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March 24, 2022

### Government Moves to Dismiss Case Challenging New York Bight Wind Energy Area Designations



#### **New York Bight Lease Sale Under Attack**

A New Jersey-based nonprofit organization, Save Long Beach Island, and its president sued in the U.S. District Court for the District of Columbia in January 2022. They are asserting that the government violated the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) when it classified areas (approximately 25,000 - 90,000 acres apiece) of the New York Bight—part of the outer continental shelf between Cape May in New Jersey and Montauk Point on the eastern tip of Long Island, New York—as "Wind Energy Areas" (WEAs). The [complaint](#) asserts that the U.S. Bureau of Ocean Energy Management (BOEM) should have undertaken NEPA analysis and ESA consultation before designating these WEAs in a memorandum signed by the director in 2021.

If successful, the lawsuit could raise doubts about the validity of the six leases recently awarded in the New York Bight auction, which generated a record-breaking \$4.37 billion for the administration—the highest-grossing competitive offshore energy lease sale in history. The government [heralded](#) the results as "a major milestone towards achieving the Biden-Harris administration's goal of reaching 30 gigawatts of offshore wind energy by 2030." The leases offered correspond to portions of the original five WEAs identified, which were reduced to three, and then further [reduced in size](#) to obviate conflicts.

#### **BOEM's Area Designation Memorandum and Plaintiffs' Challenge**

BOEM issued the memorandum after conducting three years of analysis and stakeholder engagement in order to identify areas most suitable for wind leasing. BOEM initially asked for information and nominations of commercial interest on 1.7 million acres in the New York Bight. Based on its review of scientific data and extensive input from the commercial fishing industry, tribes, partnering agencies, key stakeholders, and the public, BOEM ultimately reduced the acreage offered for lease by 72% to avoid conflicts with ocean users and minimize environmental impacts. In the [memorandum](#), the agency provided the rationale for each of the five areas selected, analyzing issues related to navigation, fisheries, marine mammals, and commercial viability, among others.

The complaint alleges that BOEM violated NEPA by not preparing a regional, programmatic environmental impact statement (PEIS) to address the impacts of all WEAs in and around the New York Bight and to consider both alternative levels of wind energy development and alternative locations to the WEAs. Plaintiffs allege that BOEM's selection of the WEAs was both a "major federal action" subject to NEPA, and an "irretrievable commitment of resources" sufficient to trigger NEPA obligations under regulations implementing NEPA. Plaintiffs also contend that BOEM violated the ESA by failing to consult with NMFS prior to selecting the New York Bight WEAs.

The government filed a [motion to dismiss](#) plaintiffs' claims on four grounds on March 21, 2022. Several of the government's arguments rely on the requirement under the Outer Continental Shelf Lands Act (OCSLA) that BOEM must conduct further environmental review and approve a construction and operations plan before any wind energy facilities can be constructed, as well as BOEM's authority to preclude the construction of any such facilities.

The government first contends that plaintiffs' NEPA and ESA claims are not ripe for review, because BOEM has neither approved a construction and operations plan, nor taken any action that may affect species listed as threatened or endangered under the ESA or modify any designated critical habitat. Thus, because the memorandum does not authorize any physical activities, the government argues that the plaintiffs' challenge is premature. The government next argues that plaintiffs lack standing because their alleged injuries are based on anticipated and eventual construction and operation of wind energy facilities, rather than impending and immediate injuries. According to the government, those alleged injuries, if they occurred, would be caused by the actual decision to authorize the construction of a wind facility, not the memorandum, making the causal link between the memorandum and plaintiffs' injuries "too tenuous."

Additionally, the government asserts that plaintiffs fail to challenge a "final agency action" as required by the Administrative Procedure Act (APA) and the ESA because the memorandum is only one administrative step in a larger process and does not represent the consummation of BOEM's decision-making regarding the approval or siting of wind energy development projects in the New York Bight.

Finally, the government states that plaintiffs failed to provide notice 60 days prior to filing suit under the ESA and, based on that jurisdictional defect alone, the ESA claim should be dismissed.

## **Conclusion**

Although the government made clear in its motion to dismiss that it would defend the validity of the memorandum against plaintiffs' challenges, the lease interests awarded in the New York Bight auction could be at risk if plaintiffs prevail in the litigation.

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