IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BP EXPLORATION & PRODUCTION INC., et al.,	)
Plaintiffs,	)
v.	) No. 4:13-cv-2349
GINA McCARTHY, in her official capacity as Administrator, United States Environmental Protection Agency, et al.,	) Hon. Vanessa D. Gilmore
Defendants.	)

MEMORANDUM OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF EPA'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO BP'S MOTION FOR SUMMARY JUDGMENT

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen strives to hold both government and corporations accountable to the people, and advocates for enforcement policies that foster compliance with the law and protection of the public. EPA's suspension of BP Exploration & Production, Inc., its corporate parent BP p.l.c., and the affiliates identified in EPA's orders—collectively, "BP"—is consonant with those interests, and Public Citizen submitted materials supporting BP's suspension during EPA's administrative proceedings. Public Citizen believes that EPA's suspension decision reflects an appropriate exercise of EPA's express statutory and regulatory authority and will have the effect of protecting the public by preventing expenditures of government funds to benefit an enterprise whose history demonstrates that its corporate practices create ongoing threats to the environment, to U.S. workers, and to the public at large.

Public Citizen submits this short amicus curiae memorandum to address specific arguments made by BP and its supporting amici curiae, the Chamber of Commerce, et al ("the Chamber"). Public Citizen believes that this memorandum may assist the Court in its consideration of the case without posing undue burdens or unnecessarily repeating arguments made by EPA.

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[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

It is undisputed that BP is criminally responsible for the Deepwater Horizon explosion and the resulting discharge of over 200 million gallons of oil into the Gulf of Mexico—the largest accidental oil spill in world history and an event that has been characterized as "the worst environmental disaster America has ever faced." Barack H. Obama, *Remarks by the President to the Nation on the BP Oil Spill* (June 15, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill. BP's actions resulted in the deaths of 11 workers and severe economic and environmental consequences spanning an entire region. Following the explosion, BP, by its own admission in its guilty plea, misled Congress about the scope of the unfolding disaster.

The Deepwater Horizon disaster was by no means the first manifestation of BP's corporate irresponsibility with respect to environmental protection and worker safety. BP's earlier criminal violations of the Clean Water Act and Clean Air Act led to guilty pleas for BP's 200,000-gallon Prudhoe Bay oil spill and its Texas City plant explosion, which killed 15 workers. For these and other violations—including criminal price-fixing charges that resulted in a deferred prosecution agreement—BP staved off suspension or debarment as a federal contractor. *See* Reina Steinzor & Anne Havermann, *Too Big to Obey: Why BP Should Be Debarred*, 36 Wm. & Mary Envtl. L. & Pol'y Rev. 81, 82–83 (2011).

The Deepwater Horizon criminal charges, and BP's Clean Water Act conviction, serve as a proper basis for suspension of BP as a federal contractor under the general suspension-and-debarment regulations set forth in 2 C.F.R. Part 180, as well as for disqualification of BP as a federal contractor under the Clean Water Act, 33 U.S.C. § 1368(a). EPA found that suspension was appropriate under the Part 180 regulations because BP's conduct in relation to the Deepwater Horizon disaster, together with its history, showed that it was not presently

responsible enough to continue as a federal contractor and that protection of the public required that BP be immediately suspended. EPA further determined that BP Exploration's home office was a location that gave rise to BP's Clean Water Act violation and that continuing disqualification of BP from contracts carried out at that location was proper because BP had not shown that it had corrected the conditions that led to the violation.

Notwithstanding these findings, BP and the Chamber assert that any suspension or disqualification of BP must be limited in ways that will render it ineffective to protect the public. With respect to BP's suspension under the Part 180 regulations, they argue that EPA abused its discretion or acted contrary to law in suspending affiliated corporations controlled by BP p.l.c.—an argument that would permit BP to avoid the consequences of suspension, and eviscerate the protection suspension affords the public against contracts with a company that has demonstrated a corporate culture of irresponsibility, merely by directing one of its many subsidiaries to step into its shoes. With respect to BP's Clean Water Act disqualification, BP and the Chamber go even further, asserting that disqualification must be limited to contracts that would be carried out *on the now-destroyed Deepwater Horizon platform*—an empty set.

Neither of these arguments is supportable under the applicable statutes and regulations. With respect to suspension of BP's affiliates, the position of BP and the Chamber is contradicted by the Part 180 regulations, which expressly authorize EPA's action. As for the Clean Water Act, BP and the Chamber rest their argument entirely on the proposition that determining where a Clean Water Act violation occurred is a simple matter of applying unambiguous statutory language. That proposition ignores long-established case law recognizing that the location of an offense is far from unambiguous. Here, EPA has exercised its rulemaking power to clarify the

ambiguity of the statutory language standing alone, and EPA has reasonably applied its regulation to the circumstances here.

ARGUMENT

I. EPA Properly Suspended Not Only BP Exploration, but Also Its Corporate Parent, BP p.lc., and Other BP Affiliates.

Obscured in the memoranda submitted by BP and the Chamber are the clear terms of the regulations governing suspension of affiliated corporations, which authorize EPA's actions. The regulations authorize suspension of BP p.l.c. based on the imputation of BP Exploration's conduct to it, and *separately* provide for the suspension of other BP affiliates because of BP p.l.c.'s control over them.

Specifically, 2 C.F.R. § 180.630 provides in relevant part that:

> For purposes of actions taken under this part, a Federal agency may impute conduct as follows:
>
> (a) *Conduct imputed from an individual to an organization*. A Federal agency may impute the fraudulent, criminal, or other improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, to that organization when the improper conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval or acquiescence. The organization's acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.
>
> * * *
>
> (c) *Conduct imputed from one organization to another organization*. A Federal agency may impute the fraudulent, criminal, or other improper conduct of one organization to another organization when the improper conduct occurred in connection with a partnership, joint venture, joint application, association or similar arrangement, or when the organization to whom the improper conduct is imputed has the power to direct, manage, control or influence the activities of the organization responsible for the improper conduct. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

As EPA found, both subsections (a) and (c) of § 180.630 authorize imputation of the criminal conduct underlying the suspensions to BP p.lc., and hence the suspension of BP p.l.c.

Imputation of BP Exploration's criminal violation to BP p.l.c. is proper under subsection (c) because BP p.l.c. had the power to direct, manage, control or influence BP Exploration, the organization that admitted its own criminal responsibility for the improper conduct. Likewise, the conduct of the individual BP Exploration employees who engaged directly in the misconduct for which BP Exploration pleaded guilty, including the false statements to Congress, occurred in connection with performance of duties for or on behalf of BP p.l.c. as well as BP Exploration, and with BP p.l.c.'s knowledge, approval, or acquiescence. Critically, neither BP nor the Chamber disputes that it was proper to impute BP Exploration's conduct to BP p.l.c. under § 180.630.

Once EPA imputed the offenses forming the basis of the suspension to BP p.l.c., EPA also had express authority to suspend BP affiliates under 2 C.F.R. § 180.625(b), which provides:

> *Any affiliate* of a participant may be included in a suspension or debarment action if the suspending or debarring official--
>
> (1) Officially names the affiliate in the notice; and
>
> (2) Gives the affiliate an opportunity to contest the action.

(Emphasis added.) The regulatory definition of "affiliate" provides that "[p]ersons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other or a third person controls or has the power to control both." 2 C.F.R. § 180.905. A "person" under the regulations includes a "corporation" or other "legal entity," 2 C.F.R. § 180.985, and a "participant" includes any person involved in a transaction subject to the suspension and debarment regulations. 2 C.F.R. § 180.980. Again, there is no dispute that the other BP entities are affiliates both of BP p.l.c. and BP Exploration under this definition. BP p.l.c. controls or has the power to control the suspended BP entities, so they are its affiliates. Likewise, BP

Exploration and the other suspended BP entities are all controlled by the same third person, namely BP p.l.c., so the suspended entities are affiliates of BP Exploration as well.

The Chamber nonetheless argues that EPA should have had to establish something more than affiliation within the meaning of the regulations in order to suspend the BP Affiliates, because otherwise the affiliation provision will provide an "short-cut" around the imputation provision. Chamber Br. 8. Thus, the Chamber suggests, the suspension of the affiliates should have required EPA to find something akin to facts that would establish that BP Exploration's misconduct could be imputed to the suspended affiliates or that they were directly involved in wrongful conduct.

The Chamber's position would render superfluous the regulations' express provision that "any affiliate" may be included in a suspension order, as well as their definition of "affiliate" to include related entities under common control, regardless of whether the conduct of one could be imputed to the other under the terms of § 180.630. And contrary to the Chamber's suggestion, the district court opinion in *Kisser v. Kemp*, 786 F. Supp. 38, 40–41 (D.D.C. 1992), *rev'd in other part sub nom. Kisser v. Cisneros*, 14 F.3d 615 (D.C. Cir. 1994), provides no support for its position. There, the district court criticized an agency for using the affiliate provision as a "short-cut" to avoid having to make the findings necessary for imputation of a company's wrongdoing to an individual, but only because the individual "was not shown to be an affiliate" within the meaning of the regulation. *Id.* at 41. In fact, the court recognized that a person that falls within the regulatory definition of an "affiliate" of a suspended organization may be subject to suspension without the proof needed to impute wrongdoing: "Under the 'affiliate' section of the regulations, all that the agency needs prove is that an individual was an affiliate, namely, that there existed the requisite 'control' relationship between the individual and the suspended

company. No actual proof of wrongdoing on the part of the individual is required." *Id*. at 40–41. The Chamber's suggestion that there is a presumption that only "affiliates actually implicated in improper conduct," Chamber Br. 9, should be suspended is wholly unsupported. Having found that BP as a whole evinced a broad lack of responsibility with respect to "safety, risk management, and environmental compliance," BP Ex. 23, at 9, it was eminently rational for EPA to exercise its clear regulatory authority to include the affiliated BP entities in the suspension both to prevent BP p.l.c. from exercising its control over them to circumvent the effects of the suspension and to protect the public from the consequences of contracting with entities that are part of a shared corporate culture of irresponsibility.

II. EPA Properly Disqualified BP Exploration's Corporate Headquarters Under the Clean Water Act.

The Clean Water Act's disqualification provision, 33 U.S.C. § 1368(a), provides that "[n]o Federal agency may enter into any contract with any person, who has been convicted of any offense under section 1319(c) of this title, for the procurement of goods, materials, and services if such contract is to be performed at any facility at which the violation which gave rise to such conviction occurred, and if such facility is owned, leased, or supervised by such person." According to BP and the Chamber, the statute is unambiguous and susceptible to only one reading: that the violation here "occurred" on the Deepwater Horizon oil rig, and that the disqualification of BP under the Clean Water Act must therefore be limited to contracts to be performed on the oil rig. Because the rig was destroyed by explosion and fire and sank in 5,000 feet of water, acceptance of BP's and the Chamber's argument would mean that the disqualification of BP under the Clean Water Act would have no effect, being limited to contracts to be performed at a location that no longer exists.

The argument advanced by BP and the Chamber rests critically on the premise that the location where a criminal offense "occurred" has an unambiguous meaning, and that that meaning dictates that there was one and only one location of the Clean Water Act offense to which BP pleaded guilty—namely, the point from which BP "discharge[d]" oil in violation of 33 U.S.C. § 1321(b). That premise is incorrect. Courts have long recognized that the location of a criminal offense or other act of wrongdoing is often unclear, and that a single offense may occur in multiple locations. *See United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999) (finding criminal venue over gun offense proper in multiple jurisdictions where crime could be said to have occurred); *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986) (holding that claim arose in multiple districts for purposes of civil venue). Moreover, the Supreme Court in *Rodriguez-Moreno* specifically rejected the simplistic notion that it is proper to look only to "the verbs of a statute," 526 U.S. at 280, to determine where an offense occurred, as BP and the Chamber advocate in focusing solely on where BP "discharged" the oil.

Unlike courts that must resolve the ambiguous issue of where an offense or tort occurred for purposes of general criminal and civil venue statutes, a court addressing the location of a Clean Water Act violation has the benefit of an authoritative agency construction of the term. In the Clean Water Act, Congress delegated broad authority to EPA "to prescribe such regulations as are necessary to carry out [its] functions under this chapter." 33 U.S.C. § 1361(a). EPA exercised that discretion to clarify the ambiguity in the statute's reference to where a Clean Water Act offense "occurred" by specifically defining the term "violating facility." 2 C.F.R. § 1532.1600(b). EPA's regulatory construction of ambiguities in the Clean Water Act is, of course, entitled to judicial deference unless it is unreasonable, even if a court, left to its own devices, might construe the Act differently. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S.

208, 218 (2009); *Arkansas v. Oklahoma*, 503 U.S. 91, 107 (1992); *see generally City of Arlington v. FCC*, 133 S. Ct. 1863 (2013); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

EPA's regulation makes clear that a Clean Water Act offense occurs not only where pollutants are discharged, but also where the conduct that "gives rise" to the defendant's conviction occurs, and that a single offense may thus occur at multiple locations:

> Violating facility means any building, plant, installation, structure, mine, vessel, floating craft, location or site of operations that gives rise to a CAA or CWA conviction, and is a location at which or from which a Federal contract, subcontract, loan, assistance award or other covered transactions may be performed. If a site of operations giving rise to a CAA or CWA conviction contains or includes more than one building, plant, installation, structure, mine, vessel, floating craft, or other operational element, the entire location or site of operation is regarded as the violating facility unless otherwise limited by the EPA.

2 C.F.R. § 1532.1600(b). Neither BP nor the Chamber argues that the regulation is an unreasonable construction of the Act or that it does not deserve deference under *Chevron*. Nor could they. Given that Clean Water Act offenses such as the one BP committed involve not only a discharge, but also negligent conduct that causes it, it is surely reasonable for EPA to conclude that the offense occurs not only where the discharge takes place, but also where the negligence that "gives rise" to it happens.

EPA's application of the regulation to the circumstances here is likewise reasonable. EPA's construction and application of its own regulation is itself entitled to deference, *see Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013), but deference is not even required to sustain EPA's action here. EPA's finding that negligence at BP Exploration's headquarters that contributed to the Deepwater Horizon disaster "gave rise" to BP's conviction within the meaning of the regulation reflects the regulation's own plain meaning. EPA's conclusion that the offense was not confined to the specific facility where the discharge took place likewise reflects

the regulation's clear language providing that the site of operations giving rise to a conviction is not limited to a single installation or operational element.

Thus, EPA did not, as the Chamber contends, effectively amend the Clean Water Act to include the Clean Air Act's separate provision allowing disqualification of other facilities where an offense did *not* occur. Rather, EPA *construed* the provision of the Clean Water Act limiting disqualification to the location of the violation. Importantly, the regulation at issue construes the term "violating facility" for purposes of both the Clean Water Act's and the Clean Air Act's provisions making disqualification of the violating facility mandatory. Under the Clean Air Act, but not the Clean Water Act, EPA also has discretion to extend the disqualification to other facilities that the regulation would not include in the class of violating facilities. EPA has not "unlawfully amended the text of the CWA to match that of the CAA." Chamber Br. 5.

CONCLUSION

The arguments of the Chamber and BP would render EPA's suspension ineffective by limiting it in ways that directly contradict the applicable statute and regulations. For the foregoing reasons, as well as those set forth by EPA, the court should deny BP's motion for summary judgment and grant EPA's motion for summary judgment.

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 February 4, 2014.

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