



## DOI's Atlantic Drilling Plan Gives Enviros A Clear Target

By Sean McLernon

Law360, New York (March 11, 2014, 7:41 PM ET) -- As the federal government lays the groundwork for potential oil and gas extraction off the Atlantic coast, outraged environmental groups are hoping to use the U.S. Department of the Interior's recent endorsement of seismic blasts used to determine resource-rich areas as the basis for vigorous court challenges against a new expansion of offshore drilling.

The DOI released a programmatic environmental impact statement late last month giving the green light to geological and geophysical surveys off the mid- and south-Atlantic coast. The seismic activity would allow oil and gas companies to locate valuable resources beneath the surface floor, but the loud blasts can also disturb marine creatures such as whales and dolphins that rely on sound.

Several green groups have already slammed the federal government's proposal, despite mitigation measures limiting the time and scope of the seismic surveys.

The government is allowing activity that would cause major impacts to marine wildlife and the ecosystem, according to the Surfrider Foundation. The Sierra Club notes that the DOI's own estimates have shown that seismic testing will injure or kill thousands of mammals.

Potential marine harm could be a major problem for the federal government, which will have to withstand seemingly inevitable court challenges from groups aiming to stop drilling activity any way they can. Seismic survey activity could

open the door for challenges under the National Environmental Protection Act, the Endangered Species Act and the Marine Mammal Protection Act.

"There's a lot of places for these lawsuits to go," said University of North Carolina law professor Victor B. Flatt, who directs the school's Center for Law, Environment, Adaptation and Resources.

Environmental groups will be shooting for a preliminary injunction to halt the process while litigation moves forward, which could be a low enough bar for challengers to clear in court, according to Flatt.

"Irreparable harm under ESA and MMPA is not so hard to show," Flatt said. "If they have some evidence that there is harm occurring, that could be enough to get a preliminary injunction."

The ESA has substantive requirements that prevent the government from decreasing the survival rate of a threatened species. The MMPA in a certain sense is even more stringent, Flatt said, because it prohibits harm of even individual members of a marine mammal population.

There's also the possibility of a NEPA suit. Former Department of Interior acting assistant secretary for land and minerals management Marcilynn A. Burke said groups could challenge the PEIS by claiming that it didn't sufficiently address cumulative impacts on marine life, especially those impacts that would be less than deadly.

Ultimately stopping drilling activity will be difficult for the environmental groups, according to Burke, but striking early helps improve their chances.

“Once the ball gets rolling, it gains momentum,” said Burke, who served as assistant secretary at the DOI from 2011 until 2013 and is currently a law professor at the University of Houston. “That’s why these environmental groups are very concerned, even at this early stage.”

The PEIS does not authorize any survey activities, but establishes a framework for additional mandatory environmental reviews for site-specific actions and identifies broadly applicable measures governing any future survey activities.

The Bureau of Ocean Energy Management, which operates within the DOI and issued the PEIS, said that new scientific information can be incorporated into survey-specific environmental reviews and held back on making broad conclusions for seismic activity across the Atlantic.

Environmental groups are still very concerned, according to Center for Biological Diversity senior attorney and oceans director Miyoko Sakashita. With seismic surveys nearly equivalent to loud explosions underwater, there are certainly groups keeping a watchful eye on the federal government’s actions, Sakashita said.

“It has some very minimal protections, but there is more that they can be doing,” Sakashita said. “They need to explore additional types of technologies that are less harmful.”

The blasts can reach up to 250 decibels and cause hearing loss in marine mammals, according to environmental groups. Even at lower noise levels, the seismic activity can allegedly make it impossible for whales and dolphins to communicate with each other.

The Natural Resources Defense Council has already filed suit against the department and the Bureau of Ocean Energy Management claiming the government is allowing the noisy surveys in

the Gulf of Mexico without the necessary permits. The action is still pending in Louisiana federal court.

Although drilling in the Gulf of Mexico has been going on for years, ocean floor drilling in the Atlantic would be unprecedented and has East Coast lawmakers and residents concerned. University of Virginia law professor Michael A. Livermore said ultimately the issue will be won or lost on the politics rather than the technical details of the agency’s policy.

Nevertheless, challenges to seismic surveys under federal environmental law would give environmental groups the chance to delay the process and gin up opposition against drilling, according to Livermore.

“The legal arguments tie into the politics,” Livermore said. “The reality is that there is no drilling in the Atlantic and the status quo is not doing these studies. The government needs to overcome the status quo.”

Opponents will also have plenty of time to build political support and find a successful legal strategy. Given the length of the process and the multiple variables in play, Burke said leasing isn’t likely to occur before 2021 or 2022.

There could be additional opposition from other agencies within the federal government, according to Burke.

“The Navy and Marines conduct a lot of training exercises off the Virginia and North Carolina coasts,” Burke said. “There will even be concerns within the Department of the Interior — the National Park Service may not like a drilling rig visible from a national seashore. There are myriad concerns that will have to be addressed before any drilling would actually occur.”

In the meantime, environmental groups are signaling that they will be out in full force against any policy that moves the country closer to drilling in the Atlantic, and it all starts with seismic surveys.

“We’re very concerned,” Sakashita said. “There are certainly groups that are taking a close look at these activities.”

--Additional reporting by Juan Carlos Rodriguez.  
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