

Outside Counsel

Expert Analysis

Scallops vs. Wind Energy: Consideration of Alternative Sites for Off-Shore Wind Farms

The ocean areas off the east coast of the United States, particularly from New Jersey to Massachusetts, are blessed with strong winds, relatively shallow waters, and proximity to major population centers with high electric energy demands, making them well suited for the location of large offshore wind farms.¹ The promise is enormous, as illustrated by the success of the offshore wind industry in Europe, which by the end of 2016 had installed 3,589 offshore turbines with 12.6 gigawatts of generating capacity, with thousands of additional offshore turbines in the development pipeline.²

In December 2016, the Bureau of Ocean Management (BOEM) took a major step to advance the east coast offshore wind industry by holding an auction for the lease



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of a designated Wind Energy Area off the south shore of Long Island (the NY WEA)—a 127 square mile area capable of accommodating up to 194 wind turbines. Under the phased process established by the BOEM regulations,³ the purpose of the lease, in the first instance, is fairly limited: It will allow the lessee auction winner (an affiliate of Statoil) to assess conditions in the NY WEA pursuant to a site assessment plan to be approved by BOEM. If, after considering the extensive data gathered during this initial phase, Statoil wishes to construct the wind farm, it must then submit a construction and operations plan (COP) for review by BOEM. Only after BOEM reviews and approves

the COP, and satisfies the requirements of the National Environmental Policy Act (NEPA)⁴ prior to doing so, may Statoil proceed with building a wind farm in the leased area, subject to the conditions imposed in the approved COP.

This article discusses a recent lawsuit brought by the scallop industry and its allies to challenge BOEM's lease to Statoil in an attempt to keep offshore wind turbines from being located in the vast ocean areas they claim to be important fishing grounds for scallops and squid.⁵ The claims asserted in the lawsuit seek to overturn not only the Statoil project, but also the fundamental process followed by BOEM in establishing wind energy areas and selling leases for the development of offshore wind.

At the outset of the case, the plaintiffs sought a preliminary injunction to prevent BOEM from consummating the lease transaction with Statoil. The court denied the motion

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on the ground that the alleged harm to scallop, squid and other fishing would occur only upon the construction of the wind farm, which is years away and subject to further BOEM approvals, so that any harm to the plaintiffs is not “imminent” as required for the issuance of a preliminary injunction.⁶ Accordingly, the court allowed the transaction to proceed while the merits of the case are litigated.

Although the lawsuit raises several claims under NEPA and the Outer Continental Shelf Lands Act,⁷ the one that is of most interest—and which is the focus of this article—is the plaintiffs’ contention that NEPA requires BOEM to consider ocean areas outside the NY WEA and outside the alleged scallop and squid fishing grounds as alternative locations for the planned offshore wind farm.

NEPA is the federal statute that requires preparation of an environmental impact statement (EIS) for “major Federal actions significantly affecting the quality of the human environment.”⁸ Among other things, an EIS must consider “alternatives to the proposed action.”⁹ A different provision of the statute—§102(2) (E)—requires federal agencies to “study, develop, and described appropriate alternatives to recommended courses of action in any proposal which involves unresolved

conflicts concerning alternative uses of available resources.”¹⁰

In general, the NEPA process begins with a preliminary review of potential environmental impacts through preparation of an environmental assessment, which must include “brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), [and] of the environmental impacts of the proposed action

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and alternatives.”¹¹ If the environmental assessment determines that the action will not result in significant environmental impacts, a finding of no significant impact (FONSI) is issued, terminating the NEPA process for that action.¹² On the other hand, if the environmental assessment indicates that the action would result in one or more significant environmental impacts, an EIS is required.

In the case of the NY WEA, BOEM prepared an environmental assessment for the leasing of the area, with the focal point of analysis being the

potential environmental impacts of the environmental, meteorological and geotechnical investigations that would be authorized under the first phase of lease activities.¹³ Thereafter, on the basis of the environmental assessment, BOEM issued a FONSI for the lease auction and lease. The environmental assessment did not include an analysis of the impacts of the construction and operation of the wind farm itself, because an EIS examining such impacts is to be prepared by BOEM (using the information gathered by the lessee during the first phase of lease activities) prior to any approval of the COP and prior to construction of the wind farm.

The environmental assessment did not consider alternative locations for the wind farm outside the NY WEA. The plaintiffs have challenged the environmental assessment, FONSI and lease on the ground that NEPA required BOEM to consider alternative locations on the east coast that would avoid scallop beds, and potential other marine resources such as squid, flounder, scup black sea bass, right whales and sea turtles. In support of this claim, the plaintiffs cite the above-quoted provision of the NEPA regulations requiring the assessment of alternatives in an environmental assessment, and caselaw requiring that an environmental assessment

evaluate “reasonable alternatives” that would “bring about the ends of the federal action.”¹⁴

In opposition to the motion for a preliminary injunction, BOEM raised the threshold issues of standing and ripeness, and the lack of imminent and irreparable harm, on the grounds that the lease merely authorizes data gathering necessary to prepare a proposed COP and EIS for the wind farm, that plaintiffs have not demonstrated that they would be harmed by such investigations, and that no wind farm may be built under the lease until a further NEPA review is performed and the COP is approved. On the merits, BOEM has argued, citing NEPA case law, that the environmental assessment was not required to consider areas of the ocean outside of the NY WEA because under NEPA only those alternatives that meet the “purpose and need” of the federal action need be considered. BOEM argued that consideration of alternative locations outside of the NY WEA would not meet the “purpose and need” of the lease of that area, and would be unreasonable. Under BOEM’s view of the matter, it would appear that neither the environmental assessment nor any future EIS for the wind farm itself would be required to consider other ocean areas as alternatives,

although the EIS would be required to take a hard look at the wind farm’s potential to harm fishing resources within the NY WEA and identify measures to mitigate such impacts.

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EIS is suggested by a recent appellate decision vacating an EIS for a proposed wind farm off the coast of Massachusetts on the ground that the three geological surveys performed for the proposed area were insufficient to determine whether its sea bed is able to support large structures and whether important archeological and prehistoric features can be protected.¹⁵ It is well established that the “goals of an action delimit the universe of the action’s reasonable alternatives”¹⁶ and that NEPA’s requirements are subject to the “rule of reason.”¹⁷ If the plaintiffs are deemed to

have standing and clear other threshold hurdles, the court is likely to apply these principles to address their claim that NEPA requires BOEM to consider multiple ocean areas before leasing any area to a potential wind farm developer.

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1. <https://www.eia.gov/todayinenergy/detail.php?id=4770>.
2. <https://windeurope.org/wp-content/uploads/files/about-wind/statistics/Wind-Europe-Annual-Offshore-Statistics-2016-Infographic.pdf>.
3. 30 C.F.R. Part 585.
4. 42 U.S.C. §4321 et seq.
5. *Fisheries Survival Fund v. Jewell*, 1:16-cv-02409 (U.S.D.C. D.C.).
6. *Id.*, Memorandum Opinion, Feb. 15, 2017.
7. 43 U.S.C. §§1331-56.
8. 42 U.S.C. §4332(2)(C).
9. *Id.* §4332(2)(C)(iii).
10. *Id.* §4332(2)(E).
11. 40 C.F.R. §1508.9(b); see also *id.* §1501.3.
12. 40 C.F.R. §1508.13.
13. Commercial Wind Lease Issuance and Site Assessment Activities on the Atlantic Outer Continental Shelf Offshore New York Revised Environmental Assessment, OCS EIS/EA BOEM 2016-070 (Oct. 2016).
14. *Flaherty v. Bryson*, 850 F. Supp. 2d 37, 71 (D.D.C. 2012) (quoting *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999)).
15. *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077, 1082-83 (D.C. Cir. 2016).
16. *Citizens Against Burlington v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991).
17. *DOT v. Pub. Citizen*, 541 U.S. 752, 768 (2004).