with any company involved in a federal program—no matter their connection to or involvement in the improper conduct. These expansive assertions of authority, and EPA's actions pursuant to that authority, pose a grave threat to federal contractors and private industries with business touching on federal programs or federal lands.

Amici submit this brief to advise this Court of that threat.

INTRODUCTION

The EPA's guilt-by-association approach to exclusion—disqualifying a *headquarters* for a misdemeanor environmental violation that occurred at a single facility and suspending far-flung corporate affiliates without a justification grounded in the public interest—threatens significant harm to domestic and international industry. First will come the layoffs of hundreds or even thousands of employees who performed jobs relating to federal programs or on property leased from the federal government. Second will come the impact on the economy from the loss of corporate value resulting from the company's exclusion from all federal contracting. Third will come the ripple effect: the broader impact on the economy as the industries involved in government programs struggle with the uncertainties introduced by the threat of exclusion of *an entire corporate family* stemming from the improper conduct of a few employees of one corporate affiliate. It is irresponsible for a single agency like EPA to take these actions without considering their consequences for industry.

The harm of allowing the automatic extension of a suspension to all affiliates without a showing that the extension is necessary to protect the public interest extends beyond just government contracting. Companies involved in federal programs in any way would be barred from doing business with the affiliates of suspended companies, whether or not the affiliates presented any risk of harm to the public interest. States, foreign countries, and private entities also often decline to do business with entities suspended by the federal government, and a company seeking a license to operate within a state or foreign country may be denied such a license because of a suspension or debarment. Thus companies that do not contract with the federal government and perform no work in connection with federal programs—such as an

international affiliate of a U.S. company—would suffer serious consequences as a result of suspension because of these and other collateral effects of suspension and debarment.

"Suspending a contractor is a serious matter. Disqualification from contracting directs the power and prestige of government at a single entity, and may cause economic injury." *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 6 (D.C. Cir. 1998). EPA's actions demonstrate a disregard for the serious ramifications of suspension and disqualification—and an indifference to the statutory and regulatory provisions governing EPA's suspension and disqualification authority. Amici understand how serious these ramifications may be—to avoid them, EPA must be confined to the exclusion authority Congress has given it.

ARGUMENT

I. EPA CANNOT DESIGNATE A CORPORATE HEADQUARTERS AS A "VIOLATING FACILITY" IF NO VIOLATION OCCURRED THERE.

EPA's determination that BPXP's corporate headquarters was the "*facility* at which the violation which gave rise to [its] conviction occurred," 33 U.S.C. § 1368(a), contradicts the plain language of the statute, is inconsistent with the policy goals of the disqualification provision, and undermines established principles for exclusion from government contracting.

The Clean Water Act's automatic disqualification provision was intended to "ensure[ ] that the Federal Government will not patronize or subsidize polluters through its procurement practices and policies." H. Rep. No. 92-1465, at 147 (1972). The exclusion from government contracting pursuant to Section 1368 is "mandated by statute" and occurs "automatically." 2 C.F.R. §§ 1532.1110, 1532.1130. And this automatic disqualification "assure[s] that each Federal agency empowered to enter into contracts . . . shall undertake such procurement and assistance activities in a manner that will result in effective enforcement" of the CWA. Executive Order No. 11,738, § 1 (Sept. 10, 1973). But, as the President's Executive Order implementing

Section 1368 recognized, once an agency "determines that the condition which gave rise to a conviction has been corrected, [it] shall promptly remove the facility and the name and address of the person concerned from the list." *Id.* § 2. [2]

The CWA, however, does not authorize the extension of disqualification to related facilities. As the contemporaneous legislative record recognized, Section 1368 is limited "to contracts affecting only the *facility* not in compliance, rather than an entire corporate entity or operating division." S. Rep. No. 92-414, at 84 (1972) (emphasis added). Where a "second plant within a corporation . . . seek[s] a contract unrelated to the violation at the first plant[,] . . . the unrelated facility should be permitted to bid and receive Federal contracts." *Id.* By contrast, the Clean Air Act's parallel provision to Section 1368, providing for automatic disqualification of the facility at which a CAA violation occurs, goes further. 42 U.S.C. § 7606(a). It not only provides for automatic disqualification of the particular facility at which the CAA violation occurs but also provides that the EPA Administrator "may extend this prohibition to *other facilities owned or operated by the convicted person*." *Id.* (emphasis added). EPA's regulations in turn recognize that the "CAA specifically authorizes EPA to extend a CAA disqualification to other facilities." 2 C.F.R. § 1532.1115. In designating BPXP's headquarters a "violating facility," EPA has unlawfully amended the text of the CWA to match that of the CAA.

[2] The fact that the rig no longer exists does not change the analysis. In its guidance on how to apply the mandatory disqualification provision, EPA recognizes that "convictions will almost always result in a listing unless circumstances are such that an ineligibility under the statute, despite a conviction, is essentially impossible." Robert F. Meunier, U.S. Environmental Protection Agency, *EPA Final Policy Guidance: Listing of Persons Ineligible for Award Under Section 306 of the Clean Air Act and Section 508 of the Clean Water Act*, American Law Institute, SK019 ALI-ABA 279, 283 (1999). One example of when "an ineligibility" would be "essentially impossible" is where "the violating facility *no longer physically exists*." *Id.* (emphasis added). This makes sense. If one of a company's plants is found to be in violation of the CWA, the company may choose to close that plant permanently. Under those circumstances, there is no longer any reason under the statute to bar contracting with that facility; contracts would no longer be performed there. EPA's Listing Guidance recognizes that a facility that has ceased to exist or to operate renders Section 1368 inapplicable as far as that facility is concerned. EPA departed from that guidance here.

EPA's regulations state that if it "determines that the risk presented to Federal procurement and nonprocurement activities . . . exceeds the coverage afforded by mandatory disqualification, EPA may use its *discretionary* authority to suspend or debar a person." 2 C.F.R. § 1532.1130(b). In this case, the EPA attempted to "exceed the coverage afforded by mandatory disqualification," but did *not* rely solely on its discretionary authority. Instead, it attempted to expand the coverage of indefinite, mandatory disqualification under Section 1368 by designating a company headquarters as the "violating facility." Such a designation, under EPA regulations, means that no federal contract may be "performed" by BPXP either "at" or "from" its Houston headquarters until the EPA certifies, in its discretion, that the violation has been corrected. *See* 33 U.S.C. § 1368(a); 2 C.F.R. § 1532.1600(b). Contrary to the statute's intent, this headquarters-level disqualification punishes a company as a whole because it has the effect of disqualifying numerous affiliated corporate facilities at which no CWA violation has occurred. Federal contractors are familiar with the traditional *discretionary* suspension and debarment process. But EPA's circumvention of that process by expansion of *mandatory* disqualification threatens to harm industry by undermining the comprehensive procedures set out for discretionary action. *See* 2 C.F.R. Part 180. This Court should not countenance EPA's novel assertion of authority, which, contrary to the text and intent of the CWA, would grant EPA license to indefinitely disqualify an entire network of facilities by imputing a violation at one facility to its headquarters.

II. AN AGENCY CANNOT SUSPEND A COMPANY'S WORLDWIDE AFFILIATES WITHOUT GROUNDING ITS DECISION IN THE PUBLIC INTEREST.

Unlike disqualification under the CWA, which is an "exclusion[ ] mandated by statute," an agency's suspension or debarment decision is an exercise of the agency's "discretionary authority." 2 C.F.R. § 1532.1130(a)-(b). An agency's exercise of this discretion must be reasonable. *See* 5 U.S.C. § 706(2)(A); *Caiola v. Carroll*, 851 F.2d 395, 398 (D.C. Cir. 1988).

And it is not reasonable for an agency to suspend multiple worldwide affiliates without offering some justification grounded in the public interest. "An exclusion is a serious action that a Federal agency may take only to protect the public interest. A Federal agency may not exclude a person or commodity for the purposes of punishment." 2 C.F.R. § 180.125(c). Punishment, however, is the only explanation for EPA's actions here. In amici's view, EPA's approach in this case threatens to undermine established principles of government contracting.

The affiliate provision on which EPA relied, 2 C.F.R. § 180.625(b)—which mirrors those of the FAR, 48 C.F.R. §§ 9.403, 9.406-1(b)—was added out of concerns that the suspension or debarment of affiliates may be "necessary to prevent a debarred person from participating in covered transactions through or under the guise of other entities that such person controls." 53 Fed. Reg. 19161, 19169 (May 26, 1988). But EPA never contended that BP would use its subsidiary BP Singapore PTE Ltd., for example, to circumvent BPXP's suspension relating to the incident in the Gulf. Instead, EPA extended the suspension of BPXP to its worldwide affiliates *automatically*, based on the "sole consideration" of control. EPA Decision 11.

Contrary to EPA's approach here, commentators interpreting the regulations and surveying the limited case law have recognized that "[p]roper application of the affiliate provisions does *not* turn simply on whether the respondent fits within the definition of 'affiliate.'" Steven D. Gordon, *Suspension and Debarment from Federal Programs*, 23 Pub. Cont. L.J. 573, 588 (1994) (emphasis added). Because the combination of the broad definition of "affiliate" and the wide discretion given to contracting agencies "is potentially subject to abuse by an overzealous agency," suspension or debarment "may be extended to an affiliate only if the facts of a particular case make such an extension appropriate." *Id.* (collecting cases).

Just such abuse occurred here. The EPA could easily have determined which affiliates were not implicated in the misconduct but chose not to do so. By employing the "affiliate" provisions but declining to base affiliate extension on complicity in the improper conduct, EPA has attempted a "short-cut" to side-step the more detailed and exacting imputation provisions. *Kisser v. Kemp*, 786 F. Supp. 38, 40-41 (D.D.C. 1992), *rev'd on other grounds sub nom. Kisser v. Cisneros,* 14 F.3d 615 (D.C. Cir. 1994). The imputation regulations move *up* the ladder of control, allowing an agency to impute an employee's or organization's conduct to the entities that control them. *See* 2 C.F.R. § 180.630(a),(c). But the imputation provisions do not allow an agency to move up the ladder of control to the parent *and then back down* to entities with no agency relationship to the improper conduct. The EPA cannot impute the improper conduct of BPXP, BP p.l.c., or any of their employees to other BP subsidiaries. *See* 2 C.F.R. § 180.630. So EPA determined to reach them by exercising its discretion to suspend "affiliates."

When a company commits a regulatory violation, agencies have discretion to exclude that company from federal programs on a government-wide basis, and discretion to extend the suspension to affiliates if "[i]mmediate action is necessary to protect the public interest." 2 C.F.R. § 180.700(c). But that discretion is not absolute. An agency must exercise its discretion in a reasonable manner, demonstrating some connection between the violation the agency is addressing and the remedy it adopts. EPA followed neither of those dictates in this case. And the implications of that approach, should it be accepted by this court, are disturbing. The action taken by EPA here on the basis of past misconduct—without any analysis of control or potential risk for recurrence—is *punishment*, not action taken to protect the federal government from the possibility of immediate harm. EPA paid no attention to the primary consideration that underlies all suspension and debarment decisions: the public interest.

EPA has conceded that "[i]n the past, BP was allowed to continue to do business with the federal government after its affiliates were convicted of . . . violations that involved the loss of life and serious environmental damages." EPA Decision 12. In amici's experience, that past practice—extending the suspension or debarment only to the affiliates actually implicated in improper conduct—is typical. Affiliates not implicated in the wrongdoing may continue to contract with the government and work in federal programs. Such targeted suspension, tailored to address the problem and protect the government, has always been the norm.

Extending a suspension or debarment to affiliates may be necessary to counteract subterfuge and ensure that the federal government is not contracting with an irresponsible entity. But the fact that such extension is *available* for such use does not mean it should apply automatically based on the "sole consideration" of control. If EPA or any other agency wants to employ the affiliate provision, it must support its application with more than an argument that the regulations technically allow it: the agency must establish an immediate need for the action grounded in the public interest. And a *worldwide* suspension of numerous affiliates without such justification exacerbates the problem by orders of magnitude. EPA's abdication of its responsibility to justify its actions threatens to undermine widely accepted principles of federal procurement and non-procurement programs by which amici and others abide. This court should uphold those principles and reject EPA's unprecedented and unlawful assertion of authority.

CONCLUSION

For all of the foregoing reasons, and those in Plaintiffs' motion, the motion for summary judgment should be granted.

Dated: December 6, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served on all counsel of record via CM/ECF on this the 6th day of December, 2013, in accordance with the Federal Rules of civil Procedure.

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