

Judge axes NEPA brawl over Great Lakes wind project

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A federal judge has tossed out bird conservationists' Trump-era lawsuit challenging the approval of the nation's first freshwater offshore wind project planned in the Great Lakes, after finding they lacked standing to bring the case.

The American Bird Conservancy and the Black Swamp Bird Observatory [opposed construction of the Icebreaker Wind project](#) in Lake Erie just north of Cleveland, citing concerns that its six proposed turbines would harm native birds and bats.

They claimed that the National Environmental Policy Act review of the Lake Erie Energy Development Corp. (LEEDCo) project was inadequate and that the federal government had failed to explore an alternative project design for monitoring wildlife impacts, among other concerns.

But Judge Timothy Kelly of the U.S. District Court for the District of Columbia said in a ruling Tuesday the groups did not have standing to raise their claims against federal financing and approvals for the project from the Department of Energy and the Army Corps of Engineers.

The decision also marks a newly cleared hurdle for the Biden administration as it seeks to help develop offshore wind energy in state waters.

"Plaintiffs have not shown that DOE has made a decision that 'may have been wrongly decided *because of* the lack of' adequate NEPA review," said Kelly, a Trump appointee, in a [memorandum opinion](#).

"Thus," he added, "any causal chain remains incomplete."

The conservation groups alleged in their lawsuit filed in 2019 that DOE should have conducted a more rigorous NEPA review — known as an environmental impact statement — before reaching a cooperative funding agreement to help LEEDCo design, construct and operate the proposed demonstration project.

The conservation groups also claimed the Army Corps should have considered an alternative that would have established a system after construction to monitor bird and bat collisions before the corps moved ahead with approving a Section 404 water permit for dredging materials under the Clean Water Act.

Kelly said that such a proposal would go beyond the type of project analysis the Army Corps is required to do before approving dredging under Section 404 of the Clean Water Act.

"The Guidelines make clear that the Corps need only consider alternatives to the discharge itself — not to any environmentally damaging aspect of the project," he wrote.

The groups also argued the Army Corps should not have relied on DOE's NEPA review of the project's impact on birds and bats during its public interest review, but instead should have deferred to the Fish and Wildlife Service's analysis, which found the level of risk was "uncertain."

Kelly, however, was unconvinced by their argument.

DOE first gave the green light in 2013 for Icebreaker in a move that was supposed to help spur the development of offshore wind installations throughout Lake Erie and in other state waters.

However, advancement of the project stalled for years. In a 2021 court filing, DOE stated that the project had not advanced beyond planning-level funding since 2016.

The American Bird Conservancy said in an emailed statement that the conservation group was still reviewing the court's ruling.

The organization noted that Kelly had not rejected their claim that DOE had violated NEPA.

"But he dismissed our claim on the ground that it was premature because the Department is not currently funding the project," according to the group.

"That leaves the door open for use to refile our complaint the moment the Department does provide further funding or otherwise supports the project," the conservancy said.

James Stouffer, president of the Lake Erie Foundation, which backed the conservation groups in a friend of the court brief before the court, said he was disappointed by the decision and continues to oppose the proposed project.

"Our Foundation continues to have grave concerns about the potential environmental impact of the project and the lack of serious review by the Department of Energy," Stouffer said in a statement. "It is worth keeping in mind that the DOE has not made any final funding decisions and we hope the concerns expressed [by] our Foundation and others are seriously considered before the Department decides if it will fund the project."

Neither the project developer, LEEDCo, nor DOE responded to a request for comment Wednesday on the court ruling. A spokesperson for the Army Corps declined to comment on Icebreaker.