

INSIGHTS

## Offshore Wind Litigation: Court Denies Fishing Groups' Challenge to Major Offshore Wind Project

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Judge Indira Talwani of the US District Court for the District of Massachusetts has rejected another challenge to federal permits and approvals for the Vineyard Wind Project (Vineyard Wind or the Project). Vineyard Wind is under construction off the coast of Massachusetts and will be the first modern utility-scale offshore wind energy project in the United States. On October 12, 2023, the court granted summary judgment in favor of the federal government and Vineyard Wind, rejecting the claims brought by five fishing groups, including Seafreeze Shoreside, Inc. and Responsible Offshore Development Alliance (RODA).<sup>[1]</sup>

In 2021 and 2022, the fishing groups filed two lawsuits alleging the Project's construction would impact their 2023 fishing season, permanently impair their ability to fish in the waters off Nantucket, and destroy the habitat of the North Atlantic right whale. The fishing groups challenged federal permits obtained by the Project, alleging violations of the Administrative Procedure Act (APA) under the Endangered Species Act (ESA), Clean Water Act (CWA), Marine Mammal Protection Act (MMPA), National Environmental Protection Act (NEPA), and Outer Continental Shelf Lands Act (OCSLA). The court consolidated the cases and considered the parties' briefings together, concluding that the plaintiffs did not have standing to bring several of their claims, and that the remaining claims should be denied.

### I. Standing

First, the court found that the plaintiffs did not have standing to bring various claims because they failed to proffer evidence of non-economic injuries or "competent evidence" of an environmental injury. Concerning the ESA claims, the court determined that the impacts to commercial fishing alleged by plaintiffs amounted to unquantified economic injuries that were not sufficiently connected to the Project's potential impact on endangered species.<sup>[2]</sup>

Regarding the NEPA and MMPA claims, the court found that the fishing groups' alleged economic injuries were not within the zone of interests protected by either statute, as the plaintiffs had not asserted any cognizable interest in marine mammals protected by the MMPA or "put forth competent evidence as to an environmental injury, or even an environmental harm that would impact their fishing" protected by NEPA.<sup>[3]</sup>

### II. CWA Claims

The court proceeded to consider the merits of the plaintiffs' remaining claims. First, the fishing groups alleged that the issuance of Vineyard Wind's Section 404 permit by the US Army Corps of Engineers (Corps) was arbitrary and capricious because the Corps failed to analyze less environmentally damaging practicable alternatives to the Project and failed to consider the cumulative impacts of other offshore wind projects.<sup>[4]</sup> In opposition, the Corps maintained that its decision was focused on the Project's export cable route and that the agency properly considered various alternatives. The Corps further argued that it properly relied on cumulative impacts analysis performed as part of the Project's NEPA review and independently considered cumulative impacts that other wind projects in the area would cause.

Agreeing with the government, the court concluded that the Corps adequately considered alternative paths for the dredged corridor that would house the Project's export cable, and that the plaintiffs had not pointed to an authority to support their argument that the Corps failed to properly analyze cumulative impacts.<sup>[5]</sup>

### III. OCSLA Claims

The fishing groups also claimed that the Bureau of Ocean Energy Management's (BOEM) "Smart from the Start" Initiative was a change in regulatory policy that violates the APA and OCSLA for assorted reasons, including that the Initiative was not promulgated through notice-and-comment rulemaking. The court determined that the plaintiffs' claims were time-barred, as the lawsuits were filed more than six years after BOEM announced the Initiative.<sup>[6]</sup>

Next, the fishing groups argued that BOEM failed to properly consider the 12 factors delineated by OCSLA, 43 U.S.C. § 1337(p)(4), when issuing the Project's lease and approving the Project's Construction Operations Plan (COP). The court determined that challenges to the lease also were time-barred, as they were filed more than six years after the lease became effective in 2015. As to BOEM's approval of the COP, the court concluded that the OCSLA factors do not mandate a particular outcome, rather BOEM "still retains some discretion in considering whether the enumerated statutory criteria have been satisfied, even where the statute does not state so expressly."<sup>[7]</sup> The court denied the remaining claims under OCSLA, concluding that the plaintiffs failed to show BOEM's COP approval was arbitrary and capricious or otherwise in violation of the statute.

### IV. Conclusion

The court's denial of the fishing groups' claims is a significant victory for the federal government and the Vineyard Wind Project. The opinion is the latest in a series of offshore wind opinions issued by Judge Talwani, all of which denied claims against Vineyard Wind brought by residents and fishing groups.<sup>[8]</sup> The Project is currently under construction and is expected to be fully operational next year.

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<sup>[1]</sup> *RODA, et al., v. U.S. Dep't of the Interior, et al.*, No. 1:22-CV-11172-IT, Dkt. No. 105 (D. Mass. Oct. 12, 2023) (Opinion).

<sup>[2]</sup> Opinion at 27.

<sup>[3]</sup> *Id.*

[4] *Id.* at 33, 35-36.

[5] *Id.* at 36-37.

[6] *Id.* at 39-40.

[7] *Id.* at 44.

[8] See also *Nantucket Residents Against Turbines, et al. v. BOEM, et al.*, No. 1:21-CV-11390-IT, Dkt. No. 130 (D. Mass. May 17, 2023); *Seafreeze Shoreside, Inc., et al. v. U.S. Dep't of the Interior, et al.*, No. 1-22-CV-11091, Dkt. No. 128 (D. Mass. May 25, 2023).