

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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| South Carolina Coastal Conservation League, <i>et al.</i> , |) | |
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| Plaintiffs, |) | Case No. 2:18-3326-RMG (Consolidated with 2:18-3327-RMG) |
| |) | |
| vs. |) | |
| |) | |
| Wilbur Ross, in his official capacity as the Secretary of Commerce, <i>et al.</i> , |) | ORDER |
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| Defendants. |) | |
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This matter comes before the Court to address significant recent developments which appear to render moot critical issues in dispute in this litigation. This lawsuit followed the issuance of an Executive Order by the President on April 28, 2017, declaring that it was the policy of the United States “to encourage energy exploration and production . . . on the Outer Continental Shelf” and to “develop and implement . . . to the maximum extent permitted by law a streamlined permitting approach for privately funded seismic data research and collection aimed at expeditiously determining the offshore energy resource potential of the United States” (Dkt. No. 445-1 at 1). Efforts were thereafter commenced by five private companies to obtain the necessary permits to conduct seismic testing on the Outer Continental Shelf, which require Incidental Harassment Authorizations (“IHAs”) issued by the National Marine Fisheries Service (“NMFS”) of the United States Department of Commerce and permits issued by the Bureau of Ocean Energy Management (“BOEM”) of the Department of the Interior. The Court is aware of no practical purpose for seismic testing on the Outer Continental Shelf other than as a prelude to offshore oil exploration and development.

This lawsuit was commenced in December 2018 and was ultimately joined by a variety of environmental groups; the states of South Carolina, North Carolina, Virginia, Maryland, Delaware, New Jersey, New York, Connecticut, and Maine; and numerous coastal municipalities. Plaintiffs alleged a broad array of legal defects in the IHAs issued to the seismic testing companies, including violations of the Marine Mammal Protection Act, Endangered Species Act, National Environmental Protection Act, and Administrative Procedures Act. These included claims that the extensive use of airguns up and down the East Coast of the United States to conduct the proposed seismic testing would cause injury and death to the North Atlantic Right Whale, an endangered species.

By the time the suit was filed, five companies, TGS-NOPEC Geophysical Company, CGG Services (U.S.) Inc., GX Technology Corporation, Spectrum Geo, Inc., and WesternGeco LLC (hereafter referred to collectively as “seismic testing companies”), had been issued the necessary IHAs. It was widely anticipated that the BOEM would soon be issuing permits to the seismic testing companies, the last regulatory hurdle before extensive seismic testing on the Outer Continental Shelf would commence. For reasons never explained to this Court, BOEM has not made a decision on the seismic testing companies’ applications, despite the fact that they have been pending for several years, and Department of Justice lawyers continue to tell the Court they do not know when a decision might be made. Therefore, the parties have to date been litigating only the issue of whether the IHAs were properly issued by the NMFS.

On September 8, 2020, the President issued a Memorandum withdrawing certain areas of the Outer Continental Shelf from oil leasing, effective July 1, 2022 and running until June 30, 2032. (Dkt. No. 445-2). The areas withdrawn from leasing by the President’s September 8,

2020 Memorandum overlapped in substantial part with the areas designated for seismic testing by the seismic testing companies. (Dkt. No. 1 at 28).¹ In response to the Court’s recent inquiry regarding the impact of the President’s Memorandum on the applications for seismic testing pending before the BOEM, the Federal Defendants stated, rather incongruously, that the Memorandum would have “no legal effect.” (Dkt. No. 447 at 2). However, in Declarations issued by an official of the NMFS, the Court was informed for the first time that the previously issued IHAs to the seismic testing companies were set to expire on November 30, 2020, and there was “no basis for reissuing or renewing these IHAs.” (Dkt. Nos. 447-1 at 3; 455-1 at 3). Consequently, if the seismic testing companies continued to seek authorization to do seismic testing on the Outer Continental Shelf, they would have to “initiate a new review and authorization process” in accordance with the regulations implementing the Marine Mammal Protection Act (with respect to issuing IHAs, 50 C.F.R. § 216.104), the National Environmental Policy Act, and the Endangered Species Act. (Dkt. No. 455-1 at 3).

The Court conducted a status conference with counsel for all parties on October 1, 2020 for further clarification regarding the present status of the Federal Government’s permitting process concerning the proposed seismic testing surveys. Following some careful questioning by the Court, the following was established:

1. The IHAs will expire November 30, 2020, and there is no mechanism to renew them without restarting and completing the full application process, including public notice and a full public comment period. Thus, after November 30, 2020, seismic testing cannot be

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On September 16, 2020, one of the seismic testing companies, WesternGeco LLC, informed the Court it had withdrawn its application to the BOEM for authorization to conduct seismic testing and terminated its previously issued IHAs. WesternGeco LLC moved before the Court to withdraw from this lawsuit, which the Court granted by Order dated September 23, 2020. (Dkt. Nos. 446, 450).

conducted on the Outer Continental Shelf by the seismic testing companies without the issuance of new IHAs that have undergone a full new regulatory process review.

2. The Department of Justice still cannot tell the Court when, if ever, BOEM will make a decision on the applications of the seismic testing companies, leaving a small but theoretical possibility that between this day and November 30, 2020 the seismic testing companies might obtain the legal authority to commence seismic testing from the date of issuance of permits by BOEM through November 30, 2020.

3. The seismic testing companies have represented to the Court that should BOEM issue permits authorizing the commencement of seismic testing between now and November 30, 2020, they would not commence or engage in seismic testing prior to the expiration of the IHAs. After November 30, 2020, the seismic testing companies would have no authority to engage in seismic testing on the Outer Continental Shelf without issuance of the necessary permits, including newly issued IHAs.

The bottom line is that the seismic testing companies will not engage in seismic testing on the Outer Continental Shelf through November 30, 2020, at which point the IHAs under challenge will have expired. The expiration of the IHAs will render moot this lawsuit. Based on the circumstances set forth herein, the Court rules as follows:

- A. This action is hereby dismissed without prejudice.
- B. Plaintiffs may petition this Court to reopen this action and restore it to the calendar at any time within the next 60 days should there be any effort to initiate seismic testing that was previously under challenge in this litigation. FED. R. CIV. P. 60(b)(6).

C. Should no motion be made by Plaintiffs to reopen this action and restore it to the calendar within 60 days of this Order, the dismissal of this action without prejudice shall be final.

AND IT IS SO ORDERED.

s/ Richard M. Gergel
Richard M. Gergel
United States District Judge

October 6, 2020
Charleston, South Carolina