IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

State of North Carolina, Plaintiff, v. **Wilbur Ross**, et al., Defendants.	Case No. 2:20-cv-00059-FL

Memorandum in Support of
Federal Defendants' Motion to Dismiss

PAUL E. SALAMANCA
Deputy Assistant Attorney General

KRISTOFOR R. SWANSON
Natural Resources Section
Envt. & Natural Resources Div.
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0248
Fax: (202) 305-0506
kristofor.swanson@usdoj.gov

November 19, 2020

TABLE OF CONTENTS

INTRODUCTION

This case relates to a proposed exploratory seismic survey on the outer continental shelf that was far from certain to occur, and for which the company proposing to undertake the survey has since withdrawn its application. Specifically, the State of North Carolina challenges a National Oceanic and Atmospheric Administration decision under the Coastal Zone Management Act that overrode the State's objection that the survey would be inconsistent with the State's coastal zone management program. The State alleges that the planned survey would harm species and commercial and recreational fishing in State and federal coastal waters.

At the time of the State's suit, however, the alleged harms were not certainly impending. Only three months remained to complete a survey that had not yet begun and that the State itself alleges would have taken 208 days. The survey had not begun because the company was not yet authorized to conduct it. The Secretary of the Interior holds the authority to authorize exploratory seismic surveys on the outer continental shelf. When the State filed suit, the company had no permit from the Secretary of the Interior. Given the nature of the State's alleged harms, the State therefore lacks standing and its case is not ripe.

The case is also now moot. The company has withdrawn its permit application from the Department of the Interior. Any future application

would start a new Coastal Zone Management Act process. The State could again seek to initiate a federal consistency review and, if the applicant issues a consistency certification, the State could again object. The case should be dismissed for lack of jurisdiction.

BACKGROUND

I. The Statutory and Regulatory Scheme.

Two federal statutes are relevant here. The first is the Outer Continental Shelf Lands Act, or "Lands Act." The Lands Act generally covers resource development on the outer continental shelf, which, as relevant here, is defined to be lands submerged under the seas and further than three miles from shore. *See* 43 U.S.C. §§ 1301(a), 1331(a), 1332. The Lands Act establishes oil and gas leasing, development, and production programs on the outer continental shelf. *See id.* §§ 1344, 1351. Separately—and as implicated here—the Act provides the U.S. Secretary of the Interior with authority to authorize "geological and geophysical explorations in the outer Continental Shelf." *Id.* § 1340(a), (g). The Secretary has delegated that authority to the Department of the Interior's Bureau of Ocean Energy Management. *See* 30 C.F.R. § 551.3.

The second statute is the Coastal Zone Management Act, or "Coastal Act."[1] The Coastal Act creates a program for development of (and federal funding for) state coastal zone management programs. *See* 16 U.S.C. §§ 1454, 1455. For those states with approved programs, the Coastal Act and its implementing regulations provide an opportunity for the state to review activities that require a federal license or permit, including exploratory activities on the outer continental shelf under the Lands Act, if the activities have reasonably foreseeable effects on coastal zone uses or resources. *See id.* § 1456(c)(3)(A), (B); 15 C.F.R. §§ 930.53, 950.54.[2] A state's "coastal zone" is generally its shoreline and coastal waters extending to three miles offshore. *See* 16 U.S.C. § 1453(1), (3) (cross-referencing the Lands Act, including 43 U.S.C. § 1312).

Pursuant to the Coastal Act, the applicant for a permit or license that would affect a coastal use or resource is to provide "a certification that the proposed activity complies with the enforceable policies of the state's

---

[1] The Lands Act and Coastal Act are often referred to as "OCSLA" and "the CZMA," respectively.

[2] Review is available where the activity in question is listed in a state's federally-approved coastal management program and would occur within a state's coastal zone, or where it would occur in a state-described geographic location outside the coastal zone but with reasonably foreseeable coastal effects. *See* 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.53. If an activity is unlisted, or outside of the geographic location description, a state must request federal approval to review the activity. 15 C.F.R. §§ 930.53, 930.54.

approved program and that such activity will be conducted in a manner consistent with the program." *Id.* § 1456(c)(3)(A), (B). The state then either concurs or objects to the applicant's consistency certification. *See id.* § 1456(c)(3)(A); *see also* 15 C.F.R. §§ 930.50–930.66 (regulations governing consistency certifications for activities requiring a federal license or permit).[3]

If the state objects to a consistency certification, the applicant for the permit may appeal the objection to the Secretary of Commerce. *See id.* § 1456(c)(3)(A), (B)(iii); *id.* § 1453(16) (defining "Secretary"). The Secretary may override a state objection if she concludes "that the activity is consistent with the objectives of [the Coastal Act] or is otherwise necessary in the interest of national security." *Id.* § 1456(c)(3)(A), (B)(iii); *see also* 15 C.F.R. §§ 930.120–930.131 (regulations governing consistency appeals to the Secretary). Absent a state concurrence or Secretarial override, the federal license or permit sought by the applicant cannot be granted. *See id.* § 1456(c)(3)(A), (B). Importantly for purposes here, "[i]f an applicant withdraws its application to the Federal agency, then the consistency process is terminated. If the applicant reapplies to the Federal agency, then a new consistency review process will start." 15 C.F.R. § 930.51(f).

[3] The Coastal Act also includes a mechanism for review of activities to be undertaken directly by a federal agency. *See* 16 U.S.C. § 1456(c)(1), (2). Those provisions are not implicated here.

The Secretary of Commerce has delegated implementation of the Coastal Act to the National Oceanic and Atmospheric Administration, which includes the Office for Coastal Management. *See* Decision and Findings by the U.S. Undersecretary of Commerce for Oceans and Atmosphere in the Consistency Appeal of WesternGeco from an Objection by the State of North Carolina 1 n.3 (June 15, 2020) ("NOAA Decision") (attached to the Complaint at ECF No. 1-1).

II. Factual Background

At issue here is a 2014 permit application by a private company, WesternGeco LLC, to conduct a geophysical exploratory survey in the Atlantic Ocean. *See* Compl. ¶ 1, ECF No. 1;[4] NOAA Decision at 3–7. WesternGeco planned to collect oil and gas resource data at least nineteen miles off the coast using seismic survey technologies. NOAA Decision at 3; Compl. ¶¶ 25–26. Generally speaking, this would involve the use of emitted (and reflected) sound waves to detail subsurface formations. *See* NOAA Decision at 3; Compl. ¶¶ 21–22. In April 2014, WesternGeco submitted an application to the Bureau of Ocean Energy Management for a permit under the Lands Act. *See* NOAA Decision at 4; Compl. ¶ 25. The State of North Carolina requested and received approval from the NOAA Office for Coastal

[4] Given the stage of proceedings, we cite to the Complaint for background purposes. Federal Defendants do not admit any alleged facts.

Management to review WesternGeco's proposed survey. NOAA Decision at 6–7.

In March 2019, WesternGeco submitted a consistency certification for its planned survey to the State of North Carolina under the Coastal Act. NOAA Decision at 7; Compl. ¶ 51. This was not the State's first review of potential seismic surveys in the Atlantic. In 2015, the State had concurred with consistency certifications made by four other companies for similar activities. *See* NOAA Decision at 7. North Carolina, however, objected to WesternGeco's certification. NOAA Decision at 7; Compl. ¶ 51. WesternGeco appealed that objection to the National Oceanic and Atmospheric Administration. NOAA Decision at 7; Compl. ¶ 52.[5]

In June 2020, the Department of Commerce's Assistant Secretary for Environmental Observation and Prediction overrode North Carolina's objection.[6] *See generally* NOAA Decision; Compl. ¶¶ 53–54. We will refer to the decision as the "NOAA Decision." The NOAA Decision concluded that the

[5] WesternGeco's survey plan extended beyond just the waters off of North Carolina. *See* Compl. ¶ 25. South Carolina objected to the company's certification that the planned activities were consistent with South Carolina's coast zone management program, which the company similarly appealed. NOAA Decision at 1 n.1. The Department of Commerce overrode South Carolina's objection on June 15, 2020.

[6] The Assistant Secretary was performing the duties of the Under Secretary of Commerce for Oceans and Atmosphere.

proposed survey would "further[ ] the national interest as articulated in [the Coastal Act] in a significant and substantial manner that outweighs any adverse coastal effects on fisheries, sea turtles, and marine mammals that are minor, limited, localized and, for the most part, short-term, both separately and cumulatively." NOAA Decision at 1.

The State filed suit in this Court on August 26, 2020, challenging the NOAA Decision as arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2). *See generally* Compl. The State asserts that the survey will harm coastal zone species and commercial and recreational fishing in State and federal waters. Compl. ¶¶ 27–29, 33–36, 38–44. The State's objection to WesternGeco's activity "ha[d] the effect of barring federal permits from issuing," and, according to the Complaint, the Acting Undersecretary's override of the State's objection "allow[ed] the project to proceed (pending the issuance of all permits)." Compl. ¶ 2; *see id.* ¶ 54 (citing Decision & Findings at 44). The State asks that the override of its objection be "set aside," thereby theoretically reinstituting the alleged

prohibition against issuance of any federal permits and preventing the formerly-proposed survey from proceeding. *See id.* ¶¶ 2, 80.[7]

Separately, WesternGeco obtained in 2018 an incidental harassment authorization from the National Marine Fisheries Service under the Marine Mammal Protection Act. Compl. ¶¶ 45–46. According to the Complaint, WesternGeco's planned surveys can only be conducted with a valid incidental harassment authorization. Compl. ¶ 46. The authorization, however, was set to expire on its own terms at the end of November 2020. *See* Compl. ¶ 46. In addition, seasonal limitations required as part of the incidental harassment authorization prohibit surveys within approximately fifty-six miles of shore from November to April. *See* NOAA Decision at 35 n.53, 36.

In order to conduct the survey, WesternGeco would also require a permit from the Bureau of Ocean Energy Management under the Lands Act. *See* 30 C.F.R. § 551.4(a). The State's Complaint, however, does not allege that the Bureau of Ocean Energy Management ever granted WesternGeco a permit. And the Bureau never did. On September 4, 2020, WesternGeco withdrew its application for the Lands Act permit. Sept. 4, 2020, Letter from

[7] Given the nature of Administrative Procedure Act review, any "setting aside" of the NOAA Decision would be in the context of remanding it to NOAA for further consideration in light of the court's opinion. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). A court generally could not step into NOAA's shoes to decide in the first instance the merits of WesternGeco's administrative appeal. *See id.*

Adil Mukhitov to Michael Celata (attached as Ex. A).[8] WesternGeco's withdrawal of its Lands Act permit application is also not the only signal that the company no longer plans to proceed with its proposal. WesternGeco terminated the incidental harassment authorization on September 4, 2020, because the company "is no longer planning to conduct the Atlantic survey" that had been the subject of the authorization. Sept. 4, 2020, Letter from Adil Mukhitov to Donna Wieting (attached as Ex. B).

STANDARD OF REVIEW

Federal Defendants move to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction. Jurisdiction is a threshold question and must be addressed before a court reaches the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88–89 (1998). Once challenged, the party seeking to invoke the court's jurisdiction holds the burden to demonstrate that jurisdiction exists. *See Evans v. B.F. Perkins Co., a Div. of Standex Int'l Corp.*, 166 F.3d 642, 647 (4th Cir. 1999). "If the court

[8] On September 8, 2020, the President withdrew from leasing disposition under the Lands Act an area that generally aligns with the Atlantic coasts of Florida, Georgia, and South Carolina. On September 24, the President extended that withdrawal to areas aligning with the North Carolina coast. Under the Lands Act, however, the Secretary of the Interior can authorize seismic surveys even in areas not otherwise open to oil and gas exploration under the Act's leasing process. *See* 43 U.S.C. § 1340; 30 C.F.R. pt. 551.

determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

Rule 12(b)(1) motions can be either "facial" or "factual" challenges. In a facial challenge—as our standing and ripeness arguments are—the court takes as true the facts alleged in the complaint and determines whether those facts are sufficient to invoke the court's jurisdiction. *See Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). The court, however, should not take as true legal conclusions disguised as factual allegations. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). In a factual challenge—as our mootness argument is—the court may consider evidence outside the complaint for purposes of assessing its own jurisdiction. *See Kerns*, 585 F.3d at 192.

ARGUMENT

Article III of the United States Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." *Hollingsworth v. Perry*, 570 U.S. 693, 700, 704 (2013). The case-or-controversy requirement manifests in the overlapping doctrines of standing, ripeness, and mootness, all of which uphold the principle that "[t]he requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those

trained in the legal process." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

The State's Complaint does not present a "Case" or "Controversy" under Article III for two reasons. First, the alleged harms the State seeks to redress are all alleged to derive from WesternGeco conducting its planned survey. The Complaint fails to allege, however, that those injuries are imminent or certainly impending. The expiration date and seasonal limitations in WesternGeco's incidental harassment authorization meant the survey would have to occur before the end of November 2020—just three months after the State filed suit. But the State itself alleges that the survey was to take 208 days. Further, the Complaint does not allege that WesternGeco obtained the necessary permit under the Lands Act. The State therefore lacks standing or, at a minimum, its case is not ripe.

Second, because WesternGeco has withdrawn its application for a Lands Act permit, the State's case is now moot. WesternGeco has represented that it will not be proceeding with the proposed activity that was the subject of the NOAA Decision. Any future application would start a new Coastal Act process. The State could again seek to initiate a federal consistency review and, if the applicant issues a consistency certification, the

State could again object. There is no live "Controversy" for this Court to resolve, and the Complaint should therefore be dismissed.

I. The State Lacks Standing (and Its Case Was Never Ripe) Because, Based on the Complaint's Allegations, the State's Injury Is Not Certainly Impending.

The Complaint should be dismissed because the State lacks standing to challenge the NOAA Decision. To meet Article III's requirements under the standing doctrine, a plaintiff must allege at the pleadings stage: (1) a "concrete and particularized" injury in fact that is "actual or imminent"; (2) that the injury in question is "fairly traceable to the challenged action"; and (3) that a favorable court decision is likely to redress the injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted) (cleaned up). Standing must exist at the time a suit is filed, and the plaintiff bears the burden to make the necessary allegations in its complaint. *Id.* at 561; *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 732 (2008) (citation omitted).

With respect to the injury-in-fact requirement, the Supreme Court "ha[s] repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper*, 568 U.S. at 409 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). An injury in fact that "relies on a highly attenuated chain of possibilities, does not satisfy the requirement that [the] threatened injury must be certainly impending." *Id.* at 410 (citing

Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009)). And courts should be "reluctan[t] to endorse standing theories that rest on speculation about the decisions of independent actors." *Id.* at 414; *accord id.* at 414 n.5 (noting that even a "substantial risk" of harm could not be shown where the plaintiff needs to speculate about the outcome of "unfettered choices made by independent actors not before the court" (citation omitted)).

The State's injuries here are ones that would allegedly occur from WesternGeco conducting the seismic survey. Specifically, the Complaint alleges that the soundwaves would impact species of the State's coastal zone (where those species occur both within and outside the State's coastal zone), and would also impact coastal zone recreational and commercial fishing in federal waters. *See* Compl. ¶¶ 27–44.

The standing problem is that the State has not offered facts sufficient to allege that the supposed injury is "certainly impending." The Complaint alleges that: (1) WesternGeco requires an incidental harassment authorization under the Marine Mammal Protection Act to lawfully conduct the survey; (2) WesternGeco's authorization expires on November 30, 2020—three months after the State filed its Complaint; but (3) the planned survey operations "will continue for months," lasting approximately 208 days over a period of about a year. *See* Compl. ¶¶ 26, 41, 45–46. Moreover, seasonal limitations in the incidental harassment authorization prohibit surveying

within about fifty-six miles of shore from November to April. NOAA Decision at 36. The Complaint (filed August 26, 2020), does not detail how the proposed survey could have occurred by the end of November.

In addition, to conduct the survey, WesternGeco would require a permit from the Bureau of Ocean Energy Management under the Lands Act. *See* 30 C.F.R. § 551.4(a). But the Complaint does not allege that the Bureau had issued a permit to WesternGeco, or that the Bureau was about to do so. *See, e.g.,* Compl. ¶ 4 (alleging that WesternGeco "*requires* a permit" (emphasis added)).

Thus, the State asks the Court to assume an injury based upon a speculative and "highly attenuated chain of possibilities" (*Clapper*, 568 U.S. at 410): that the Bureau issues a permit and that WesternGeco implements, in approximately three months, a proposed survey that the State itself alleges is planned for 208 days. The State therefore lacks standing.

For similar reasons, the State's challenge to the NOAA Decision is not ripe. The ripeness doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized *and* its effects felt in a concrete way by the challenging parties."

Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967) (emphasis added), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

To determine whether an administrative action is ripe for judicial review under the Administrative Procedure Act, courts evaluate: (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding review. *Id.* at 149. The State's challenge arguably meets the first factor in the sense that NOAA has completed its decision-making and the NOAA Decision constitutes a "final agency action" under the Administrative Procedure Act. *See Abbott Labs.*, 387 U.S. at 149–50; 15 C.F.R. § 930.130(c). Even in those circumstances, however, courts must still consider whether there is a hardship to the parties that provides a "strong reason" for immediate judicial review. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733–4 (1998); *Abbott Labs.*, 387 U.S. at 149.

The State's case is not ripe for the same reason that the State has failed to adequately plead standing: at the time the State filed suit, the survey could not have practically occurred under the existing incidental harassment authorization and the Bureau of Ocean Energy Management had not issued a permit to WesternGeco under the Lands Act. Given this context, there is no need to resolve the issues presented in the State's Complaint. The

NOAA Decision, standing alone, does not "command [the State] to do anything or to refrain from doing anything." *Ohio Forestry*, 523 U.S. at 733.[9]

Indeed, in following the Supreme Court, the Fourth Circuit has concluded that, "[w]here an injury is contingent upon a decision to be made by a third party that has not yet acted, it is not ripe as the subject of decision in a federal court." *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 758 (4th Cir. 2013) (citing *Franks v. Ross*, 313 F.3d 184, 195 (4th Cir. 2002)). There is no strong reason for judicial review based upon the facts that the State alleges. The Complaint should be dismissed as unripe.

II. Because WesternGeco Has Withdrawn Its Application for a Survey Permit, The State's Case Is Also Now Moot.

Even if the State had standing and its claims were ripe when filed, this case is now moot. "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quotation omitted). Here, if an Article III "controversy" ever existed, none remains. WesternGeco is no longer pursuing the very

[9] Federal Defendants are not arguing that a state can never challenge a Secretarial override prior to the issuance of the underlying federal agency license or permit. Rather, the State lacks standing and the case is not ripe given the harms and facts that the State has alleged in the Complaint here.

thing that the State claims would cause harm—the previously-planned survey.

"If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477–478 (1990)). That is because "a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (citation omitted). This includes situations where "the claimant receives the relief he or she sought to obtain through the claim." *Friedman's, Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002) (citation omitted).

Here, the State seeks relief—to "set aside" the NOAA Decision—that, according to the Complaint, would prohibit any federal permit for WesternGeco's proposed survey and would, therefore, prevent the proposed survey from proceeding. The Complaint alleges that the planned survey would have injured the State's interests in species and commercial and recreational fishing in State and federal waters. Compl. ¶¶ 27–29, 33–36, 38–44. And the State claims that its objection to WesternGeco's consistency certification had "barr[ed] federal permits" for the planned survey—thus,

preventing the claimed harms from occurring. *See* Compl. ¶ 2; 16 U.S.C. § 1456(c)(3)(A), (B). The State theorizes, however, that the NOAA Decision overriding the State's objection has now "allow[ed] the project to proceed (pending issuance of all permits)"—again making the alleged harms a possibility—and asks the Court to "set aside" NOAA's Decision. *See* Compl. ¶¶ 2, 54, 80.

But there is not going to be any harm as alleged in the Complaint because WesternGeco's proposed survey is not moving forward. The company has withdrawn its permit application and stated to federal regulators that it "is no longer planning to conduct the Atlantic survey." *See* Exs. A & B. Absent the Lands Act permit, there can be no survey and, thus, no harm to the interests the States identifies in the Complaint. *See* 16 U.S.C. § 1456(c)(3)(A), (B); 30 C.F.R. § 551.4(a). The State's requested judicial remedy "could not possibly have any practical effect on the outcome of the matter." *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 161 (4th Cir. 2010) (citing *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1217 (11th Cir. 2000)).

Courts have made mootness findings in similar circumstances where the application underlying (but not directly approved by) the challenged federal action is withdrawn. *See ConocoPhillips Alaska, Inc. v. Nat'l Marine Fisheries Serv.*, No. 3:06-cv-0198-RRB, 2007 WL 9718215 (D. Alaska April 17,

2007) (challenge to prior yet expiring agency action moot where application for post-expiration approval was withdrawn); *Givaudan Corp. v. Reilly*, No. 90-cv-0235 (JHG), 1991 WL 126027, at *3–6 (D.D.C. June 25, 1991) (suit involving alleged failure to deny competitor's application moot after application withdrawn); *accord Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70–71 (1983) (finding moot a claim against Secretary of Education's regulatory interpretation brought by collegiate honor society where university president had, during the course of litigation, banned the society from campus).

Indeed, in October, the U.S. District Court for the District of South Carolina conditionally dismissed as moot challenges to Marine Mammal Protection Act incidental harassment authorizations (and associated Endangered Species Act and National Environmental Policy Act review) for Atlantic seismic surveys, in part, because: "after November 30, 2020, the seismic test companies would have no authority to engage in seismic testing on the Outer Continental Shelf without issuance of the necessary permits, including newly issued [incidental harassment authorizations]." Order 4, *S. Carolina Coastal Conserv. League v. Ross*, No. 2:18-cv-3326-RMG, ECF No. 463 (D.S.C. Oct. 6, 2020) (attached as Ex. C). Even before that, the court had granted WesternGeco's motion to withdraw from that litigation because the

company had withdrawn its Lands Act permit application and terminated its incidental harassment authorization. *See id.* at 3 n.1.

In addition, neither of the two exceptions to the mootness doctrine apply here. Under the "voluntary cessation" exception, "a *defendant* cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013) (emphasis added). "This case, however, concerns the voluntary acts of a third party non-defendant." *Iron Arrow*, 464 U.S. at 72. The circumstances here are also not "capable of repetition, yet evading review" (the other exception). *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016). Even if WesternGeco were later to pursue an Atlantic survey—and assuming, speculatively, that the circumstances mirrored those here and resulted in an override decision—any Secretarial override would be based upon that new proposal. The override would be a new final agency action, based upon its own administrative record, that could itself (assuming all other requirements for justiciability had been met) be challenged in federal court. And nothing about the nature of a Secretarial override decision makes "its duration too short to be fully litigated prior to cessation or expiration." *See Kingdomware*, 136 S. Ct. at 1976. There is nothing that would evade judicial review. *Accord Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 837 (9th Cir. 2014) (recognizing that the "capable of repetition, yet evading review" exception is

not available where circumstances allow for preliminary injunctive relief "to maintain a live controversy").

Finally, we understand the State intends to argue that any order dismissing the case as moot should also vacate the NOAA Decision. This, of course, is the very relief the State seeks *on the merits* of its case. *See* Compl. ¶ 80. The Court should decline the invitation for three reasons.

First, as explained above, the State has not alleged an actual or "certainly impending" injury necessary for standing. *Clapper*, 568 U.S. at 409, 414 n.5. The Court therefore never had jurisdiction to begin with and cannot vacate an agency action. *See Nike, Inc.*, 568 U.S. at 90 ("In our system of government, courts have 'no business' deciding legal disputes or expounding on law in the absence of [an Article III] case or controversy." (citation omitted)); *Church of Scientology*, 506 U.S. at 12 (a federal court lacks jurisdiction "to declare principles or rules of law which cannot affect the matter in issue in the case before it." (citations omitted)).

Second, even when a plaintiff prevails on the merits of an Administrative Procedure Act claim, vacatur of the agency action is an equitable remedy, not a required one. *See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1289–91 (11th Cir. 2015) (citing cases from the Ninth, Federal, First, and D.C. Circuits). Thus, in seeking mootness-based vacatur, the State is requesting an outcome to which it may

not have even been entitled on the merits. The State will surely argue that the equities favor dismissal with vacatur because mootness arose by no fault of the State. But the same is true of the Federal Defendants. And, unlike the State's claims, the NOAA Decision is presumptively valid. *See Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009).

Third, where courts have vacated agency action as part of a mootness dismissal, they have done so because the agency action would have had some lingering effect on the plaintiff if left in place. Take, for example, the Supreme Court case in which mootness-based vacatur of agency action appears to have originated, *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324 (1961). The case involved a competition-based rate dispute before the Interstate Commerce Commission between railroads and barge lines. *See id.* at 325–26. The Commission temporarily approved the railroad's proposed railroad rates while it investigated the proposal, and the barge lines challenged that temporary approval. *Id.* at 326. During the district court litigation, the railroads "eliminated" the offending rates, and withdrew their application before the Commission. *Id.* at 327. The district court then granted a motion to dismiss on mootness grounds. *Id.* at 328.

Before the Supreme Court, the barge lines argued that, despite withdrawal of the application, they continued to suffer a potential harm from the Commission's approval order. *See id.* at 328–29. Specifically, the barge

lines argued that the railroads could use the order as a defense against a claim for damages by the barge lines, and that, in such a proceeding, the barge lines would be unable to attack the order's validity. *See id.* The Court relied on that continuing effect to conclude that the district court should have vacated the Commission's order along with its dismissal. *See id.* at 329; *see also Radiofone, Inc. v. F.C.C.*, 759 F.2d 936, 941 (D.C. Cir. 1985) (Scalia, J., concurring) (noting that, while mootness-based vacatur "extends to agency orders as well as district court judgments under review it does not apply to the former *automatically*, since what moots the dispute before [the court] does not necessarily nullify the agency action." (citation omitted)).[10]

The NOAA Decision does not have any lingering effect like that present in *Mechling*. The NOAA Decision resolved an appeal of a specific State objection to a specific proposed activity. That activity is no longer planned, so there is nothing left for the NOAA Decision to affect. *See* 15 C.F.R. § 930.51(f) (terminating consistency review process when an application is

[10] Another factor in *Mechling* illustrates why that case is not vacatur-demanding precedent. The complaint challenged, in part, the *process* the Commission used to temporarily approve the proposed rates. *See Mechling*, 368 U.S. at 326–27, 330–31. The plaintiff challenged the Commission's "continuing" practice of approving proposed rates before it undertook a full investigation and made findings. *Id.* at 327. By the time of Supreme Court review, the Commission had amended its process and "conceded that it [was] obliged to make findings and that the challenged order [was] fatally defective because no supporting findings were made." *Id.* at 330. The Commission had effectively confessed error.

withdrawn); *Westmoreland v. Nat'l Transp. Safety Bd.*, 833 F.2d 1461, 1463 (11th Cir. 1987) (per curiam) (refusing to vacate where there was "an insufficient showing that the administrative order will have any real continuing effect").

Should WesternGeco or some other entity pursue survey permits in the future, those specific proposals would be subject to a new Coastal Act process. The State could again seek to initiate a federal consistency review, and any new federal consistency review would require its own consistency certification(s). *See* 15 C.F.R. §§ 930.51(f), 930.54, 930.57(a), 930.58(a); *see also* 16 U.S.C. § 1456(c)(3)(A) (consistency certification process applies to the "proposed activity"). Any State objection would also be specific to the applicant's certification and the then-proposed activity. *See* 15 C.F.R. § 930.63. And any appeal of the State's objection would consider, based on the fact-specific record for that appeal, whether the specific proposed activity "may be federally approved because the activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security." *Id.* § 930.120; *see also* 16 U.S.C. § 1456(c)(3(A). Indeed, in promulgating the current regulations, NOAA recognized that "all Secretarial appeal decisions are made on a case-by-case basis and rely on the record developed for that case." Coastal Zone Management Act Federal Consistency Regulations, 71 Fed. Reg. 788, 803 (Jan. 5, 2006). The NOAA Decision would

not preclude a different outcome than the present one should WesternGeco file a new application that may come before the Secretary on appeal. There is no basis upon which to vacate the NOAA Decision.

CONCLUSION

The Complaint fails to allege a certainly impending injury in fact for purposes of Article III because the proposed survey—the conduct of which forms the basis of the State's alleged harm—had only a remote and speculative likelihood of actually occurring at the time the State filed suit. At a minimum, and for the same reason, the State's case is not ripe. In addition, WesternGeco has since withdrawn its application to permit the proposed activity that was the subject of the NOAA Decision, and the Complaint is therefore now moot. The case should be dismissed for lack of jurisdiction.

November 19, 2020

PAUL E. SALAMANCA
Deputy Assistant Attorney General

s/ Kristofor R. Swanson
KRISTOFOR R. SWANSON
(Colo. Bar No. 39378)
Natural Resources Section
Envt. & Natural Resources Div.
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0248
Fax: (202) 305-0506
kristofor.swanson@usdoj.gov