

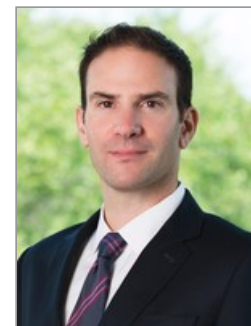


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## The Science And Controversy Of Offshore Wind

By **Brook Detterman** (December 13, 2017, 1:15 PM EST)

The U.S. Bureau of Ocean Energy Management (BOEM) is embarking on several studies to better understand offshore resources and species. At the same time, fishing interests have sued BOEM to block an offshore wind lease, challenging not only the lease itself but the process that BOEM uses to award leases and conduct its environmental analysis under the National Environmental Policy Act (NEPA). The law and science emerging from these processes will have significant consequences for the future of offshore wind in the United States.



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### Fighting Over Fish

On Sept. 12, 2017, the Fisheries Survival Fund and other fishing interests asked a federal judge to block a \$42.5 million lease awarded by BOEM to Statoil Wind on the Outer Continental Shelf (OCS), offshore of New York. The case, *Fisheries Survival Fund et al. v. Sally Jewell et al.*, was filed in late 2016 by a coalition of fishing groups and municipalities who argue that the issuance of the lease poses a serious threat to fishing interests, navigation and the environment.

The case represents the first real test of BOEM's offshore wind energy leasing program, and comes against the backdrop of numerous studies underway on the impact of offshore wind development on fish populations and other marine life.

The Outer Continental Shelf Lands Act authorizes BOEM to establish a regulatory scheme for leasing areas of the OCS for offshore energy. Current BOEM regulations establish a three-phase process: lease issuance, installation of site assessment facilities (e.g., meteorological buoys) and construction and operation of a wind farm. Each step necessitates distinct action and approvals by BOEM, and approval of one step does not commit BOEM to approve the next.

The lease issued to Statoil is the culmination of "step one" (the leasing process), and does not authorize the construction of any project on the lease. Next, Statoil must submit a site assessment plan (SAP) which, if approved by BOEM, would authorize Statoil to install a meteorological facility on the lease. If the SAP is approved by BOEM, Statoil will have four and a half years to submit to BOEM a Construction and Operations Plan (COP) for a commercial wind project on the lease.

Once BOEM receives a COP for a proposed wind project, BOEM prepares an Environmental Impact Statement for that COP under NEPA, which involves extensive public and stakeholder participation. BOEM may approve, approve with modifications or deny approval of any submitted COP. COP approval is a prerequisite to the construction of any wind farm on the lease.

In their Sept. 12, 2017, motion for summary judgment, the Fisheries Survival Fund and other plaintiffs allege that BOEM violated NEPA and the Outer Continental Shelf Lands Act by considering only those environmental impacts associated with issuing the lease itself (which are minimal and relate only to anticipated geologic, geophysical and biological surveys conducted by the lessee), as opposed to all of the impacts associated with the construction and operation of a theoretical wind farm on the lease.

They also took aim at BOEM's regulatory process, alleging that, despite extensive stakeholder participation, it lacked transparency and failed to meaningfully consider the impact of lease development on both the environment and the seafood industry.

On Oct. 24, 2017, BOEM filed its own motion for summary judgment and response to the plaintiffs' motion. BOEM asserts that the plaintiffs' challenge is premature because it is "based nearly entirely on the false premise that BOEM has already received a proposal for the construction and operation of a wind energy facility."

Because any actual physical development of the lease is purely speculative at this stage, BOEM argues that the plaintiffs have not demonstrated a concrete or particularized injury to their fishing interests and therefore lack constitutional standing to pursue the case. BOEM also asserts that the case is not ripe for review because "BOEM has reserved the right deny development of the lease area."

In general, NEPA applies to federal agency actions that "result in an irreversible and irretrievable commitment of resources to an action that will affect the environment." Since Statoil has not yet proposed a SAP or COP (much less has BOEM approved either), and since the lease does not authorize any construction, BOEM argues that there has been no "irreversible and irretrievable commitment" of resources that may impact the environment or the plaintiffs' fishing interests in the manner plaintiffs allege. For the same reason, and because BOEM must still approve any SAP and COP submitted by Statoil, BOEM asks the court to reject the plaintiffs' NEPA "segmentation" argument.

Ultimately, the case may hinge on how the court views the issuance of a wind energy lease: as the first in a series of events that may lead to development of a wind farm (as BOEM has designed it), or as a single event with development of a specific project as a foregone conclusion (as the plaintiffs see it). The case has implications beyond the New York lease and any potential Statoil project.

A victory for BOEM will solidify its process for OCS leasing and offshore wind energy development, while a victory for the Fisheries Survival Fund and other plaintiffs will likely derail the current BOEM process, and potentially undermine the validity of the other eleven offshore wind leases issued to date. Briefing is expected to conclude in December, with a decision likely in 2018.

## **Conserving Birds and Bats**

In partnership with Deepwater Wind, the U.S. Fish and Wildlife Service, the University of Rhode Island and the University of Massachusetts Amherst, BOEM is funding a study that will aid conservation efforts for key bird and bat species. Since 2013, the U.S. Fish and Wildlife's Division of Migratory Birds, in collaboration with URI and UMass Amherst, has deployed advanced VHF telemetry to track the movement of high-priority bird and bat species, including common terns, American oystercatchers and certain species protected under the Endangered Species Act, such as roseate terns and piping plovers.

Deepwater Wind recently installed a new tracking station on the easternmost platform at the Block Island Wind Farm (the nation's first offshore wind farm), which will provide data on any tagged species that fly within a 20-mile radius of the wind farm. This station is among more than 40 tracking stations along the U.S. East Coast that, with funding provided by BOEM, researchers are using to study movements of birds and bats between nesting sites and foraging areas, as well as movements when departing for fall migration.

This information will help BOEM to determine to what extent these species fly over federal waters where potential exists for future energy development projects, including wind farms. Ultimately, this cooperative effort will enable BOEM and project developers to better evaluate the potential impacts to marine and migratory birds from offshore wind projects and to design appropriate mitigation and conservation strategies for future projects.

## **Understanding Coral, Canyons and Seeps in the Atlantic**

BOEM, the United States Geological Survey and the National Oceanic and Atmospheric Administration have launched a 4.5-year study to better understand little-known natural resources of the deep

ocean. The study, known as the Deep Sea Exploration and Research of Coral/Canyon/Seep Habitats (or DEEP SEARCH), will explore geological and biological aspects in deep water locations between 30 and 130 miles off the mid-Atlantic and Southeast Coasts (from Virginia to Georgia). Many of these features — such as corals and naturally occurring gas seeps, and the organisms that inhabit them — are poorly understood.

The Woods Hole Oceanographic Institution has provided an autonomous underwater vehicle (AUV) to aid the research, which will occur in three deep-sea expeditions over the next three years. The AUV, Sentry, is equipped with highly advanced electronics, including instruments to map seafloor bathymetry, measure water chemistry and collect images of benthic habitats and organisms.

Scientists will use this data to create high-resolution maps of the seafloor and document deep-sea communities. BOEM will then use this information to inform environmental reviews under NEPA and offshore energy decision-making, such as lease locations and specific permitting actions.

## **What's Next?**

Studies conducted by BOEM and others will shape how offshore wind is developed, and how the United States manages environmental impacts associated with that development. At the same time, cases like Fisheries Survival Fund will continue to test BOEM's regulatory and leasing process. Practitioners, project developers and other stakeholders should watch closely as the science and law of offshore wind evolve, or risk leaving the fate of this nascent industry in the hands of an active few.

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