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 TECHAMERICA AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

CASES:

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES:

REGULATIONS:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

LEGISLATIVE AUTHORITIES:

OTHER AUTHORITIES:

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. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

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, and, since 2000, has invested nearly 2 trillion dollars in U.S. capital projects to advance all forms of energy.

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. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM is the voice of the manufacturing community and the leading advocate for policies that help manufacturers compete in the global economy and create jobs across the United States.

The National Ocean Industries Association (NOIA) is the only national trade association which advocates solely on behalf of the offshore energy industry. It represents more than 300 member companies dedicated to the safe development of traditional and renewable offshore

[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.

energy for the continued growth and security of the United States. NOIA members are engaged in activities including oil and natural gas exploration and production, equipment supply and fabrication, transportation, geological services, gas transmission, navigation, research and technology, shipping and shipyards, telecommunications, and environmental safeguards.

The Organization for International Investment (OFII) is a non-profit association representing 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 works to promote policies that will encourage them to establish U.S. operations, increase American employment, and boost U.S. economic growth. OFII also 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.

TechAmerica is the leading voice for the Information and Communications Technology industry in the United States. TechAmerica's membership is comprised of large, medium and small technology companies creating a variety of products and delivering a multitude of services in the private sector and to governments at the state and national level. TechAmerica's top priority is to foster an environment for its members to succeed through comprehensive advocacy as well as high-level business intelligence that delivers an edge in the marketplace.

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, including the oil, natural gas, and renewable energy industries, 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, refining, supply, support, 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, no matter their connection to or involvement in the improper conduct. The suspension also is not restricted to a single agency or a single industry; the affiliates are barred from entering into a contract with any government agency or working with any company involved in a federal program, even in an entirely unrelated industry. 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.

When a company commits a regulatory violation, agencies have *discretion* to exclude that company from federal contracting on a government-wide basis. But that discretion is not absolute. An agency must abide by the terms of the statutes and regulations that govern the exclusion of entities that have committed such violation. And 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.

Federal contractors compete to provide the best, most cost-effective services to the United States. In performing their work, contractors must comply with a wide variety of standards. When, despite those standards, accidents happen, an agency can take action to protect against mistakes that may harm the public interest. An agency cannot, however, adopt sweeping punishments based on mere affiliation. Far from protecting the public interest, excluding a company's affiliates from *all* federal programs punishes entities that share no blame.

And make no mistake: injuries caused by guilt-by-association exclusion would be significant. If an entire corporate family is suspended or disqualified from federal programs, a cascade of impacts will follow. First will come the layoffs of hundreds or even thousands of employees whose performed jobs with any relation to federal programs. Second will come the impact on the economy from the loss of corporate value resulting from the entire 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 suspension or disqualification of *an entire corporate structure* 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 U.S. 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. For example, because a federal oil or gas lease is a "covered

transaction" for the purposes of suspension and debarment, no federal leaseholder—which includes a large majority of oil and gas companies—may contract with a suspended or debarred affiliate. And other industries would similarly suffer; 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. Thus, two private companies would be prevented from entering into a contract because a mere affiliate of one company had been suspended and the other company was, for example, a federal leaseholder. 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. Companies that perform no contracts with the federal government—such as an international affiliate of a U.S. company—would suffer serious consequences as a result of federal suspension because of these and other collateral effects of suspension and debarment.

Amici submit this brief to protect the industry from those harms.

INTRODUCTION

The *Deepwater Horizon* blowout was an unprecedented event, and it was met with a forceful and immediate response by the federal government. In the aftermath of the accident, BP Exploration & Production Inc. (BPXP) pleaded guilty to criminal violations, including a misdemeanor violation of the Clean Water Act (CWA). Plea Agreement, *United States v. BP Exploration & Production Inc.*, No. 2:12-cr-00292, Dkt. No. 2, at 15-16 (E.D. La. 2012).

The plea agreement triggered a reflexive response from EPA. In November 2012, and without prior notice, it suspended BP p.l.c., BPXP, and nineteen other BP p.l.c. affiliates, preventing all of those entities from entering into any new federal procurement contracts and

non-procurement covered transactions. Revised Action Referral Memorandum, Complaint, Ex. D-2 (ARM). A couple of months later, EPA added another affiliate to the suspension list. Supplemental Action Referral Memorandum, Complaint, Exh. E-2 (Supp. ARM). And then, in February 2013, EPA disqualified BPXP's Houston corporate headquarters from federal contracting by designating that corporate headquarters a "violating facility" under the CWA. As a result of the disqualification, BPXP is ineligible to receive any new federal contracts or benefits for an indefinite period pending certification by EPA that the violation is corrected.

Amici well understand the damage caused by the *Deepwater Horizon* blowout, and they do not seek to excuse the responsible parties from their actions. But EPA's headquarters-level disqualification and its decision to extend suspension to affiliated corporate entities without any showing of public need plainly exceeded its statutory authority.

"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) (internal quotation marks and citations omitted). EPA's actions against BPXP, BP p.l.c., and BP's worldwide affiliates 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. EPA may want to punish BPXP, but EPA, like all other federal agencies, may only respond to an incident within the bounds of the authority Congress has given it.

ARGUMENT

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

The CWA provides for the automatic disqualification from federal contracting of any person convicted of specified CWA violations "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 the convicted person. 33 U.S.C. § 1368(a). EPA's determination that BPXP's Houston corporate headquarters was the "*facility* at which the violation which gave rise to [its] conviction occurred" 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. EPA's designation of a headquarters as a "violating facility" despite the lack of any CWA violation at that location is not just unsupported by statute; it appears to be unprecedented. EPA's designation of the headquarters as a "violating facility" was therefore unlawful, unreasonable, arbitrary, and capricious.

A. EPA's Designation Of BPXP's Headquarters As A "Violating Facility" Is Precluded By The Plain Language Of The CWA.

The *Deepwater Horizon* blowout occurred on an oil rig in the middle of the Gulf of Mexico. EPA nonetheless concluded that BPXP's corporate headquarters in Houston was the "violating facility" for the misdemeanor violation of the CWA to which BPXP pleaded guilty. EPA's interpretation is flatly inconsistent with the language of Section 1368.

When "Congress has directly spoken to the precise question at issue," then "the intent of Congress is clear, [and] that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *City of Arlington v. FCC*, 133

S. Ct. 1863, 1868 (2013) (quoting *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). The "unambiguously expressed intent" of Congress in Section 1368 is that a particular facility is automatically disqualified from contracting only if it is the facility "at which the violation . . . occurred." That is the "end of the matter" here.

Section 1368 mandates disqualification from a particular federal contract if three conditions are present. First, a person must be "convicted of any offense under [S]ection 1319(c)." 33 U.S.C. § 1368(a). The pertinent part of Section 1319(c) makes it a crime to "negligently violate" 33 U.S.C. § 1321(b)(3). *Id.* § 1319(c)(1)(A). And Section 1321(b)(3), in turn, prohibits the "discharge" of hazardous substances into particular waters. *Id.* § 1321(b)(3). Thus, the first condition is that a person must be "convicted" of "negligently" "discharg[ing] hazardous substances" into the defined waters. Second, the contract must be for the procurement of goods, materials, or services "to be performed at any facility at which the violation which gave rise to such conviction occurred." 33 U.S.C. § 1368(a). A person convicted of one of the listed crimes under Section 1319(c) is thus not automatically disqualified from receiving a contract if that contract will not be performed at the facility "at which the violation which gave rise to such conviction occurred." And the statutory context makes clear that the "violation" is the CWA violation. *See id.* § 1319(c)(1)(A). Finally, Section 1368 only disqualifies convicted persons from contracts to be performed at a violating facility if "such facility is owned, leased, or supervised by such person." *Id.* § 1368(a). *See also* 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, 282 (1999) (Listing Guidance).

In its plea agreement, BPXP admitted that it "did negligently discharge and cause to be discharged oil in connection with activities under the Outer Continental Shelf Lands Act . . . in such quantities as may be harmful in violation of [33 U.S.C. §§] 1319(c)(1)(A) and 1321(b)(3)." Plea Agreement 15-16. The first condition was thus satisfied. And BPXP certainly owns and supervises its corporate headquarters in Houston. But the designation of corporate headquarters as the "*facility*" at which the violation occurred defies the unambiguous language of the statute.

The facility at which the CWA violation occurred was an oil rig in the Gulf of Mexico. BPXP was convicted of "negligently violating" 33 U.S.C. § 1321(b)(3), which prohibits, among other things, the "discharge of oil or hazardous substances . . . in connection with activities under the Outer Continental Shelf Lands Act." 33 U.S.C. § 1321(b)(3)(ii). Section 1321 defines "discharge" as including, but not limited to, "any spilling, leaking, pumping, pouring, emitting, emptying, or dumping" of oil. 33 U.S.C. § 1321(a)(2). The negligent conduct of "spilling," "leaking," or "emitting" oil "in connection with activities under the Outer Continental Shelf Lands Act" was the "violation" to which BPXP pleaded guilty. And that "spilling" occurred on an oil rig on the outer continental shelf in the Gulf of Mexico. The oil rig alone was the "facility at which the [discharge] that gave rise to the conviction occurred." No "spilling" or "emitting" occurred at BPXP's corporate headquarters.[2]

[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." Listing Guidance 283. 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; no further, contracts would be performed there. EPA's Listing Guidance correctly 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 in this case.

EPA never reconciled its contrary view with the plain statutory language. Instead, it relied on its regulation interpreting the statute, which defines "violating facility" for purposes of Section 1368 and the analogous provision of the Clean Air Act (CAA), 42 U.S.C. § 7606:

> 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 EPA. [2 C.F.R. § 1532.1600(b).]

The EPA reasoned that BPXP's headquarters was a "location" or "site of operations" within the meaning of the regulation and that "the conditions giving rise to the conviction, i.e. management decisions regarding running the Rig, originated from" the headquarters. EPA Decision, Complaint, Dkt. 1, Exh. H, at 13-14 (EPA Decision). As a result, EPA concluded that "the conditions that gave rise to the violation occurred at the [headquarters] and the Rig." *Id.* at 14. But this line of reasoning itself demonstrates EPA's error.

The statute does not forbid contracts that will take place at the facility where "the conditions that *gave rise* to the violation occurred." It restricts the disqualification to the "*facility at which* the violation . . . occurred." 33 U.S.C. § 1368(a) (emphasis added). The statute does use the "gave rise" language—but it does so in requiring that the violation that forms the basis of the disqualification be the one that "gave rise to such *conviction*." *Id.* (emphasis added). In other words, the excluded facility must be the one "at which" the violation "occurred," and the conviction that leads to automatic disqualification must be based on that violation. The statute does not allow EPA to determine that a headquarters is the "violating facility" because something happened there that "gave rise" to the *violation*. Instead, the statute requires that the

violation—that is, the "discharge"—occur "at" the facility. The preposition "at" is unequivocal. This is not a statute in which Congress "left ambiguity" to allow EPA discretion to define which facilities should be held responsible for a CWA violation. *City of Arlington*, 133 S. Ct. at 1868 (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996)).

Congress provided for the extreme sanction of mandatory disqualification only when three conditions were present. One of those conditions requires that the violation occur *at* the disqualified facility. EPA cannot, by regulation or interpretation, excise this unambiguous statutory mandate and exclude a corporate headquarters from all government programs because some decisions may, down the line, have ultimately "g[i]ve[n] rise to" the violation. When Congress has expressed its intent clearly, EPA cannot grant itself more power by broadening the language of the statute beyond the meaning it will bear. Adherence to statutory constraints is especially important given the mandatory, indefinite nature of disqualification under the CWA.

Even if one assumes, as EPA does, that the "facility at which the violation . . . occurred" is ambiguous and applies EPA's implementing regulation, the agency's decision that BPXP's corporate headquarters is a "violating facility" is "plainly erroneous" and "inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted). As discussed, EPA's own regulatory definition requires that the excluded facility "give[ ] rise to a CWA or CAA conviction," but none of the conduct charged in the Information or agreed to in the Plea Agreement occurred at BPXP's corporate headquarters. Indeed, *all* of the allegations in the Information and the facts agreed to in the Plea Agreement pertinent to the CWA count occurred on the rig itself.

The Information charged that the two Well Site Leaders stationed on the rig acted negligently because they, among other things, "failed to phone engineers onshore to advise them

during the negative testing of the multiple indications that the well was not secure" and "accepted a nonsensical explanation for the abnormal readings during the testing, again without calling engineers onshore to consult[.]" Information, *United States v. BP Exploration & Production, Inc.*, No. 2:12-cr-00292, Dkt. No. 1 ¶ 21 (E.D. La. 2012). For the purposes of the Information, the employees' negligent actions on the rig were imputed to BPXP, and BPXP admitted that those actions "proximately caused the discharge" into the Gulf. *Id.* ¶ 24; *see* Plea Agreement, Exh. A (factual allocution). The Information does not assert that any individuals located at BPXP's headquarters acted negligently in choosing to assign these two particular Well Site Leaders. Nor does it assert that "management decisions" made at the headquarters "location" played any role in the spill by failing to supervise the leaders or to recognize the developing problem. In fact, the Information and Plea Agreement make clear that headquarters was *not aware* of the problem; the employees' principal negligent acts consisted of *failing to notify* "onshore engineers." Information ¶¶ 19, 20, 21; Plea Agreement, Exh. A.

The imputation of certain employees' conduct to their employer does not constitute an "admi[ssion]" that BPXP's corporate headquarters is the "violating facility," as EPA would have it. EPA Decision 14-15. The triggering event for disqualification does not turn on the agency relationship to a "person" convicted. According to EPA's implementing regulation, the statute requires that the "building, plant, mine, . . . location, or site of operations" must be the location where conduct occurred that "gives rise" to the conviction. 2 C.F.R. § 1532.1600(b); *see* 33 U.S.C. § 1368(a). That a contractor pleads guilty to a violation on the basis of conduct that occurred at one facility does not mean that an entirely *different* facility (its *headquarters*) at which none of the conduct giving rise to the conviction occurred is also disqualified from performing all government contracts and from participating in other covered federal programs.

BPXP's corporate headquarters did not give rise to the discharge of oil into the Gulf, and the record of conviction contains no evidence that actions at headquarters gave rise to the violation. EPA's decision is thus contrary to the unambiguous text of the statute and also plainly erroneous and inconsistent with the text of the agency's own regulation.

B. Accepting The Designation Of BPXP's Headquarters As A "Violating Facility" Would Undermine The Intent Of The Statute.

The CWA'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; *see also* Listing Guidance 282 (disqualification under Section 1368 is "mandatory in nature and the automatic consequence of a criminal conviction"). 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), 38 Fed. Reg. 25, 161. 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.

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.* The concern of the statute is thus with the violation—in this case the discharge of oil—that might be occurring at a particular location. The statute seals off that location from federal contracting until the cause of the violation has been corrected. Otherwise, the federal government, through its contractors or leaseholders, would be complicit in environmental violations.

The CAA has a parallel provision to Section 1368 providing for automatic disqualification of the facility at which a CAA violation occurs. 42 U.S.C. § 7606(a). But the CAA goes further: it not only provides for automatic disqualification of the particular facility at which the CAA violation occurred but also provies 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. But the CWA does not track the CAA in this respect.

EPA's regulations state that it may also "take *discretionary* suspension and debarment actions" for violations of the CWA. 2 C.F.R. § 1532.1115 (emphasis added). And another regulation asserts that if EPA "determines that the risk presented to Federal procurement and nonprocurement activities on the basis of the misconduct which gives rise to a person's CAA or CWA convictions 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). But neither provides for the extension of *automatic* disqualification to other facilities.

In this case, the risks EPA attempted to address "exceed[ed] the coverage afforded by mandatory disqualification," but EPA did *not* rely only on its discretionary authority to suspend or debar BPXP. Instead, it attempted to expand the coverage of mandatory disqualification

under Section 1368 beyond the terms of the statute 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. *See* 2 C.F.R. § 1532.1600(b).

Excluding the facility at which a CWA violation occurred prevents federal complicity in an environmental violation. But the designation of a headquarters as a "violating facility," the route taken by EPA here, punishes a company as a whole because it has the effect of disqualifying numerous related corporate facilities at which no CWA violation has occurred. EPA has essentially amended the text of the CWA to match that of the CAA. But EPA cannot expand its authority under the CWA by stretching its definition of "violating facility" to reach numerous facilities of a corporation by targeting one of its headquarters. If the agency wants to impute a CWA violation that occurred at one facility to other, non-violating facilities owned by that company, it must, as its own regulations provide, rely on its *discretionary* suspension and debarment authority—authority that comes with a comprehensive set of procedural protections and implementing regulations. *See* 2 C.F.R. Part 180 (setting forth comprehensive procedures for government-wide suspension and debarment from nonprocurement contracts). Federal contractors are extremely familiar with the traditional suspension and debarment process, but EPA's novel circumvention of that process through expansion of mandatory disqualification threatens to undermine its effectiveness.

Other contexts demonstrate the irrationality of designating a headquarters as a "violating facility," and the massive expansion of power that such imputation entails. For example, the FDA has the authority to order the suspension of the registration of a "facility" engaged in, among other things, the manufacturing, processing, or packing of food if the Secretary finds that

the food at that facility has a "reasonable probability of causing serious adverse health consequences." 21 U.S.C. § 350d(b)(1). It would be absurd under the statute for the FDA to suspend the registration of a *headquarters*—suspending the operation of all of its associated facilities as a result—on the basis of a contamination at one of the facilities without evidence that the contamination also infects the headquarters itself, even if it could arguably claim that the headquarters was involved in the "manufacturing" or "processing" of food since it oversaw the operations. Similarly, statutes and regulations that exclude health care "providers" from federal health care programs due to fraud or other health care violations should be read to exclude only the violating entity, not an entity's headquarters, unless the regulations specifically provide otherwise. *See, e.g.*, 5 U.S.C. § 8902a; 5 C.F.R. § 890.1003; 42 U.S.C. §§ 1320a-7(b)(13), 1320b-6; *see also* 10 U.S.C. § 983(a) (denying federal funds to "an institution of higher education (including any subelement of such institution)" that has a policy discriminating against ROTC participation); 32 C.F.R. § 216.3(c)(2) (clarifying that, as applied to an "individual institution of education that is part of a single university system," the statute denies funds only to "that individual institution within [a] university system" that has the offending policy, not the broader university system).

Numerous other statutes, regulations, and Executive Orders providing for the disqualification or exclusion of entities from federal contracting on the basis of some violation explicitly provide for the exclusion of the "contractor" itself—or, like the CAA, expressly allow the agency to extend exclusion to other related entities. *See, e.g.*, 41 U.S.C. § 6706(b) (contract cannot be awarded to the "person or firm" found in violation of the prevailing wage law "or to an entity in which the person or firm has a substantial interest"); Executive Order No. 11,246, § 209(6) (Sept. 28, 1965), 30 Fed. Reg. 12,319 (Secretary of Labor may exclude "any

noncomplying *contractor*" until it adopts complying employment policies); 7 C.F.R. § 400.454(d)(3) (in disqualification from the federal crop insurance program, the "conduct of one organization in violation . . . may be imputed to another organization" when the second organization "has the power to direct, manage, control, or influence the activities of the organization responsible for the improper conduct"). The CWA contains no such authorization.

The intent of CWA's Section 1368 is clear: to eliminate federal involvement with the particular facilities responsible for criminal violations of the CWA. The consequences of disqualification are immediate and severe. Unlike suspension or debarment, statutory disqualification is indefinite, excluding all violating facilities until the agency, in its discretion, determines that the problem has been corrected. This Court should not countenance EPA's attempt to transform the word "facility" into a more encompassing term such as "company" or "corporate entity" and thereby augment the already powerful hammer it wields.

II. AN AGENCY CANNOT SUSPEND MULTIPLE WORLDWIDE AFFILIATES OF A COMPANY WITHOUT GROUNDING ITS DECISION IN THE PUBLIC INTEREST OR SHOWING A LACK OF PRESENT RESPONSIBILITY.

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). In suspending nineteen worldwide BP "affiliates" on account of the conduct of four individuals employed by BPXP or its parent BP p.l.c., EPA abused its discretion. An agency cannot extend a suspension to sweep in multiple worldwide affiliates without offering some justification grounded in the public interest.

To suspend an entity from all government contracting, EPA must conclude that "[i]mmediate action is necessary to protect the public interest," and the suspension must be supported by adequate evidence. 2 C.F.R. § 180.700(c); *see also* 2 C.F.R. §§ 180.605, 180.705; *Robinson v. Cheney*, 876 F.2d 152, 160 (D.C. Cir. 1989) ("[T]he ultimate inquiry as to 'present responsibility' relates directly to the contractor itself."). "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 delayed suspension of multiple worldwide BP affiliates without even an attempt to show that the suspensions were in the public interest or that the suspended entities lacked present responsibility. In amici's view, EPA's approach in this case threatens to undermine established principles of government contracting.

An "affiliate" of a contracting entity "may be included in a suspension or debarment action" provided that the affiliate receives notice and an opportunity to contest the action. 2 C.F.R. § 180.625(b). The regulations define "affiliate" broadly, providing 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." *Id.* § 180.905. These provisions, which mirror those of the FAR, 48 C.F.R. §§ 9.403, 9.406-1(b), were 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).

EPA never contended, however, that BP would use its subsidiary BP Singapore PTE Ltd. or BP Marine Global Investments Salalah Company LLC (based in the Sultanate of Oman), for example, to circumvent BPXP's suspension relating to the incident in the Gulf. EPA stated only

that "BP PLC is the owner of, and thus controls or has the power to control the following entities . . . . As such, these entities are all "affiliates" of each other . . . . Accordingly, any suspension or debarment of BP PLC or any of the entities named in this paragraph extends to all other entities named in this paragraph pursuant to 2 C.F.R. § 180.625." ARM 19. And in subsequently adding Castrol Marine Americas to the excluded company list, EPA did not offer any rationale other than the fact that it was a BP affiliate that EPA had overlooked previously. Supp. ARM 5-6. EPA repeated this logic in its decision rejecting BP's appeal, stating that "'[c]ontrol' by the parent, in this case BP plc, is the sole consideration." EPA Decision 11.

EPA's ipso facto reasoning is inherently flawed. Core principles of government contracting establish that the automatic extension of a suspension to far-flung subsidiaries—many of which have no dealings whatsoever with the federal government—does not necessarily or "[a]ccordingly" follow based on the "sole consideration" of control. Section 180.625 provides that an affiliate "may" be suspended, requiring an exercise of discretionary authority by the agency. 2 C.F.R. § 180.625(b). But EPA saw no need to support its exercise of this discretion with any reasoning; instead it extended the suspension to affiliates automatically because of shared control. Contrary to EPA's decision 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. Aside from the negligence of the two Well Site Leaders at the site of the explosion, *see supra* at 12, the alleged "improper conduct" that forms the basis for this worldwide suspension was (1) the deletion of text messages and voicemails by a BP drilling engineer and (2) certain statements made by BP's Deputy Incident Commander that underestimated the amount of oil spilling out of the Macondo well. *See* ARM 10-19; *see also United States v. Mix*, No. 2:12-cr-00171 (E.D. La.); *United States v. Rainey*, No. 2:12-cr-00291 (E.D. La.). The negligence occurred on the oil rig, and the other improper conduct—obstructing justice and making false statements—occurred in the unique and isolated context of the subsequent investigation of the oil spill. There were no improper business practices by the parent company that might infect the entire BP conglomerate. In fact, the parent company itself, BP p.l.c., was not indicted on or convicted of any improper conduct; EPA imputed the conduct of two employees to it. *See Agility Def. & Gov't Servs., Inc. v. U.S. Dep't of Def.*, No. 5:11-cv-0411-CLS, Slip Op. 22, 2012 WL 2480484, at *9 (N.D. Ala. June 26, 2012) ("[T]he government may immediately suspend numerous affiliates on the basis of its suspicion of one of them, and then has a limited period of time in which to determine which affiliates actually participated in wrongdoing before it must terminate the suspensions of those not facing accusations. That arrangement allows the government to put an immediate stop to potential wrongdoing that it may not have been able to investigate fully, but it does not give the government the power to suspend an affiliate *indefinitely* without even *suspicion* of wrongdoing."). Here, EPA and BP were engaged in dialogue for several months, and EPA could easily have determined which affiliates were not implicated in the misconduct.

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). EPA relied on 2 C.F.R. § 180.630 to impute to BPXP the conduct of the negligent Well Site Leaders and to impute to BP p.l.c. the improper conduct of two employees indicted for obstruction of justice and making false statements. ARM 16-19. Section 180.630 allows an agency to impute the conduct of an individual to an organization when the improper conduct of the individual "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." *Id.* § 180.630(a). EPA also imputed to BP p.l.c. the improper conduct of BPXP, as admitted in its plea agreement. ARM. 18-19. Section 180.630 allows the imputation of the conduct of one organization to another "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." 2 C.F.R. § 180.630(c). These imputation provisions move *up* the ladder of control, allowing an agency to impute an employee or organization's conduct to the entities that control them. 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."

In support of this exercise of discretion, EPA found that there was an "immediate need" to suspend worldwide affiliates of BP because they "bid for and are awarded federal contracts that appear to be worth millions of dollars every fiscal year" and thus "this flow of taxpayer's funds to BP plc, or one of its many affiliates, is routine and constant." EPA Decision 12. But

EPA never explained why it had to act to stem this flow immediately in order to "protect the public interest," the only permissible reason for the drastic remedy of suspension. 2 C.F.R. § 180.125. And EPA never reconciled the fact that BPXP itself, along with its affiliates, had been awarded numerous contracts since the oil spill, each requiring the awarding agency to determine at that time that BPXP or the affiliate was a "responsible" contractor. *See* 48 C.F.R. §§ 9.103, 9.104-1; Complaint ¶¶ 41-45 (describing subsequent contract awards); *Lion Raisins, Inc. v. United States*, 51 Fed. Cl. 238, 247 (2001) (agency suspension decision not rational where it occurred almost two years after agency discovered conduct and during the intervening two years the agency had awarded numerous contracts to the plaintiff).

In response to these arguments, EPA said that it did not have a "clear and full understanding" of the conduct until the plea agreement. EPA Decision 12. Even accepting that contention as true, however, the plea did not implicate other affiliates. EPA may not base a worldwide suspension of affiliates on actions that happened in the *past* merely because the agency realized the conduct was more egregious than it had previously thought without also showing that the new information demonstrates a potential risk to the public interest. If the individual who had engaged in misconduct had some control over affiliates or the agency had reason to believe that the misconduct extended to certain affiliates, then the extension of the suspension may be warranted. But retroactive action taken 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 considerations that underlie all suspension and debarment decisions: present responsibility and the public interest. *See Gonzales v. Freeman*, 334 F.2d 570, 576-77 (D.C. Cir. 1964) ("Notwithstanding its severe

impact upon a contractor, debarment is not intended to punish but is a necessary means for accomplishing the congressional purpose[.]") (internal quotation marks omitted).

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 CAA and CWA violations that involved the loss of life and serious environmental damages." EPA Decision 12. 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.

As to why this time is different, the final sentence of EPA's decision is telling. After recognizing that past suspensions had been more narrowly tailored to the entities at fault for improper conduct, EPA concluded: "There is an immediate need to see that this does not happen again." EPA Decision 12. Perhaps "this" is another oil spill, although *nothing* in the decision states that any BP entity other than BPXP played any role in the spill. Perhaps "this" means covering up the spill, but, again, nothing in the decision indicates that the obstruction of justice or deception beyond the actions of two individual employees of BP in their responses to the accident. Regardless of the meaning of EPA's ambiguous statement, there is no reasoning in the decision that even suggests that any affiliate shared or played any role in the policies and improper conduct forming the basis for the suspension.

The last sentence of EPA's decision starkly confirms that EPA sought to use the fullest extent of its authority to send a punitive message to BP. But to use the "affiliate" provisions to accomplish that goal without any showing that such shared attribution is necessary to protect the public interest is unlawful. Agencies may not take advantage of the "affiliate" provisions to

bypass the regulations governing imputation. As twenty-eight agencies recognized in enacting the affiliate provisions, they may be necessary to counteract subterfuge and ensure that the federal government is not contracting with an irresponsible party. But the fact that they are *available* for such use does not mean they apply automatically based on the "sole consideration" of control." EPA Decision 11. If EPA or any other agency wants to invoke these regulations, it must support their application with more than an argument that the regulations technically allow it: the agency must provide a justification grounded in the public interest. Otherwise, any suspension is arbitrary, capricious, and an unlawful abuse of the agency's discretion. And a worldwide suspension of multiple affiliates without 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

The Court should declare EPA's disqualification of BPXP's corporate headquarters contrary to law, and it should declare that EPA's unprecedented assertion of suspension power over affiliates is arbitrary, capricious, an abuse of the agency's discretion, and otherwise contrary to law. The designation of BPXP's corporate headquarters as a "violating facility" should be voided and the suspension of BP p.l.c.'s affiliates lifted.

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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 2nd day of December, 2013, in accordance with the Federal Rules of civil Procedure.

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APPENDIX