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The Gulf Deepwater Drilling Moratorium Litigation: While Merits Still Pending, Already Significant Practical Effect?

by Cynthia A. Drew

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"[N]early one-third of the Gulf of Mexico has been closed to commercial and recreational fishing."

—U.S. District Judge Martin Feldman (June 22, 2010)

On April 20, 2010, the Deepwater Horizon well operated by BP exploded, killing 11 and injuring many more workers, as it began spewing "endless gushes of crude oil" into the Gulf of Mexico 50 miles south of the Louisiana coastline at a depth of 5,000 feet.[1] Besides these immediate "senseless" worker deaths and injuries, "horrible losses" were sustained by the families and loved ones of the dead and injured crew, the broken pipe on the floor of the sea gushed crude for nearly three months afterwards, and the oil muck "spread across thousands of square miles and persists in damaging sensitive coastlines, wildlife, and the intertwined local economies."[2]

In response to these "all-too-familiar tragic facts,"[3] on May 28, 2010, the U.S. Department of the Interior (DOI) Secretary Ken Salazar imposed a six-month moratorium on Gulf deepwater drilling. Oil drilling services companies (Hornbeck) operating in the Gulf promptly filed suit, seeking a preliminary injunction forbidding the moratorium from taking effect. On June 22, 2010, the federal district court granted plaintiffs' motion. Shortly afterwards, the U.S. Court of Appeals for the Fifth Circuit refused to reinstate the moratorium. On July 12, 2010, Secretary Salazar issued a new moratorium. The government then moved, on mootness grounds, in the district court to dismiss plaintiffs' suit based on the first moratorium and in the U.S. Court of Appeals for the Fifth Circuit to vacate the district court's preliminary injunction. On September 1, 2010, the district court ruled that plaintiffs' case challenging the Secretary's first moratorium was not moot. On September 29, 2010, the Fifth Circuit ruled that the government's appeal of the preliminary injunction was moot because the injunction was legally dead, and this expedited chain of swiftly moving events was still in process.

I. Background of Case

By late April 2010, President Barack Obama had ordered the Secretary of the Interior to review and report on the Deepwater Horizon blowout within 30 days—specifically, on "what, if any, additional precautions and technologies should be required to improve the safety of oil and gas exploration and production operations on the outer continental shelf."[4] After submitting a May 27, 2010, report on these matters to the president,[5] the next day, Secretary Salazar imposed the challenged six-month moratorium on offshore drilling operations of new and currently permitted deepwater wells in waters deeper than 500 feet. On June 7, 2010, several plaintiff oil services companies sued for declaratory and injunctive relief, alleging, inter alia, that the Secretary had acted contrary to law in imposing the moratorium. Plaintiffs then moved for a preliminary injunction to prohibit the DOI from enforcing its six-month moratorium on Gulf deepwater drilling.[6]

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1. Hornbeck Offshore Services, LLC v. Salazar, 696 F. Supp. 2d 627, 630 n.2, 40 ELR 20173 (E.D. La. June 22, 2010).
2. *Id.*
3. *Id.*
4. Memorandum from Ken Salazar, Sec'y of the Interior, to Michael Bromwich, Director, Bureau of Ocean Energy Management, Regulation, and Enforcement (July 12, 2010).
5. U.S. DOI, Increased Safety Measures for Energy Development on the Outer Continental Shelf (2010).
6. Louisiana Gov. Bobby Jindal filed an amicus brief on the motion for preliminary injunction. The Florida Wildlife Federation, the Center for Biological Diversity, the Natural Resources Defense Council, the Sierra Club, and the Defenders of Wildlife intervened as defendants.

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By the time of Judge Martin L.C. Feldman's June 22, 2010, ruling on plaintiffs' motion seeking a preliminary injunction, BP had unsuccessfully attempted to engineer several possible solutions to staunch the flow of crude into the Gulf.[7] Moreover, the "gushes" of oil BP had initially estimated at 1,000 barrels a day had already in April been increased five times to 5,000 barrels a day, then increased again in May by two to five more times to 12,000-19,000 barrels a day, then increased again in June by three to five times more—all told, to a "staggering" 35,000-60,000 barrels a day.[8] By mid-June, it was already being predicted that the quantities of crude oil gushing from the Deepwater Horizon, a much more complex and likely long-term toxic catastrophe than the *Exxon Valdez* spill,[9] would surpass the amounts spilled when the *Exxon Valdez* ran aground in 1989 in Prince William Sound.[10] Despite three presidential trips to the Gulf Coast (and a first address to the American people from the White House), the continuous work of a plethora of state and local officials and federal agencies to mitigate the spill's toxic effects, and BP's daily ongoing recovery efforts staffed from a command center in Houston, at the time of the district court's June 22, 2010, ruling, a "permanent" solution to cutting off the massive flows of crude oil from the damaged well was still likely to occur only with the planned August 2010 completion of relief wells.[11]

II. First Round of Preliminary Injunction Litigation

After the district court granted plaintiffs' motion for preliminary injunction—thus prohibiting the government from enforcing its six-month drilling moratorium imposed May 28—the government immediately sought a stay pending appeal in the Fifth Circuit. On July 8, 2010, in a 2-1 decision, the appellate court denied this motion for stay, because the Secretary had not shown there was "any likelihood that drilling activities will be resumed pending appeal."[12] Noting, however, that the Secretary retained the right to seek emergency relief if he could show that deepwater rigs had "commenced" or were "about to commence" drilling activity, the court emphasized that it would evaluate any renewed government motion for stay "on existing circumstances."[13]

On July 12, 2010, the Secretary imposed a second moratorium to replace his May 28 moratorium that the district court's June 22 order had "immediately" prohibited him from enforcing.[14] The *New York Times* termed the Secretary's action to reaffirm his May 28 decision to suspend Gulf deepwater drilling "a new, and necessary," moratorium: "Despite legal challenges from industry, complaints from local politicians and bad rulings from unsympathetic judges," the administration has "reaffirmed one of the basic lessons of this mess: that industry claims cannot be accepted at face value."[15] The *Wall Street Journal* termed it "the new-old drilling ban," and criticized the Secretary's "fiddl[ing] with the ban's details in the hope of passing judicial muster."[16]

III. Mootness Round of Preliminary Injunction Litigation

On July 13, 2010, the government moved in the district court to dismiss plaintiffs' lawsuit, arguing that the revised moratorium—which may allow new drilling to proceed if companies can meet enhanced safety standards—replaced the earlier moratorium, rendering the pending challenge moot. Concurrently, the government moved in the Fifth Circuit to vacate the district court's preliminary injunction as moot.[17]

In response to the government's motion, on August 16, 2010, the Fifth Circuit opined that, while the Secretary had asserted "substantial reasons suggesting mootness," the court had an "insufficient" record on which to decide the issue. The appellate court then instructed the district court as to specific issues on which the district court must make findings of fact and conclusions of law to supplement the record.[18]

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7. *See, e.g.*, Clifford Krauss & Jackie Calmes, *BP Engineers Making Little Headway on Leaking Well*, N.Y. Times, May 28, 2010 (two "junk shot" attempts failed); Leslie Kaufman & Clifford Krauss, *BP Prepares to Take New Tack on Leak After "Top Kill" Fails,* N.Y. Times, May 29, 2010.
8. *See, e.g.*, respectively, Campbell Robertson & Leslie Kaufman, *Size of Spill in Gulf of Mexico Is Larger Than Thought*, N.Y. Times, Apr. 28, 2010; Tom Zeller Jr., *Estimates Suggest Spill Is Biggest in U.S. History*, N.Y. Times, May 27, 2010; Joel Achenbach, *Oil Leak Is Stopped for First Time Since April 20 Blowout*, Wash. Post, July 16, 2010.
9. *See, e.g.*, David Fahrenthold & Juliet Eilperin, *Challenge of Cleaning Up Gulf of Mexico Oil Spill "Unprecedented" at Such Depths*, Wash. Post, May 15, 2010: "Because of the leak's extreme depth, and effects of dispersants, the spill is breaking the maxim that oil floats. Instead, scientists fear it is settling on sensitive corals or poisoning ecosystems that produce shrimp, snapper and sport fish, all too deep for scientists to watch or help."
10. *See, e.g.*, Anne C. Mulkern, *BP's PR Blunders Mirror Exxon's, Appear Destined for Record Book*, N.Y. Times, June 10, 2010.
11. The well flow stopped on July 15, 2010; as of early August, an estimated 4.9 million barrels of oil had spilled into the Gulf. Joel Achenbach & David A. David Fahrenthold, *Oil Spill Dumped 4.9 Million Barrels Into Gulf of Mexico, Latest Measure Shows,* Wash. Post, Aug. 3, 2010.
12. *Hornbeck*, No. 10-30585 (5th Cir. July 8, 2010), *available at* PACER, Document 0051168004.
13. *Id.* The court also ordered the government's appeal of the preliminary injunction to be expedited to a merits panel. The dissenting judge concurred in these actions, but would have granted the government's motion to stay.
14. Hornbeck Offshore Services, LLC v. Salazar, 696 F. Supp. 2d 627, 40 ELR 20173 (E.D. La. June 22, 2010). After the government issued its second moratorium, the Fifth Circuit withdrew its order scheduling September 1, 2010, as the expedited date for oral argument on the interlocutory appeal on the district court's ruling on the government's first moratorium.
15. Editorial, *A New, and Necessary Moratorium*, N.Y. Times, July 13, 2010, at A26.
16. Editorial, *The New-Old Drilling Ban*, Wall St. J., July 13, 2010.
17. The government also argued to the district court that it should stay its orders until after the Fifth Circuit ruled on the government's motion to vacate.
18. *Hornbeck,* No. 10-30585, 2010 WL 3219469, at *1. By the time the Fifth Circuit issued this limited remand, the district court had already ordered the parties to submit supplemental briefing comparing what "new" information the Secretary used to support his July 12 directive that was "not available" before May 28—and to analyze the possible applicability of *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, 113 S. Ct. 2297 (1993) (city's repeal of ordinance according preference to certain minority-owned businesses was not rendered moot when city repealed ordinance and enacted a different such ordinance covering a smaller class of minorities). *Hornbeck,* No. 10-1663, 2010 WL 3523040, at *2.

   It seems questionable, however, as to what extent this *Jacksonville* case regarding the circumstances in which a city might reconsider its actions in a minority-owned business matter would be on point vis-à-vis a case regarding the circumstances in which a Secretary implementing a statutory scheme requiring him to balance competing national interests might, in an emergency situation, reconsider his action. Such a local government entity would operate under a very different legal framework than an agency to which the entire body

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IV. Limited Remand Record Issues

In response to the Fifth Circuit's limited remand, the district court amended its briefing order also to cover the three questions on which the Fifth Circuit had instructed the district court to provide findings of fact and conclusions of law:

1. Whether the Secretary has the authority under the provisions of the Outer Continental Shelf Lands Act [OCSLA] and the Administrative Procedures [sic] Act [APA] to declare the provisions of the May 28 Moratorium to be withdrawn, cancelled, and no longer in force and effect, especially given that the May 28 Moratorium is the subject of a preliminary injunction issued by the district court and an appeal filed by the Secretary under the provisions of 28 U.S.C. 1292(a)(1).
2. Whether the evidence upon which the Secretary relied in issuing the July 12 Moratorium and not asserted in the May 28 Moratorium was available or unavailable to the Secretary when the May 28 Moratorium was issued, and the nature of such additional evidence.
3. With respect to the scope and substance of the May 28 Moratorium and the July 12 Moratorium, what are the differences, if any, and, considering such differences and any other circumstances—including changed conditions, changed facts, and changed positions or subsequent conduct of the parties—whether the preliminary injunction of the May 28 Moratorium was mooted by the issuance of the July 12 Moratorium.[19]

One member of the Fifth Circuit panel, the same who had dissented from the court's July 8 denial of the government's motion for stay, also dissented from this limited remand. First, the dissenting judge believed that the interpretation of the Secretary's powers under the OCSLA was a legal question that the Fifth Circuit should have determined without remanding the case to the district court. Second, the dissenting judge would have deemed that, even if the Fifth Circuit determined that comparing the records of the Secretary's two moratorium orders were necessary before the court could rule on the Secretary's motion to dismiss the preliminary injunction as moot, those records were already before the court. Finally, the dissenting judge believed that the Fifth Circuit could already rule that the case was not moot, because it fell within three exceptions to the mootness doctrine: (1) the voluntary cessation exception; (2) the "capable of repetition, yet evading review" exception; and (3) the collateral consequences exception.[20]

V. District Court Ruling: Case on First Moratorium Is Not Moot

On September 1, 2010, the district court issued its Order and Reasons in response to the Fifth Circuit's limited remand.[21] As to the Fifth Circuit's first question regarding the Secretary's authority to withdraw his May 28 moratorium decision, the district court could find no legal precedent holding that a Secretary's reconsideration and rescission of a decision under judicial review was invalid. The district court therefore found that consideration of the doctrine of mootness became "pivotal."[22] After considering the parties' strenuous contrary arguments that the Secretary's second moratorium decision mooted the first (especially regarding just how "new" the new administrative record was),[23] the district court found that, because the Secretary's second moratorium "arguably fashions no substantial changes" from the first moratorium, the government had "failed to circumvent" the voluntary cessation exception to mootness.[24]

VI. Fifth Circuit Ruling: Motion to Vacate Injunction Is Moot; Injunction Is Legally Dead

At the time this Article went to press, the Fifth Circuit had just ruled that the government's motion to vacate the district court's preliminary injunction was moot.[25] Emphasizing that the court could not maintain appellate jurisdiction if it could not provide the parties with "some type of injunctive relief," the court opined that the May 28 moratorium had been "expressly rescinded" by the Secretary and the rescission had been "recognized by the district court, at least for purposes of the preliminary injunction against that moratorium."[26] The Fifth Circuit therefore held that the government's appeal of the preliminary injunction had been mooted both by the acts of the Secretary and by "the subsequent rulings of the district court that granted that injunction."[27] Thus, "[a]ny opinion expressed by this court on the merits and legality of the issu-

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of administrative law applies, particularly in the latter's control relationships with all three constitutional actors in our federal system: Congress, the president, and the courts.

19. *Hornbeck,* No. 10-30585, 2010 WL 3219469, at *1. The Fifth Circuit instructed the district court and the parties to expedite responses to the requests of its limited remand, and to file simultaneous briefs after the district court filed the supplemented record and its findings and conclusions.
20. *Hornbeck,* No. 10-30585, 2010 WL 3219469, at *2 (Dennis, J., dissenting).
21. *Hornbeck,* No. 10-1663, 2010 WL 3523040, at *2.
22. *Id.* at *4.
23. *Id.* at *6. In its September 1 opinion, the district court noted that the new moratorium had by then also been challenged in a different case pending before the court. *Id.* n.7 (referencing *Ensco Offshore Co. v. Salazar*, No. 2:10-cv-01941-MLCF-JCW (E.D. La. July 20, 2010)). The state of Texas had by then also brought suit in the Southern District of Texas challenging the Secretary's second moratorium. Texas v. Salazar, No. 4:10-cv-02866 (S.D. Tex. Aug. 11, 2010).
24. *Hornbeck*, No. 10-1663, 2010 WL 3523040, at *7 (E.D. La. Sept. 1, 2010). Per this exception, where a defendant's voluntary cessation of disputed conduct is challenged, a case is only found moot "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at *5 (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 189, 30 ELR 20246 (2000)).
25. *Hornbeck*, No. 10-30585, 2010 WL 3825385 (5th Cir. Sept. 29, 2010). In doing so, the Fifth Circuit declined to express an opinion as to "whether the Secretary's issuing a second moratorium (1) violated the district court's preliminary injunction; (2) was done merely to avoid judicial review of the first moratorium; or (3) renders moot the merits of the underlying suit." *Id.* at *1 n.2.
26. *Id.* at *1.
27. *Id.*

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ance of the preliminary injunction would address an injunction that is legally and practically dead."[28]

VII. Conclusion: Whatever the Outcome, Litigation's Contribution to Preventing Negative Economic Impact?

By September 29, 2010, the Fifth Circuit had returned the first-filed suit in the burgeoning docket of post-BP oil spill/Gulf moratorium cases to the district court for decision on the merits of the government's pending motion for dismissal, on grounds of mootness, of plaintiffs' lawsuit challenging the Secretary's first moratorium. At this point,[29] the fascinating practical effect of the rapid-fire litigation developments—especially after the *Hornbeck* plaintiffs quickly won an early victory when the district court enjoined the Secretary from enforcing his May 28 moratorium—may have been that oil companies decided not to abandon wholesale their operations in the Gulf. Thus, as the *New York Times* reported on August 24, 2010, the dire economic impacts predicted in plaintiffs' early pleadings have not occurred:

> Yet the worst of those forecasts has failed to materialize, as companies wait to see how long the moratorium will last before making critical decisions on spending cuts and layoffs. Unemployment claims related to the oil industry along the Gulf Coast have been in the hundreds, not the thousands, and while oil production from the gulf is down because of the drilling halt, supplies from the region are expected to rebound in future years. Only 2 of the 33 deepwater rigs operating in the gulf before the BP rig exploded have left for other fields.[30]

Nonetheless, these predicted "worst" forecasts (although then (as now) largely still speculative) had been credited by the *Hornbeck* district court as a basis for its June 22 grant of a preliminary injunction preventing the Secretary from enforcing his first moratorium.[31] On the other hand, when making that decision, the district court apparently gave short shrift to the strength of Congress' delegation of authority to the Secretary properly to balance the competing considerations of America's "national policy" regarding the outer continental shelf: "a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development subject to environmental safe-guards, in a manner which is consistent with the maintenance of competition and other national needs."[32] For, although acknowledging that "both harm to the parties and to the public may be considered"[33] in striking an equitable balance between the economic and environmental harms that would presumably accrue depending upon whether the Secretary were enjoined from enforcing his May 28 moratorium, the district court in rendering its decision apparently considered mainly the economic—not also the environmental—public harms.[34] Moreover, in so doing, the district court did not cite the administrative law "gold standard" authority regarding the nature and scope of judicial review of agency action, the landmark *Chevron*.[35]

After the Fifth Circuit's September 29, 2010, ruling held moot the government's motion to vacate the preliminary injunction because the injunction was "legally and practically dead,"[36] dispositive questions remained pending on the merits of OCSLA and APA issues: e.g., whether the Secretary acted beyond his authority or unreasonably in implementing the six-month moratorium that he deemed would best address a rapidly escalating environmental disaster.[37] But, if the district court were so to rule, how likely is it that the Fifth Circuit would ultimately affirm such a decision? Or would the Fifth Circuit (which has already twice framed its terse rulings on the government's interlocutory appeal of the district court's grant of a preliminary injunction in different terms than those used by the court below[38]) instead be more

28. *Id*. The same judge who had dissented from the panel's prior rulings again dissented for the same reasons expressed in his most recent opinion. *See supra* note 20. The Fifth Circuit majority concluded that the dissent's legal arguments had no merit because they applied to "rare situations" not presented: "Apparently eager to reach the merits of a *different* appeal, the dissent urges that we decide today 'whether the [DOI] acted arbitrarily in issuing its 6-month deepwater drilling moratorium.'" *Id.* n.3. Since that question was currently pending before the district court, the Fifth Circuit remained "decidedly unpersuaded" that one of its duties was to "render judgment on matters that are not before us." *Id.*
29. The purpose of this brief Article is to alert readers to the jurisprudential issues raised by this fast-paced expedited litigation. When "the dust settles," a later article will more fully analyze the likely future precedential value of these cases.
30. John M. Broder & Clifford Krauss, *Job Losses Over Drilling Ban Fail to Materialize,* N.Y. Times, Aug. 24, 2010.
31. *See, e.g.*, *Hornbeck*, 696 F. Supp. 2d 627, 638, 40 ELR 20173 (E.D. La. June 22, 2010): "Some of the plaintiffs' contracts have been affected; the Court is persuaded that it is only a matter of time before more business and jobs and livelihoods will be lost."
32. *Id*. at 632 (quoting 43 U.S.C. §1332(3)). *Cf.* the district court's acknowledgement that, "[i]n the preparation and maintenance of this federal leasing program, OCSLA mandates consideration of the 'economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf, and the potential impact of oil and gas exploration on other resource values . . . and the marine, coastal, and human environments,'" *id*. at 633 (quoting 43 U.S.C. §1344(a)(1)), *with* the district court's conclusion that the government "trivialize[d] such losses [those affecting plaintiffs' contracts, *see supra* note 31] by characterizing them as merely a small percentage of the drilling rigs affected . . . ," *id*. at 638.
33. *Id*. at 639 (quoting Long Island R.R. v. Int'l Ass'n of Machinists, 874 F.2d 901, 910 (2d Cir. 1989)).
34. *Id*. at 639; *see, e.g.,* "The effect on employment, jobs, loss of domestic energy supplies caused by the moratorium as the plaintiffs (and other suppliers, and the rigs themselves) lose business, and the movement of the rigs to other sites around the world will clearly ripple throughout the economy in this region." *Id.*
35. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 14 ELR 20507 (1984) (requiring judicial deference to agency action committed to agency discretion by Congress). *Cf. supra* note 21 (*Hornbeck* district court found no authority holding that a Secretary's reconsideration and rescission of a decision under judicial review was invalid).
36. *Hornbeck*, No. 10-30585, 2010 WL 3825385, at *1 (5th Cir. Sept. 29, 2010).
37. These questions would be pending before the district court if either (1) the district court ruled that plaintiffs' challenge to the Secretary's May 28 moratorium were not mooted by the Secretary's subsequently rescinding it and issuing his July 13 second moratorium; or, alternatively, (2) after a district court ruling that plaintiffs' lawsuit on the first moratorium were moot, plaintiffs immediately filed a similar lawsuit challenging the second moratorium. In the latter event, similar OCSLA and APA issues on the merits of the second moratorium would also then be pending before the *Hornbeck* district court as are now pending before the Southern District of Texas in the *Texas* case cited *supra*, note 23.
38. *See supra* notes 12-14, 25-28, and accompanying text. Although it was a "win" for plaintiffs that the Fifth Circuit's July 8, 2010, interlocutory ruling denied the government's motion to vacate the district's court's preliminary injunction, the basis of that ruling—that the Secretary did not show a likelihood that forbidden drilling activities would resume pending appeal—was scarcely a ring-

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likely to conclude that the district court had not shown sufficient judicial deference to the scope of the Secretary's authority granted him by Congress?[39]

In a sense, now that the *Sturm und Drang* of the expedited litigation challenging the district court's June 22 grant of a preliminary injunction against the Secretary's first six-month moratorium is over, the *Hornbeck* case may be more likely to be approached by the courts for what it is: a case calling for garden-variety judicial review of agency action, regarding which the scope and standards of review are well-settled.[40] For, as a unanimous Court opined in *Chevron*:

> [w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[41]

Postscript: On October 12, 2010, Secretary Salazar lifted the suspension on deepwater drilling for "those operators that are able to clear the higher bar that we have set" to reduce the risks associated with deepwater drilling.

ing endorsement of the district court's rationale for granting the injunction. *See supra* notes 32 and 34 and accompanying text. Second, in that ruling, all members of the Fifth Crcuit panel, including the dissenting judge who would have granted the government's motion to stay the injunction pending appeal, agreed that the Secretary retained the right to move for emergency relief should he show that oil drilling companies were about to commence activities he had forbidden. Finally, the Fifth Circuit's September 29, 2010, interlocutory ruling cited the district court's own recognition of the Secretary's rescission of his May 28 moratorium as a basis for ruling that the government's motion to vacate the preliminary injunction was moot and the district court's injunction dead—thus ruling in a manner suggesting that the Fifth Circuit does not necessarily frame such issues as the district court has.

39. Particularly, e.g., in weighing such equitable considerations as the likelihood of success on the merits.
40. *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 1 ELR 20110 (1971): "Although [a district court's] inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."
41. *Chevron*, 467 U.S. at 865-66.