



Third-Party Enforcement of Community Benefit Agreements and Fisheries Compensation Agreements

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1 Introduction

New England has recently seen a rapid expansion in the offshore wind industry. Construction on South Fork Wind finished in February of 2024.¹ Vineyard Wind 1 remains under construction, and offshore construction of Revolution Wind will begin in 2024.² This growing industry is expanding in areas that are already heavily utilized and it has been met with some reservations. Fishers have raised concerns about offshore wind construction potentially harming fish and limiting their access to fishing grounds due to the difficulty of maneuvering between turbines while using fishing gear.³ Members of coastal communities have voiced their worries about, among other things, the potential impacts of running transmission lines for these projects under local beaches and roads.⁴ In response to some of these concerns, offshore wind developers have entered into agreements with states and towns to provide various benefits and payments to communities that may be impacted by their projects.⁵ This report provides an overview of these agreements and examines issues related to

¹ See Michelle Lewis, *South Fork Wind Just Became the U.S.'s First Complete Utility Scale Offshore Wind Farm*, ELECTREK (Feb. 27, 2024), <https://electrek.co/2024/02/27/south-fork-us-first-complete-utility-scale-wind-farm/>.

² Miriam Wasser, *Vineyard Wind, Country's First Large-Scale Offshore Wind Project, Is Producing Clean Electricity*, WBUR (Jan. 3, 2024), <https://www.wbur.org/news/2024/01/03/vineyard-offshore-wind-massachusetts-first-power-clean-energy>; *Revolution Wind Receives Final Approval from U.S. Department of the Interior*, REVOLUTION WIND (Nov. 20, 2023), <https://revolution-wind.com/news/2023/11/revolution-wind-receives-final-approval-from-us-department-of-the-interior>.

³ See Will Sennott & Anastasia Lennon, *Blown Away: Fishermen Endangered by Offshore Wind's Political Power*, PROPUBLICA (Apr. 18, 2023), <https://www.propublica.org/article/fishermen-endangered-offshore-wind-political-power>; Mary Lhowe, *Fishermen See Offshore Wind Coming and Buckle Down To Plan for Shared Future*, ECORI NEWS (Nov. 9, 2023), <https://ecori.org/fishermen-see-offshore-wind-coming-and-buckle-down-to-plan-for-shared-future/>; Miriam Wasser & Benjamin Storrow, *As Turbines Rise, Small-Scale Fishermen Have the Most to Lose*, WBUR (Oct. 14, 2021), <https://www.wbur.org/news/2021/10/14/offshore-wind-fishing>.

⁴ See Bruce Mohl, *Cape Cod Residents Voice Concerns on Offshore Wind Transmission Lines*, COMMONWEALTH BEACON (June 26, 2023), <https://commonwealthbeacon.org/energy/cape-cod-residents-voice-concerns-on-offshore-wind-transmission-lines/>; Sabrina Shankman, *Cape Cod Residents Say No to Offshore Wind Transmission Lines Under Beaches*, BOSTON.COM (Nov. 17, 2023), <https://www.boston.com/news/the-boston-globe/2023/11/16/cape-cod-residents-say-no-to-offshore-wind-transmission-lines-under-beaches/>.

⁵ See Mary Lhowe, *Hundreds of Millions of Dollars for Mitigation Can Ease Offshore Wind Opponents' Pain*, ECORI (Jan. 25, 2024), <https://ecori.org/hundreds-of-millions-of-dollars-for-mitigation-can-ease-offshore-wind-opponents-pain/>; see also, e.g., Letter from Jeffrey M. Willis, Exec. Dir., R.I. Coastal Res. Mgmt. Council, to Elizabeth Klein, Dir., Bureau of Ocean Energy Mgmt., Karen J. Baker, Chief, Off. of Renewable Energy Program, Bureau of Ocean Energy Mgmt., James Bennet, Manager, Off. of Renewable Energy Programs, Bureau of Ocean Energy Mgmt. & Ryan Chaytors, Project Dev. Dir., Revolution Wind, LLC attach. at app. 8 (May, 12, 2023) (on file with R.I. Coastal Res. Mgmt. Council) [hereinafter

whether individuals who are not a party to an agreement may nevertheless enforce it. Whether a given individual who is not a party to an agreement may enforce that agreement is a case-by-case determination based on a number of factors; as such, individuals who are interested in a given agreement should seek legal counsel to help them evaluate their individual circumstances.

2 Background

The agreements that offshore wind developers have entered into to provide benefits to impacted communities generally fall into two broad categories: community benefit agreements and fisheries compensation agreements.

Community benefit agreements (often also referred to as CBAs) are agreements between developers and either government entities or community groups.⁶ These agreements are usually negotiated in the context of the developer seeking government approvals or funding for its project.⁷ In these agreements, developers promise to provide certain benefits to the community, in exchange for the community's support and a smoother approval process.⁸ The benefits developers agree to provide vary based on the particulars of the project and the community's concerns, but they often include promises to use local labor, to construct the project in an environmentally friendly way, and to pay money to the community.⁹ Community benefit agreements, therefore, may provide tailored benefits to communities while easing a developer's approval process.

The modern community benefit agreement trend began in California over twenty years ago when community groups reached agreements with developers of large projects such as the Hollywood and Highland Center (which houses the theater that hosts the Academy Awards), the Staples Center (the Los Angeles Lakers' home stadium), and an expansion of LAX airport.¹⁰ Since then, these types of agreements have spread across the country.¹¹ For offshore wind projects, community benefit agreements are becoming more and more common.¹² The Bureau of Ocean Energy Management, which runs the federal government's offshore renewable energy leasing program,¹³ offered a bidding credit to developers who committed to entering into community benefit agreements in its Final Sale Notice for its recent sale of leases off the coast of California.¹⁴ In each of the leases issued from that sale, the Bureau included conditions requiring that the developers enter into community benefit

Rhode Island Revolution Wind Consistency Decision],

http://www.crmc.ri.gov/windenergy/revolution/RevWind_FedConDecision_20230512.pdf.

⁶ See, e.g., NAT'L RENEWABLE ENERGY LAB'Y, WIND ENERGY COMMUNITY BENEFITS GUIDE 3 (2023),

<https://windexchange.energy.gov/community-benefits-guide.pdf>.

⁷ See Vicki Been, *Community Benefit Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 7 (2010); OFF. OF ECON. IMPACT & DIVERSITY, U.S. DEP'T OF ENERGY, GUIDE TO ADVANCING OPPORTUNITIES FOR COMMUNITY BENEFIT THROUGH ENERGY PROJECT DEVELOPMENT 4 (2017).

⁸ MATTHEW EISENSON & ROMANY M. WEBB, EXPERT INSIGHTS ON BEST PRACTICES FOR COMMUNITY BENEFITS AGREEMENTS 3 (2023),

https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1207&context=sabin_climate_change.

⁹ See *id.*; Been, *supra* note 7.

¹⁰ See Patricia E. Salkin & Amy Lavine, *Understanding Community Benefit Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 J. ENV'T L. 291, 301–06 (2008).

¹¹ See Salkin & Lavine, *supra* note 10, at 317–18; Been, *supra* note 7, at 10–11.

¹² See NAT'L RENEWABLE ENERGY LAB'Y, *supra* note 6.

¹³ See Reorganization of Title 30—Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 88 Fed. Reg. 6,376, 6,378 (Jan. 31, 2023).

¹⁴ See Pacific Wind Lease Sale 1 (PACW-1) for Commercial Leasing for Wind Power on the Outer Continental Shelf in California – Final Sale Notice, 87 Fed. Reg. 64,093, 64,102–03 (Oct. 21, 2022).

agreements as they promised in their bids.¹⁵ Several towns in the Northeast, including Portsmouth, Rhode Island, have already entered into community benefit agreements with developers building offshore wind projects in the region.¹⁶ As such, community benefit agreements are beginning to play an important role in offshore wind development in the United States.

Along with community benefit agreements, offshore wind developers have also entered into many fisheries compensation agreements. Like community benefit agreements, fisheries compensation agreements are often negotiated and agreed to in the context of the developer seeking a government permit or approval.¹⁷ In these arrangements, the developers enter an agreement with the relevant state in which they promise to establish multiple funds for different purposes.¹⁸ Typically, they agree to create at least two funds: one that compensates commercial and charter fishers for direct impacts from the project, such as loss of access to fishing grounds and reduced harvest, and one that provides general support to fishing or coastal communities in the state.¹⁹ Some provide additional benefits, such as funding studies on offshore wind's impact on fisheries and grants to help fishers buy new navigational equipment or attend trainings.²⁰ These agreements, like community benefit agreements, are becoming common fixtures in New England's offshore wind industry.²¹

¹⁵ See BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, COMMERCIAL LEASE OF SUBMERGED LANDS FOR RENEWABLE ENERGY DEVELOPMENT ON THE OUTER CONTINENTAL SHELF, RENEWABLE ENERGY LEASE NUMBER OCS-P 0561, at C-27 to C-32 (2023) (RWE Offshore Wind Holdings, LLC), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/2023-05-16_BOEM_RWE_POCSR_Lease-0561.pdf; BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, COMMERCIAL LEASE OF SUBMERGED LANDS FOR RENEWABLE ENERGY DEVELOPMENT ON THE OUTER CONTINENTAL SHELF, RENEWABLE ENERGY LEASE NUMBER OCS-P 0562, at C-27 to C-32 (2023) (California North Floating LLC), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/2023-05-16_BOEM_CA-North-Float_POCSR_Lease-0562.pdf; BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, COMMERCIAL LEASE OF SUBMERGED LANDS FOR RENEWABLE ENERGY DEVELOPMENT ON THE OUTER CONTINENTAL SHELF, RENEWABLE ENERGY LEASE NUMBER OCS-P 0565, at C-27 to C-32 (2023) (Invenergy California Offshore LLC), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/2023-05-16_BOEM_Invenergy_POCSR_Lease-0565.pdf; BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, COMMERCIAL LEASE OF SUBMERGED LANDS FOR RENEWABLE ENERGY DEVELOPMENT ON THE OUTER CONTINENTAL SHELF, RENEWABLE ENERGY LEASE NUMBER OCS-P 0564, at C-27 to C-29 (2023) (Central California Offshore Wind LLC), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/2023-05-16_BOEM_CCOW_POCSR_Lease-0564.pdf; BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, COMMERCIAL LEASE OF SUBMERGED LANDS FOR RENEWABLE ENERGY DEVELOPMENT ON THE OUTER CONTINENTAL SHELF, RENEWABLE ENERGY LEASE NUMBER OCS-P 0563, at C-27 to C-32 (2023) (Equinor Wind US LLC), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/2023-05-16_BOEM_Equinor_POCSR_Lease-0563.pdf.

¹⁶ See Lhowe, *supra* note 5.

¹⁷ See, e.g., Rhode Island Revolution Wind Consistency Decision, *supra* note 5; Revolution Wind, LLC, No. 2021-07-005 (R.I. Coastal Res. Mgmt. Council Feb. 8, 2023), http://www.crmc.ri.gov/windenergy/revolution/2023_0221_RevWind_CableDecision.pdf; Letter from Lisa Berry Engler, Dir., Mass. Off. of Coastal Zone Mgmt., to Mark Roll, Avangrid Renewables 2 (Nov. 9, 2023) (on file with Mass. Off. of Coastal Zone Mgmt.) [hereinafter Massachusetts New England Wind Consistency Decision], <https://www.mass.gov/doc/offshore-wind-park-city-wind-fcr-decision-11-9-23-revised-and-signed-with-attachments/download>.

¹⁸ See, e.g., Rhode Island Revolution Wind Consistency Decision, *supra* note 5; Massachusetts New England Wind Consistency Decision, *supra* note 17, at 2, attach. at 3–5.

¹⁹ See, e.g., Rhode Island Revolution Wind Consistency Decision, *supra* note 5, at 6, app. 8 at exhibit A-1, exhibit B-1; Massachusetts New England Wind Consistency Decision, *supra* note 17, at 2, attach 3–5.

²⁰ See, e.g., Rhode Island Revolution Wind Consistency Decision, *supra* note 5.

²¹ See, e.g., Rhode Island Revolution Wind Consistency Decision, *supra* note 5; Massachusetts New England Wind Consistency Decision, *supra* note 17; Letter from Lisa Berry Engler, Dir., Mass. Off. of Coastal Zone Mgmt., to Ryan Chaytors, Sunrise Wind, LLC attach. at 4–6, exhibit A-1 (Oct. 6, 2023) (on file with Mass. Off. of Coastal Zone Mgmt.)

The funds for direct compensation typically use a claims process through which fishers must establish they are eligible for compensation and submit a claim to receive compensation.²² Most direct compensation funds will be administered by a third-party, not the developer itself, who will review both eligibility applications and claims.²³ Although these agreements are between the state and the developer, they establish processes where fishers will interact with the fund's third-party administrator.

In both the community benefit agreements and fisheries compensation agreements related to offshore wind projects in New England, the parties to the agreement tend to be the developer and either a state or local government.²⁴ As such, assuming that the requirements of the relevant state's contract law are met and that the developer cannot assert an affirmative defense,²⁵ the state or municipality that entered the agreement may be able to bring a breach of contract action to enforce the developer's obligations under the agreement.²⁶

Community benefit agreements and fisheries compensation agreements, however, often contain promises that individuals within those states or municipalities may be keenly interested in, such as

[hereinafter Massachusetts Sunrise Wind Consistency Decision], <https://www.mass.gov/doc/offshore-wind-sunrise-wind-federal-consistency-determination-with-attachments-10-6-23/download>; Letter from Jeffrey M. Willis, Exec. Dir., R.I. Coastal Res. Mgmt. Council, to Elizabeth Klein, Dir., Bureau of Ocean Energy Mgmt., Karen J. Baker, Chief, Off. of Renewable Energy Programs, Bureau of Ocean Energy Mgmt., Jennifer Flood, Permitting Dir., SouthCoast Wind Energy LLC & Kyle Cassidy, Marine Sci. Permitting Manager, SouthCoast Wind Energy LLC attach. (Dec. 19, 2023) (on file with R.I. Coastal Res. Mgmt. Council) [hereinafter Rhode Island SouthCoast Wind Consistency Decision], http://www.crmc.ri.gov/windenergy/southcoast/SCW_FedConDecision_12-19-23.pdf.

²² See, e.g., Rhode Island Revolution Wind Consistency Decision, *supra* note 5; Massachusetts New England Wind Consistency Decision, *supra* note 17, at attach. at 4; Massachusetts Sunrise Wind Consistency Decision, *supra* note 21; Rhode Island SouthCoast Wind Consistency Decision; *supra* note 21.

²³ See, e.g., Rhode Island Revolution Wind Consistency Decision, *supra* note 5; Massachusetts Sunrise Wind Consistency Decision, *supra* note 21; Letter from Jeffrey M. Willis, Exec. Dir., R.I. Coastal Res. Mgmt. Council, to Amanda Lefton, Dir., Bureau of Ocean Energy Mgmt., James Bennett, Renewable Energy Program Manager, Bureau of Ocean Energy Mgmt. & David Hardy, CEO, Ørsted Offshore North America attach. at app. 30 at 4–5, exhibit A-1 (July 1, 2021) (on file with R.I. Coastal Res. Mgmt. Council) [hereinafter Rhode Island South Fork Consistency Decision], http://www.crmc.ri.gov/windenergy/dwsouthfork/SFWF_FedConsistencyDecision_20210701.pdf; Letter from Lisa Berry Engler, Dir., Mass. Off. of Coastal Zone Mgmt., to Rachel Patcher, Chief Dev. Officer, Vineyard Wind LLC exhibit B (May 22, 2020) (on file with Mass. Off. of Coastal Zone Mgmt.) [hereinafter Massachusetts Vineyard Wind 1 Consistency Decision], <https://www.mass.gov/doc/offshore-wind-vineyard-wind-boem-usace-action-5-22-20-signed-with-attachments/download>.

²⁴ See, e.g., Lhowe, *supra* note 5; Massachusetts Vineyard Wind 1 Consistency Decision, *supra* note 23; Rhode Island South Fork Consistency Decision, *supra* note 23.

²⁵ In Rhode Island, “a valid contract requires ‘competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation.’” *DeAngelis v. DeAngelis*, 923 A.2d 1274, 1279 (R.I. 2007). See also, for example, *Burt v. Bd. Of Trs. Of Univ. of R.I.*, 84 F.4th 42, 47–48, 52–54 (1st Cir. 2023), which upheld a lower court’s dismissal of the plaintiffs’ breach of contract claims, despite finding that a contract existed between the parties in which the defendant promised to provide a service it stopped providing to plaintiffs, because the defendant could assert frustration of the contract as a defense.

²⁶ See *Barkan v. Dunkin Donuts, Inc.*, 627 F.3d 34, 39 (1st Cir. 2010) (“To succeed on a breach of contract claim under Rhode Island law, a plaintiff must prove that (1) an agreement existed between the parties, (2) the defendant breached the agreement, and (3) the breach caused (4) damages to the plaintiff.”); see also *Murphy v. Central Falls Det. Facility Corp.*, No. C.A. 14-203 S., 2015 WL 1969178, at *13 (D.R.I. Apr. 30, 2015) (“A breach of contract claim may be brought by the parties”).

those related to compensation processes for fishers.²⁷ This raises the issue of whether a third party—someone who was not a party to the agreement—may enforce it. This report will analyze this issue under Rhode Island law; however, the law in other jurisdictions may be different.

3 Individuals' Ability to Enforce Community Benefit Agreements and Fisheries Compensation Agreements

Under Rhode Island law, whether a third party may enforce a contract they were not a party to turns on whether the third party is an intended beneficiary.²⁸ Although one party carrying out their obligations to another under a contract often benefits third parties, not all third parties who benefit from the performance of a contract may enforce it.²⁹ For example, even though a company's customers may “incidentally benefit[] from the business” that company conducts with another, this is not enough for customers to be able to maintain a lawsuit to enforce a contract between the two companies.³⁰ Only intended beneficiaries—those who “the parties directly and unequivocally intend to benefit”— may enforce a contract between two other parties.³¹

Rhode Island follows the Restatement (Second) of Contracts' approach to determining whether a third party is an intended, as opposed to merely an incidental, beneficiary.³² Restatements attempt to present the general principles and rules in a given area of law across jurisdictions, but they are not themselves binding authority unless a court in a given jurisdiction adopts the Restatement's provisions.³³ When it comes to intended third-party beneficiaries, the Restatement (Second) of Contracts provides:

Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

- (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
- (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.³⁴

The promisor is the person promising to “act or refrain from acting” in a certain way, while the promisee is the person to whom this promise is made.³⁵ The Restatement's test “essentially requires that the parties directly and unequivocally intend to benefit the third party in order for that third party to be considered an intended beneficiary.”³⁶

²⁷ See, e.g., Rhode Island South Fork Consistency Decision, *supra* note 23; Massachusetts Sunrise Wind Consistency Decision, *supra* note 21.

²⁸ See *Glassie v. Doucette*, 157 A.3d 1092, 1097 (R.I. 2017).

²⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. e (AM. L. INST. 1981).

³⁰ See also *BHK Realty, LLC v. Narragansett Elec. Co.*, 542 F. Supp. 3d 133, 142–43 (D.R.I. 2021).

³¹ See *Forcier v. Cardello*, 173 B.R. 973, 984–85 (D.R.I. 1994); *Hexagon Holdings, Inc. v. Carlisle Syntec Inc.*, 199 A.3d 1034, 1039–40 (R.I. 2019).

³² See *Glassie*, 157 A.3d at 1097–98 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 302 (AM. L. INST. 1981)).

³³ See *Restatement of the Law*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/restatement_of_the_law (Aug. 2020).

³⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 302 (AM. L. INST. 1981).

³⁵ See *id.* § 2.

³⁶ See *Forcier*, 173 B.R. at 985.

Before an intended third-party beneficiary may enforce a contract made between others, however, she must assent to or ratify the contract.³⁷ Even if the parties intend to benefit a third party, the third party does not have a right to enforce the agreement until the third party takes some action that shows she “knows of the promise . . . , accepts the new agreement, and accedes to its terms.”³⁸ One way to assent to the contract, though, is to bring a lawsuit to enforce it.³⁹ Therefore, an intended third-party beneficiary can obtain the right to enforce the agreement by bringing a suit to enforce it.⁴⁰

Whether a particular individual qualifies as an intended third-party beneficiary to a given community benefit agreement or fisheries compensation agreement, and, therefore, can enforce that agreement, will vary case-by-case. Some important factors in making this determination include whether the agreement states that it does not create any third-party beneficiaries, the specificity of the claimed class of intended beneficiaries, and the purpose of the agreement. As such, these factors will play a large role in determining whether an individual can enforce a given community benefit agreement or fisheries compensation agreement.

If a community benefit agreement or fisheries compensation agreement states that it does not create any intended third-party beneficiaries, a third party likely will not be able to enforce the agreement. Although the Restatement provides a test for determining whether a person qualifies as an intended beneficiary, the parties can agree to override this test.⁴¹ Essentially, if the parties agree that they do not intend to create any third-party beneficiaries, then no intended third-party beneficiaries are created.⁴² As such, if a community benefit agreement or fisheries compensation agreement stated that it did not create any third-party beneficiaries, individual community members or fishers would not be able to enforce the agreement, even though they may benefit from it, because they would not qualify as intended beneficiaries.⁴³

A recent Rhode Island Superior Court case provides a good example of this principle. In *Wilkey v. WED Portsmouth One, LLC*, the Town of Portsmouth, Rhode Island entered an agreement with a developer to have the developer install a wind turbine at Portsmouth High School.⁴⁴ Nearby residents complained that this turbine was noisy and cast flickering shadows on close by properties.⁴⁵ These residents attempted to sue the developer for breach of its contracts with the town, asserting

³⁷ See *Curato v. Brain*, 715 A.2d 631, 635 (R.I. 1998) (“The right of enforcement, however, is contingent upon the third party’s assenting to or ratifying the contract.”).

³⁸ See *Blake v. Atl. Nat’l Bank*, 82 A. 225, 226 (R.I. 1912).

³⁹ See *id.* (noting that the required showing can be made “by suit brought upon the agreement or in some other manner”).

⁴⁰ See *id.* Note, though, that if the statute of limitations for the breach of contract at issue has run by the time the intended third-party beneficiary brings an action to enforce the contract, her rights will be extinguished before they vested—before she assented to the contract—and she will not be able to enforce the agreement. See *Curato*, 715 A.2d at 635.

⁴¹ See RESTATEMENT (SECOND) OF CONTRACTS § 302 (AM. L. INST. 1981) (beginning with the caveat “[u]nless otherwise agreed between promisor and promisee”).

⁴² See *id.*

⁴³ See *id.*; *Cathay Cathay, Inc. v. Vindalu, LLC*, 962 A.2d 740, 746 (R.I. 2009) (quoting *Singer v. Singer*, 692 A.2d 691, 692 (R.I. 1997)) (Noting that the language of an agreement is the “best expression of [the parties’] contractual intent, and when that language is ‘clear and unambiguous, words contained therein will be given their usual and ordinary meaning and the parties will be bound by such meaning.’”).

⁴⁴ See *Wilkey v. WED Portsmouth One, LLC*, No. NC-2021-0352, 2022 WL 1768823, at *1 (R.I. Super. Ct. May 18, 2022).

⁴⁵ See *id.*

that they were intended third-party beneficiaries to these agreements.⁴⁶ The court rejected this argument because, among other things, one of the agreements at issue clearly stated it did not intend to create any third-party beneficiaries.⁴⁷ Therefore, if a community benefit agreement or fisheries compensation agreement similarly stated that it did not create any intended third-party beneficiaries, then individual fishers and community members likely would not be able to enforce the agreement because they would not be intended beneficiaries.⁴⁸ Individuals, however, should seek out the advice of legal counsel in evaluating their particular circumstances.

Another important consideration for determining whether an individual counts as an intended third-party beneficiary, and can therefore enforce one of these agreements, is the specificity of the class of claimed beneficiaries. When dealing with government contracts, such as fisheries compensation agreements and community benefit agreements, a third party must meet a heightened level of scrutiny to show that they are an intended third-party beneficiary.⁴⁹ Even though “[g]overnment contracts often benefit the public” at large, by default “individual members of the public are treated as incidental beneficiaries,” who do not have rights under the contract.⁵⁰ To qualify as an intended third-party beneficiary of a government contract and be able to enforce it, “[the plaintiff] must show that the [government] specifically had her in mind (or, at least, her class) when it bargained with [the defendant],” and the language of the contract must reflect the government’s specific intent to benefit her or her class.⁵¹ As such, to qualify as an intended beneficiary of an agreement between a state or municipality and an offshore wind developer, an individual fisher would need to show that the government specifically intended to benefit her or her class and that the contract’s language shows this intent.⁵²

Wilkey, again, provides a good example. There, the plaintiffs argued that the parties intended to benefit surrounding property owners as a class, but the court noted the difficulty in determining who would fall within such a vaguely defined class.⁵³ In holding that the plaintiffs were not intended third-party beneficiaries, the court went on to find that the agreement “was not intended to benefit the specific Plaintiffs in this case but, rather, the Town as a whole.”⁵⁴ Both the vagueness of the asserted class of third-party beneficiaries and the agreement’s intent to benefit the town as a whole, rather than specific individuals, contributed to the court’s decision to hold that the plaintiffs were not intended third-party beneficiaries and could not enforce the agreement.⁵⁵ Individuals may struggle to enforce an agreement between the government and another party, such as a fisheries compensation agreement or community benefit agreement, when they are part of a poorly defined

⁴⁶ *See id.* at *3.

⁴⁷ *See id.* at *3–4.

⁴⁸ *See id.*; RESTATEMENT (SECOND) OF CONTRACTS § 302 (AM. L. INST. 1981).

⁴⁹ *See Iacampo v. Hasbro, Inc.*, 929 F. Supp. 562, 580 (D.R.I. 1996).

⁵⁰ *See* RESTATEMENT (SECOND) OF CONTRACTS § 315 (AM. L. INST. 1981) (“An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee”); *see Iacampo*, 929 F. Supp. at 580 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 313 cmt. a (AM. L. INST. 1981)).

⁵¹ *See Iacampo*, 929 F. Supp. at 580.

⁵² *See id.*

⁵³ *See Wilkey*, 2022 WL 1768823, at *4 (“[W]here is the cut off line of who is a ‘surrounding property owner’ for the purposes of being a third-party beneficiary to this lease? The plaintiffs all live between 740 and 1155 feet from the wind turbine. Does this mean that the Lease Agreement intended to encompass the whole neighborhood and, if so, how would that be defined? The entire Town of Portsmouth?”).

⁵⁴ *Id.*

⁵⁵ *See id.* at *3–5.

class of beneficiaries or where the parties intended that the agreement would benefit the public at large, rather than specific individuals.

In contrast, the Restatement provides an example where those benefitted by a government contract are intended beneficiaries and would be able to enforce the contract.⁵⁶ In this example, a “chicken processing and fertilizer plant” contracts with a municipality to use its sewer system.⁵⁷ “With the purpose of preventing harm to landowners downstream from its system,” the municipality obtains a promise from the plant to remove certain types of waste from its deposits before sending them into the system.⁵⁸ Here, a downstream landowner would be an intended beneficiary of the agreement between the municipality and the plant.⁵⁹ As such, an individual is more likely to be an intended third-party beneficiary if she can show that the government intended to benefit her individually or a specific class that encompasses her, rather than the general public.⁶⁰ A fisher or community member, therefore, has a better chance of being able to enforce a fisheries compensation agreement or community benefit agreement if she can make such a showing.

An individual fisher or community member may also be an intended beneficiary and be able to enforce a fisheries compensation agreement or community benefit agreement if the “‘central purpose[,]’ the ‘end and aim[,]’ and ‘the heart of the contract’ at issue” is to benefit that individual.⁶¹ For example, in *Credit Union Central Falls v. Groff*, a credit union that lent to borrowers refinancing their mortgages was an intended beneficiary of the contracts between the borrowers and the attorney who represented them at the real estate closings.⁶² The court noted that the services the lawyer supplied to the borrowers were aimed at inducing the credit union to give the loans to the borrowers.⁶³ The attorney also extensively communicated with the credit union and received instructions from it throughout this process.⁶⁴ The attorney’s legal services, therefore, were provided for the “direct purpose” of benefitting the credit union, and the credit union was an intended beneficiary.⁶⁵ When the “central purpose” of a contract is to benefit a third party, that third party is an intended beneficiary.⁶⁶ As such, if a fisher or community member could show that “central purpose” of a community benefit agreement or fisheries compensation agreement was to benefit them, they may be able to enforce the agreement.

While one may be a third-party beneficiary if the “central purpose” of the contract is to benefit them, it is important to note that this is not necessary to find that a third party is an intended beneficiary.⁶⁷ The Rhode Island Supreme Court, for example, allowed a restaurant to enforce a provision in a neighboring business’s lease preventing them from offering take-out window service

⁵⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. d illus. 10 (AM. L. INST. 1981).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See *Iacampo v. Hasbro, Inc.*, 929 F. Supp. 562, 580–81 (D.R.I. 1996); compare *Wilkey*, 2022 WL 1768823, at *3–5, with RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. d illus. 10 (AM. L. INST. 1981).

⁶¹ See *Hexagon Holdings, Inc. v. Carlisle Syntec Inc.*, 199 A.3d 1034, 1041 (R.I. 2019) (quoting *Credit Union Cent. Falls v. Groff*, 966 A.2d 1262, 1273 (R.I. 2009)).

⁶² See *Credit Union Cent. Falls v. Groff*, 966 A.2d 1262, 1274 (R.I. 2009).

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ See *Hexagon Holdings, Inc.*, 199 A.3d at 1041.

⁶⁷ See *id.*; *Iggy’s Doughboys, Inc. v. Giroux*, 729 A.2d 701, 706 (R.I. 1999).

because the plaintiff restaurant “was the de facto beneficiary of the lease restriction in question.”⁶⁸ The central purpose of that lease, however, likely was not to benefit the plaintiff but to rent space to the defendant. As such, one may be an intended beneficiary of a specific provision of an agreement, rather than the entire agreement, and, therefore, may be able to enforce that provision.⁶⁹ As with the lease, a fisher or community member may be able to show that they are an intended beneficiary of a particular provision of a fisheries compensation agreement or community benefit agreement, rather than the entire agreement.⁷⁰

Important factors to consider in determining whether a third party is an intended beneficiary of, and therefore may enforce, a community benefit agreement or fisheries compensation agreement include whether the agreement states that there are no third-party beneficiaries, the specificity of the claimed class of intended beneficiaries, and the purpose of the agreement. Given that this is a fact-specific case-by-case determination, individuals who are interested in a particular fisheries compensation agreement or community benefit agreement should seek out legal counsel on their particular circumstances. Individuals who are interested in the potential impacts of offshore wind development may also benefit from voicing their concerns to their local and state officials, so that these officials can attempt to address them in a community benefit agreement or fisheries compensation agreement.

4 Conclusion

Community benefit agreements and fisheries compensation agreements are becoming common in New England’s expanding offshore wind industry.⁷¹ Even though these agreements often contain provisions that individuals may have an interest in, such as provisions establishing claims processes,⁷² individuals, other than the governments and developers that enter these agreements, will only be able to enforce these agreements if they are intended third-party beneficiaries.⁷³ Whether a given individual is an intended third-party beneficiary will vary from person to person and agreement to agreement, but important considerations include whether the agreement states that there are no third-party beneficiaries,⁷⁴ the specificity of the alleged class of intended beneficiaries,⁷⁵ and the purpose of the agreement.⁷⁶ Again, though, since an individual’s ability to qualify as an intended third-party beneficiary will vary based on their particular circumstances, those who are interested in assessing whether they can enforce a specific community benefit agreement or fisheries compensation agreement should seek out the advice of legal counsel.

⁶⁸ See *Iggy’s Doughboys, Inc.*, 729 A.2d at 706.

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See, e.g., *Lhowe*, *supra* note 5; Massachusetts Vineyard Wind 1 Consistency Decision, *supra* note 23; Rhode Island South Fork Consistency Decision, *supra* note 23.

⁷² See, e.g., Rhode Island Revolution Wind Consistency Decision, *supra* note 5; Massachusetts New England Wind Consistency Decision, *supra* note 17.

⁷³ See *Glassie v. Doucette*, 157 A.3d 1092, 1097 (R.I. 2017); *BHK Realty, LLC v. Narragansett Elec. Co.*, 542 F. Supp. 3d 133, 142–43 (D.R.I. 2021).

⁷⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 302 (AM. L. INST. 1981); *Wilkey v. WED Portsmouth One, LLC*, No. NC-2021-0352, 2022 WL 1768823, at *3 (R.I. Super. Ct. May 18, 2022).

⁷⁵ See *Iacampo v. Hasbro, Inc.*, 929 F. Supp. 562, 580–81 (D.R.I. 1996); compare *Wilkey*, 2022 WL 1768823, at *3–5, with RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. d illus. 10 (AM. L. INST. 1981).

⁷⁶ See *Hexagon Holdings, Inc. v. Carlisle Syntec Inc.*, 199 A.3d 1034, 1041 (R.I. 2019) (quoting *Credit Union Cent. Falls v. Groff*, 966 A.2d 1262, 1273 (R.I. 2009)).