This week, three different offshore wind projects that were targeted with shutdown orders by the Trump Administration won preliminary injunctions against those orders. Those lawsuits are in response to a blanket order in December from the Trump Administration, issuing stop work orders to all off-shore wind projects in the United States. (For some projects, this is the second stop-work order from the Administration, with the prior ones either also defeated in court or voluntarily withdrawn by the Administration after a deal that the Administration has since reneged upon.)

The court rulings on the preliminary injunctions are so far very terse – the complaint filed by Revolution Wind challenging its first stop work order (a complaint that produced a preliminary injunction as well), emphasized the inconsistency and incoherence of the Administration's national security rationale for the stop work orders. In particular, the complaint noted that the national security rationales were not supported in the order, were inconsistent with prior agency statements (but with no explanation for the change in position), and were also inconsistent with public statements by the Administration about why it was issuing the order (which focused more on economic or policy grounds).

But that line of argument only addresses the competence of the claimed rationale for ordering the stop work order. If the Administration got its act together, and came up with a coherent and defensible rationale, could it shut down the projects? The answer, I think, is probably, and the reason is that the relevant law, the Outer Continental Shelf Lands Act (OCSLA) gives the executive branch pretty broad authority to suspend, and ultimately cancel, leases on the continental shelf (including where these off-shore farms are located).

The key provision of OCSLA is Section 5(a)(1), 43 U.S.C. § 1334(a)(1), which gives the executive the authority to suspend leases or permits for reasons such as national security interests or the threat of serious, irreparable, or immediate harm or damage to life or the marine, coastal, or human environment. Once a suspension has lasted for five years, then the executive can cancel the lease or permit under 5(a)(1) if (1) continued activity would "probably cause" harm or damage to life, property, any mineral, national security or defense, or the marine, coastal, or human environment; (2) the threat will not sufficiently decrease within a "reasonable" period of time; and (3) the benefits of cancellation outweigh the benefits of continued performance. (The summary of the relevant provisions comes from this article, which I co-authored with Jordan Diamond.)

It's not hard to see this Administration coming up with a plausible reason to invoke these provisions. For instance, it's possible that with enough time and resources, they could develop some sort of analysis that wind turbines are adversely affecting radar or other defense infrastructure, and articulate why past studies missed important issues. And since this Administration is shameless, I wouldn't put it past them to draw on impacts on marine mammals or fisheries (which undoubtedly exist) and characterize them as sufficient to justify cancellation. After all, the standard only requires "serious" harm to trigger suspension, and then that the benefits of cancellation outweigh the harms. Those vague standards leave a lot of wiggle room for an executive eager to get what it wants. Note that these same provisions would apply to oil and gas projects, if a future administration was so inclined to act (as we noted in our article).

Indeed, there are similar provisions in Revolution Wind's offshore wind lease (which is the standard lease provision) – in particular giving broad power to the government to issue stop work orders for national security reasons, and to otherwise invoke the authority of OCSLA. There are other potential hooks for stop work orders in those lease terms. Section 7(a) prohibits the lessee from taking actions that would "unreasonably interfere with or endanger activities or operations carried out under any lease or grant" under OCSLA "or under any other license or approval from any Federal agency." That provision appears to allow the agency to conclude wind projects might "unreasonably interfere" with fishing or other licensed activities.

Given all this, there is good reason for Congress to take a look at permit certainty if it is worried about abusive executive actions for existing projects – though as I've noted before, the current efforts appear to be woefully inadequate. And, as I'll detail in a follow-on post, the potential for executive discretion to yank permits is probably even greater for on-shore projects (both renewable and oil and gas). So there is room for Congressional action, though it won't necessarily be easy to strike the balance between preventing abuse, and giving the executive the power to respond to new and dangerous threats to national security or the environment. Indeed, the suspension and cancellation provisions form OCLSA were specifically enacted after the Santa Barabara oil spill so the government could respond to an environmental disaster. And we probably do want the government to have the power under leases to intervene if some sort of unexpected conflict or problem arises from a lease. The challenge is, I don't if anyone trusts this Administration to use those powers in good faith.