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A three-judge panel of the Fifth Circuit heard argument today on the Obama administration's request that it stay the [District Court's injunction](#) of the 6-month [deepwater oil development moratorium](#), and by a 2-1 vote quickly [rejected the request](#).

The moratorium halted any new drilling, and the granting of any new permits for drilling, in depths beyond 500 feet based on the Secretary of Interior's finding that "deepwater drilling poses an unacceptable threat of serious and irreparable harm or damage to wildlife and the marine, coastal and human environment." The District Court overturned the moratorium, finding that the Secretary had not adequately justified the breadth of the suspension.

The District Court's decision to block the moratorium seems clearly wrong. Surely the Deepwater Horizon blowout, which the oil industry claims was entirely unexpected, together with the company's inability to stem the flow for more than 80 days, is compelling evidence that deepwater drilling poses a "threat of serious, irreparable, or immediate harm or damage" to people and the environment, the relevant legal standard for suspending leases under the Outer Continental Shelf Land Act.

Furthermore, the moratorium is simple common sense. It is not yet known precisely what went wrong on the Deepwater Horizon, or how the government could ensure a quicker and more effective response to a blowout. Operation of the Deepwater Horizon had been judged safe prior to the blowout and in the (minimal) environmental review that preceded permitting. In other words, no one really knows whether other operations in the Gulf might pose a similar risk. Under the circumstances, it is hardly irrational to call a halt to new drilling until the various causes of the disaster are better understood. The district court complained that Interior had not adequately justified drawing the line between shallow and deepwater operations at 500 feet — apparently that's the line between fixed and floating rigs — but it didn't cite any evidence that operations beyond 500 feet don't pose a threat of harm.

The Fifth Circuit today refused to stay the injunction while the government appeals. Its reasoning is just as odd as the district court's. According to two judges on the Fifth Circuit panel,

the Secretary has failed to demonstrate a likelihood of irreparable injury if the stay is not granted; he has made no showing that there is any likelihood that drilling activities will be resumed pending appeal.

That's true, but the panel drew precisely the wrong conclusion from it. In order to obtain an injunction, plaintiffs were required to show that *they* would suffer irreparable harm if the moratorium were left in place. Plaintiffs, it is worth noting, do not hold any Gulf leases. They provide services that support drilling, but they have no control over whether drilling goes forward, with or without a moratorium. They offered no evidence that drilling would proceed if the moratorium were lifted. In fact, as the US pointed out in its [motion for a stay](#),

In conceding that Interior's suspension orders would not cause it any irreparable injury, Hornbeck [Offshore Services, the lead plaintiff] necessarily admits that a temporary stay of the district court's injunction would cause it no harm either.

I would go further. If Hornbeck can't show that new drilling would be started within the period of the moratorium if the moratorium were lifted, not only does it not have the right to an injunction, it does not even have standing to challenge the moratorium. Absent at least some evidence to that effect, Hornbeck cannot show that the moratorium (rather than the spill) has caused its alleged economic injuries or that a court ruling in its favor would redress those injuries. And so far, no lease holder has come forward to say they want to start a new deepwater well in the Gulf. That would be politically risky, to put it mildly, at a time when Congress is in the midst of deciding what new restrictions to impose on Gulf offshore operations.

In any case, this latest decision seems unlikely to have much effect on the situation in the Gulf. Secretary Salazar has already promised to issue a new version of the moratorium order. Neither the district court decision nor this one questions Interior's right to impose a moratorium, only the explanation for the particular set of restrictions imposed. Expect a new order soon. And if the government's appeal goes ahead as scheduled (which seems unlikely because Hornbeck's claim will be moot if a new moratorium is adopted), expect the US to prevail on the merits, which were not addressed in today's brief order.

