UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GREAT LAKES DREDGE & DOCK COMPANY, LLC,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. 4:22-CV-02481
	§	
CHRIS MAGNUS, *et al.*,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Before the Court are the plaintiff's, Great Lakes Dredge & Dock Company, LLC, ("Great Lakes") and the defendants', Chris Magnus and Alejandro Mayorkus (collectively the "Government"), and the intervenor's, American Petroleum Institute ("API"), motions for summary judgment (Docs. 40, 41, & 42) brought under Fed. R. Civ. P. 56, wherein each party asserts that no genuine issue of material fact exists and each claim that summary judgment on its behalf is appropriate. The Court, being duly advised of the premises, GRANTS API's motion (Doc. 41) and DENIES AS MOOT the remaining pending motions. (Docs. 40 & 42).

II. FACTUAL BACKGROUND

Great Lakes is a limited liability company that provides dredging services in the United States. This action stems from Great Lakes' request for the U.S. Customs and Border Patrol Agency's ("Customs") determination on whether the transportation of merchandise to the seabed of the outer continental shelf was subject to the Jones Act. The Jones Act regulates the use of foreign-flagged vessels for transportation of "merchandise by water, or by land and water," within

the confines of the United States waterway points "to which the coastwise laws apply[.]" 46 U.S.C. § 55102(b). It also promotes the use of vessels wholly owned by United States citizens within its coastwise points. *Id*. The United States outer continental shelf territories however are governed by the Outer Continental Shelf Lands Act ("OSCLA"). 43 U.S.C. § 1331. OSCLA exercises federal jurisdiction over territories adjacent to a State to: "(i) the subsoil and seabed of the Outer Continental Shelf; (ii) all artificial islands on the Outer Continental Shelf; (iii) installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or production resources, including nonmineral energy resources; or (iv) any such installation or other device (other than a ship or vessel) for the purpose of transporting or transmitting such resources." *Id*.

On February 12, 2022, Great Lakes requested a determination from Customs on whether a proposed transportation of merchandise was subject to the Jones Act. Great Lakes' request pertained to a vineyard wind select project (the "Project") that oversaw the placement of scour protection stones to stabilize wind turbine generators erected on the outer continental shelf. Scour protection is composed of rock, or similar material, that prevents sediment erosion and protects against increased seabed drag after the placement of the foundation.

On January 27, 2021, Customs issued its ruling letter finding that the Jones Act applied to the Project. However, Customs issued a superseding ruling letter later stating that Great Lakes' proposed transportation was not governed by the Jones Act, until a first layer of scour rock was installed. The letter established new precedent from Customs and overrode its prior rulings on the topic.

On May 18, 2021, Great Lakes appealed the letter asserting that OSCLA extends the Jones Act's jurisdiction to the entirety of the seabed of the outer continental shelf for all activities that

are consistent with the purposes of OSCLA, and further argued that the Jones Act's jurisdiction attaches to installations and devices that are attached to the seabed when the first rock is set, as opposed to the first layer of rock. On June 6, 2022, Customs denied Great Lakes appeal.

Great Lakes now seeks declaratory and injunctive relief, alleging that Customs violated the Administrative Procedures Act ("APA"). On January 20, 2023, API filed an unopposed motion to intervene; and on June 30, 2023, the parties filed their motions for summary judgment.

III. CONTENTIONS OF THE PARTIES

Great Lakes contends that it is entitled to a declaratory summary judgment, because: (1) the Government's and API's arguments that Customs' ruling must stand are contrary to the OSCLA and the Jones Act; and (2) Customs' conclusion that the site is not a U.S. coastwise point until after the first layer of scour protection material is placed on the seabed, is contrary to Customs' legislative history and federal law. Great Lakes further argues the APA requires that the Court set aside Customs' ruling.

In opposition, API argues that Great Lakes lacks standing to bring this action. Further, API argues Great Lakes request for a Customs determination was based on its interest in performing the Project and that Great Lakes has no legally protected interest in the Project; and, therefore disqualifies Great Lakes from the equitable relief that it seeks. API further asserts that: (1) Great Lakes lacked a vessel to complete the Project; (2) the vessels, that Great Lakes intended to use for the Project, would not be completed until after the Project's completion date; (3) Great Lakes has no offshore wind contract in place, and therefore, lacks standing to bring this action; and (4) Customs' letter is in compliance with federal law.

Further in opposition, the Government argues that: (1) Customs' interpretation of the Jones Act in relation to the OSCLA and the Project is correct; (2) Customs' interpretation of the OSCLA

is in compliance with federal law; and (3) OSCLA's subject matter jurisdiction confirms its limited reach, thereby substantiating Customs' opinion. The Government did not address whether Great Lakes lacked standing in its briefing.

IV. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure authorizes summary judgment against a party who fails to make a sufficient showing of the existence of an element essential to the party's case and on which that party bears the burden at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Little v. Liquid Air Corp*., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). The movant bears the initial burden of "informing the district court of the basis for its motion" and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323; *see also Martinez v. Schlumber, Ltd*., 338 F.3d 407, 411 (5th Cir. 2003). Summary judgment is appropriate where the pleadings, the discovery and disclosure materials on file, and any affidavits show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

"A dispute is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Allen v. United States Postal Service*, 63 F.4th 292, 300 (5th Cir. 2023). A disputed fact is material if it "might affect the outcome of the suit under the governing law." *Id*. "In making this assessment, the court 'may not make credibility determinations or weigh the evidence.'" *Id*.

V. ANALYSIS

a. Great Lakes Lacks Article III Standing to Maintain This Action.

The Court is of the opinion that API's motion for summary judgment based on lack of standing is dispositive of the suit. API argues Great Lakes lacks standing to maintain this action

because it cannot timely complete the Project, and therefore, cannot establish the requisite injury in fact, to satisfy Article III standing. Great Lakes opposes API's argument asserting that API's argument is frivolous and mischaracterizes binding and persuasive case law that supports Great Lakes' standing.

"A plaintiff must have Article III standing to maintain an action in federal court." *Wendt v. 24 Hour Fitness USA, Inc*., 821 F.3d 547, 550 (5th Cir. 2016). "To establish Article III standing, the plaintiff must show (among other things) that he has suffered an 'injury in fact.'" *Id*. "An injury-in-fact constitutes 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Id*. "[A] plaintiff, as the party involving federal jurisdiction, bears the burden of establishing an injury-in-fact." *Id*. "The jurisdictional issue of standing is a legal question [ ] [.] " *Id*.

The Court holds that Great Lakes lacks standing to maintain this action. Great Lakes presents a wealth of case law in support of its arguments none of which supports its claim. In fact, several cases proffered by Great Lakes confirms the Court's position. *American Fuel & Petrochemical Manufacturers v. Environmental Protection Agency*, 3 F.4th 373 (D.C. Cir. 2021); *Cooper v. Texas Alcoholic Beverage Com'n*, 820 F.3d 730 (5th Cir. 2016); *National Credit Union Admin v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 479 (1998).

In *American Fuel*, the petitioners challenged the EPA's authority to determine that E15 fuel satisfied Subsection 7545(f)(1)(A) to be sold year-round, thereby, departing from its previous limitation on E15 fuels. *American Fuel & Petrochemical Manufacturers*, 3 F.4th at 378. As here, the court addressed whether the petitioners had Article III standing. In that instance, an association brought forth an action on behalf of its members. The petitioner represented two companies that

satisfied competitor standing; hence, the court found an actual protected interest existed that supported standing. *Id*.

In *Cooper*, the petitioner sought to purchase a nightclub business, as a non-Texas resident, and avoid violating the Texas Alcoholic Beverage Code's residency requirement. *Cooper*, 820 F.3d at 734. The court found standing based on the "increased economic competition from out-of-state business" as a sufficient basis for satisfying Article III standing. *Id*. The court further found that "[t]he regulatory allowance of increased competition in a plaintiff's market" qualifies "as a clear injury in fact." *Id*. at 739. Lastly, in *National Credit Union Admin*, the petitioner, sought to overturn the National Credit Union Administration's approval of applications filed by certain credit unions that sought to expand the territory they serviced. 522 U.S. at 479. The Supreme Court addressed prudential standing by applying the "zone of interest test." *Id*. at 480. The Supreme Court found that the petitioner satisfied Article III standing because, as a federal credit union competitor, it had a direct interest in "limiting the markets that federal credit unions serve[d]." *Id*.

The Court finds that the facts in this case are distinguishable from the authority presented. First, the Court is not asked to address associational standing, because Great Lakes represents only its own interest. Second, the facts before the Court establish that Great Lakes did not have a vessel capable of handling the Project. In this respect, Great Lakes claim is hypothetical as opposed to actual. *Shrimpers & Fisherman of RGV v. Tex. Comm'n on Env't Quality*, 968 F.3d 419, 424 (5th Cir. 2020). Therefore, any claim for damages would be hypothetical and not based on "specific, concrete facts demonstrating that [it] [suffered] harm." *Shipbuilders Council of Am. v. U.S.*, 868 F. 2d 452, 456 (D.C. Cir. 1989). Finally, it is undisputed that Great Lakes does not have a current contract to perform the Project.

VI. CONCLUSION

Standing is one of the essential prerequisites to jurisdiction under Article III and Great Lakes has failed to allege facts that show "actual or imminent, not conjectural or hypothetical," harm or that it has an ability to service the Project. Accordingly, API's motion for summary judgment is GRANTED. The Court also determines that this issue is dispositive of Great Lakes' lawsuit. Consequently, Great Lakes' and the Government's motions for summary judgment (Docs. 40 & 42) are DENIED AS MOOT.

It is so ORDERED.

SIGNED on October 16, 2023, at Houston, Texas.

Kenneth M. Hoyt
United States District Judge