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Courts Scrutinize Pretextual Challenges to Offshore Wind

By Josh Kaplowitz, M. Benjamin Cowan, Toyja E. Kelley and Rachael Beavers*

In this article, the authors discuss a recent decision suggesting that courts will take a hard look at whether plaintiffs challenging offshore wind activities are claiming the types of concrete harms that would give them Article III standing.

Stop us if you have heard this one before: a group of local residents or businesses opposes a renewable energy project for aesthetic, economic, or ideological reasons. But when filing lawsuits challenging project approvals, they focus instead on the project's purported effects on protected species. That has been the story, time and again, for lawsuits seeking to stop offshore wind and other forms of renewable energy.

But a recent decision by the U.S. District Court for the District of New Jersey[1] shows that courts may not always play along. In dismissing a lawsuit brought by a local anti-wind group and its president challenging seabed survey activities that precede offshore wind development, Judge Robert Kirsch held that the plaintiffs lacked standing because they failed to show that they would be harmed by any of the federal government's alleged violations of environmental laws. This decision comes on the heels of another offshore wind case in Massachusetts in which several environmental claims were similarly dismissed on standing grounds.

So are these just poorly pled cases, or part of a trend of courts demanding a more particularized showing of injury when they smell a pretextual challenge? The answer seems to be a little bit of both.

BACKGROUND

Save Long Beach Island (SLBI) is an organization formed in 2021 by a group of New Jersey coastal residents with the stated goal of stopping offshore wind farms from being built off the Jersey Shore. Starting in early 2023, a series of whale strandings occurred off the Jersey Shore that experts have uniformly stated are not attributable to offshore wind activities – and most likely the result of strikes from fast-moving vessels.[2] SLBI and other groups, however, falsely

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[1] Save Long Beach Island v. U.S. Dep't of Commerce, No. 23-1886 (D.N.J. Feb. 29, 2024).

[2] See, e.g., Nat'l Oceanic and Atmospheric Admin., Frequent Questions – Offshore Wind

and opportunistically blamed the strandings on high resolution geophysical (HRG) surveys being conducted by offshore wind developers in the New York Bight.[3]

Developers conduct HRG surveys in order to model geological conditions to ensure that offshore wind turbines are properly engineered and safely installed, as well as to identify sensitive benthic habitats and marine archaeological resources.[4] Notably, similar HRG surveys are employed to identify subsea sand resources that are used to restore beaches in communities such as Long Beach Island that have been eroded due to increasingly intense storms and sea level rise.[5]

Offshore wind HRG surveys are generally considered to have much lower impacts on wildlife than other types of HRG surveys.[6] Nonetheless, they rank among the most regulated of any maritime activity. Developers obtain incidental take authorizations (ITAs) from the National Marine Fisheries Service (NMFS) under the Marine Mammal Protection Act (MMPA) before conducting these surveys. For a one-year window, these ITAs authorize a limited amount of "harassment" of marine mammals incidental to a specified activity within a specified region. To receive an ITA, developers must

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and Whales, at https://www.mmc.gov/wp-content/uploads/Update-on-Strandings-of-Large-Whales-along-the-East-Coast-2.21.2023.pdf; Marine Mammal Commission, Update on Strandings of Large Whales Along the East Coast (Feb. 21, 2023), at https://www.mmc.gov/wp-content/uploads/Update-on-Strandings-of-Large-Whales-along-the-East-Coast-2.21.2023.pdf. It should be noted that only about 2% of vessels operating off the East Coast are related to offshore wind development – and most of those are required to travel at very slow speeds. See, e.g., MarineTraffic: Global Ship Tracking Intelligence | AIS Marine Traffic, at https://www.marinetraffic.com/en/ais/home.

[3] Kirk Moore, Offshore Wind Critics Call for Investigation of New Jersey Whale Strandings, Nat'l Fisherman (Jan. 9, 2023), at https://www.nationalfisherman.com/mid-atlantic/offshore-wind-critics-call-for-investigation-of-new-jersey-whale-strandings.

[4] Bureau of Ocean Energy Mgmt. (BOEM), Offshore Wind Activities and Marine Mammal Protection (Nov. 2023), at https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Offshore%20Wind%20Activities%20and%20Marine%20Mammal%20Protection_2.pdf.

[5] See, e.g., BOEM, Geological and Geophysical (G&G) Surveys, (BOEM G&G Sheet), at https://www.boem.gov/sites/default/files/about-boem/BOEM-Regions/Atlantic-Region/GandG-Overview.pdf; BOEM, BOEM and New Jersey Sign Agreement to Identify Sand Resources for Coastal Resilience and Restoration Planning (May 12, 2014), at https://www.boem.gov/newsroom/press-releases/boem-and-new-jersey-sign-agreement-identify-sand-resources-coastal; John D. Sullivan et al., Identification of Sand Resources Using Subbottom Profiling Geophysical Survey Techniques Offshore Louisiana, Gulf of Mexico, USA (Aug. 2019), at https://library.seg.org/doi/pdf/10.1190/segam2019-3216350.1.

[6] G&G Sheet.

implement a rigorous suite of mitigation measures designed to greatly reduce any potential species impacts. These measures include exclusion zones around surveys that operators must ensure are clear of marine mammals, visual monitoring by trained protected species observers, seasonal vessel speed restrictions, and ramp-up procedures to ensure animals have time to move away from any bothersome sound sources.

THE SLBI LAWSUIT

Notwithstanding these facts, SLBI and its president, Bob Stern, filed suit against the Department of Commerce and NMFS in April 2023 challenging virtually every ITA issued to conduct surveys in the Bight, as well as one ITA to undertake construction activities. The challenged ITAs included both pending and expired ITAs. Two developers, Orsted North America Inc. and Atlantic Shores Offshore Wind LLC, intervened in the suit.

SLBI alleged that the issuance of the ITAs was arbitrary and capricious and lacking in substantial evidence on the grounds that the ITAs would result in a more than "negligible" effect on marine mammals, thereby violating the MMPA, the National Environmental Policy Act (NEPA), and the Administrative Procedures Act (APA). SLBI took issue with the scientific data and conclusions NMFS relied upon to issue the ITAs, and alleged that the defendants violated NEPA because a cumulative environmental impact statement (EIS) assessing the "potential harm of all issued ITAs" was not prepared. SLBI sought an order "reversing and setting aside" the ITAs, an injunction against any pending ITAs, creation of an advisory board to "perform a thorough, transparent, [sic] investigation of the potential causes of the recent statistical anomaly of whale deaths" and to develop protocols relating to noise impact estimation, and preparation of a cumulative EIS.[7]

NMFS and the intervenor developers filed motions to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), arguing first and foremost that Stern and SLBI lacked standing to assert these claims because the plaintiffs had failed to demonstrate any personal harm to either Stern or the members of SLBI. The agencies and intervenors also averred that SLBI's challenges to expired and pending ITAs were not justiciable: claims relating to the expired ITAs were moot, and the pending ITAs were not ripe for review because there had been no final agency action. Further, they alleged that SLBI had not exhausted its administrative remedies because it had only raised issues during the notice and comment period for three of the eleven challenged ITAs.

[7] Notably, SLBI's complaint did not challenge any decisions by the BOEM to issue leases or approve offshore wind projects.

NMFS and the intervenors also sought dismissal on substantive grounds, arguing that the agencies had complied with NEPA and the MMPA.

THE RULING

The court dismissed all of SLBI's claims without prejudice, on grounds of standing, ripeness, and mootness. Because all claims were dismissed on procedural grounds, the court did not reach the merits of plaintiffs' NEPA and MMPA claims.

Standing

The court agreed that SLBI and Stern had failed to demonstrate standing on either an organization or individual basis because of a failure to allege an injury-in-fact. The court held that the allegations presented by SLBI and Stern constituted a "mere academic or philosophical interest" in marine mammals, rather than a concrete injury-in-fact required to establish standing. While SLBI and Stern claimed an interest in protecting the "aesthetic elements" and "economic interests" of the area, the plaintiffs failed to allege any injury to those interests or even use of the ocean aside from merely living near it.

The court was unpersuaded by Plaintiffs' contention that they "have legally protected interests in preserving marine mammals," stating that "while Plaintiffs have a noble interest in believing it their duty and responsibility to protect these mammals, they have not demonstrated a legally-protected one." Applying *Lujan v. Defenders of Wildlife*, the court held that protection of SLBI's and Stern's "worry about the harm that may befall marine mammals" is not sufficient to demonstrate harm to the Plaintiffs themselves. The court rejected as untimely Stern's efforts to insert new facts about his plans to observe the marine mammals into his opposition brief. The court also held that SLBI had failed to demonstrate associational standing by failing to present facts indicating that its members would have standing to sue in their own right.

Ripeness & Mootness

The court held that the challenges to the unissued ITAs were unripe for review because a final agency action consummating the agency's decision-making process had not yet occurred with respect to those ITAs. Further, the challenges to the expired ITAs were found to be moot because the proposed relief would have "no meaningful effect, as the ITAs no longer apply to the Defendants." SLBI and Stern attempted to circumvent this conclusion by stating that the ITAs fell under the narrow "capable of repetition yet evading review" exception to the mootness doctrine, but the court quickly disposed of this argument because the ITAs authorized actions that would not be repeated in the same areas by the same parties.

WHAT DOES THIS DECISION PORTEND?

Judge Kirsch's decision shows that courts will take a hard look at whether plaintiffs challenging offshore wind activities are claiming the types of concrete harms that would give them Article III standing. Offshore wind is still a new industry in the U.S., and the first wave of development has sparked numerous lawsuits from project opponents, a trend that is likely to continue. However, some of the main objections raised by those who oppose offshore wind – aesthetic concerns, economic impacts to other industries – are not always redressable. Coastal residents don't have a protected right to a pristine viewshed from their beach houses, and commercial fishermen don't have a legal right to an ocean that is free from all structures. The nation's continental shelf is a shared resource that is open to all prospective users. When individuals and groups leverage environmental laws to seek relief from non-environmental concerns, friction – and perhaps fiction – may ensue.

This also is not the first time a court has cast a skeptical eye at an offshore wind plaintiff's standing. In recent litigation challenging federal approval of Vineyard Wind 1, the largest offshore wind farm in the United States, District of Massachusetts Judge Indira Talwani found that commercial fishermen lacked standing to bring claims under the Endangered Species Act because they had failed to adequately allege any injury flowing from harms the project might cause to the highly endangered North Atlantic right whale (NARW).[8] Judge Talwani noted that purported economic harms that the wind farm might cause to their fishing business had nothing to do with the ESA.[9] Fishermen similarly lacked standing under NEPA and the MMPA where their alleged economic harms placed them outside of the "zone of interest" created by the purposes of those two statutes. Notably, Judge Talwani found that the named plaintiffs representing coastal residents had met the minimum requirements for standing because their declarations stated that they had seen NARW in the past and planned to do so in the future.[10]

These decisions should not necessarily be viewed as durable victories for the offshore wind industry. Because SLBI's lawsuit was dismissed without prejudice, it may amend its complaint and will likely submit new declarations alleging

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[8] Seafreeze Shoreside Inc. v. U.S. Dep't of the Interior, No. 1:22-cv-11091-IT, at 27-29 (D. Mass. Oct. 12, 2023).

[9] Id. Judge Talwani restrained herself from noting the irony that the commercial fishing industry is frequently cited as one of the biggest threats to the NARW due to gear entanglement.

[10] Nantucket Residents Against Turbines v. U.S. Bureau of Ocean Energy Mgmt., No. 1:21-cv-11390, at 24-26 (D. Mass. May 17, 2023); Melone v. Coit, No. 1:21-cv-11171-IT, at 8-9 (D. Mass. August 4, 2023).

more particularized harms. In other words, the offshore wind industry is not yet out of the woods in defending the integrity of its current and future MMPA permits. It remains to be seen whether merely fixing facial defects in a pleading will be sufficient for plaintiffs to establish an injury-in-fact that the court has previously determined did not exist. Moreover, future plaintiffs will surely be scouring both the New Jersey and Massachusetts opinions for clues as to what types of statements are most likely to get their feet in the door.

Nonetheless, these decisions show that it is good legal strategy for federal agencies and renewable energy project developers to continue to put plaintiffs' standing to the test. Courts seem inclined to require project opponents to show actual, non-hypothetical harm from environmental effects – particularly where there is an obvious mismatch between their legal claims and their underlying motives. Well-crafted legal arguments can force plaintiffs to work harder to get into court, and in some instances can even knock out claims and parties. In other words, plaintiffs alleging that agencies approving offshore wind farms have failed to comply with environmental laws had best demonstrate legitimate environmental injury.

A NEW LAWSUIT

A recent lawsuit against Dominion Energy's approved Coastal Virginia Offshore Wind (CVOW) project off the coast of Virginia illustrates that plaintiffs will craft their complaints around recent standing rulings in New Jersey and Massachusetts – but pushes new boundaries in the process.[11]

The case in question was filed in March in the U.S. District Court for the District of Columbia by a group of conservative think tanks that oppose climate action, including the Heartland Institute, the Committee for a Constructive Tomorrow (CFACT), and the National Legal and Policy Center (NLPC) – as well as the executive employees of two of the plaintiff organizations. Unlike past offshore wind lawsuits that take more of a "kitchen sink" approach, this complaint alleges only that the NMFS violated the Endangered Species Act (ESA) by failing to adequately analyze impacts to the NARW. The substantive claims are of dubious merit,[12] but the threshold question is whether the

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[11] Committee for a Constructive Tomorrow v. U.S. Department of the Interior, 1:24-cv-00774 (D.D.C.), filed March 18, 2024 (CFACT Complaint).

[12] For instance, Plaintiffs' primary allegation in paragraphs 74-83 that NMFS failed to include every single potential offshore wind project off the Atlantic coast in its cumulative effects analysis runs up against the plain text of the ESA regulations, which defines "cumulative effects" as "those effects of future State or private activities, *not involving Federal activities*, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 CFR 402.02 (emphasis added).

plaintiffs have demonstrated that they will suffer particularized harm as a result of the alleged ESA violations.

The plaintiffs clearly read the New Jersey and Massachusetts opinions, because they took great pains to allege that they had a profound interest in – and concrete future plans to observe – the "magnificent" NARW.[13] They even went so far as to state that they had already purchased tickets for a whale watching tour off Virginia in December, conveniently after offshore construction of the CVOW project is expected to commence.[14] While these individual plaintiffs' standing hinge on how credulously the court treats these factual assertions, the standing of the plaintiff organizations are a tougher sell since (to put it mildly) Heartland, CFACT, and NLPC have not historically had environmental protection-based missions. Among other things, CFACT has criticized environmental groups who "adroitly" use the ESA to "stop projects not of their liking."[15]

(Even more of a stretch were certain plaintiffs' allegations of harm due to (a) a potential surcharge on their Virginia utility bills, and (b) a potential decline in the value of their Dominion stock holdings. Long-established precedent indicates that such purported economic damages lie well outside the zone of interests protected by the Endangered Species Act.)

In May, the district court denied plaintiffs' request for a preliminary injunction based on a failure to show irreparable harm.[16] However, the court did find as a threshold matter that "a substantial likelihood of standing" had been established because one individual plaintiff had expressed "concrete plans to observe the Right Whale in the near future, and he believes that the Project will interfere with these plans."[17] Although the court was admittedly ruling under a more relaxed standard for Rule 65 motions (and reserved judgment on the standing of other plaintiffs for the merits phase), the decision demonstrates that at least some judges are willing to set aside context and take individual plaintiffs' statements at face value on this critical issue.

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[13] CFACT Complaint at paragraph 27.

[14] Id.

[15] Bonner Cohen, This landmark conservation bill has been an abject failure for fifty years, Committee For A Constructive Tomorrow (Dec. 26, 2023), at https://www.cfact.org/2023/12/26/this-landmark-conservation-bill-has-been-an-abject-failure-for-fifty-years/.

[16] Committee for a Constructive Tomorrow v. U.S. Department of the Interior, 1:24-cv-00774 at 8-10 (D.D.C. May 24, 2024).

[17] Id. at 6.