

Offshore Wind Litigation: Court Declines to Halt Vineyard Wind Construction

Update

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A federal court has denied a request by members of the fishing industry to pause offshore construction of the Vineyard Wind Project (Project), the first modern utility-scale offshore wind project in the United States to receive all permits and approvals necessary to begin construction.[1] On May 25, 2023, Judge Indira Talwani of the US District Court for the District of Massachusetts denied a motion for stay, or in the alternative, for preliminary injunction brought by various organizations representing the northeast fishing industry[2] on the grounds that the plaintiffs did not have standing, were not likely to succeed on the merits of their claims, failed to show irreparable harm, and failed to establish that the public interest weighed in favor of the project being stalled.

In *Seafreeze Shoreside, Inc. et al. v. US Department of the Interior et al.*, the plaintiffs alleged that the Bureau of Ocean Energy Management (BOEM) and various other federal permitting agencies violated the National Environmental Policy Act (NEPA), the Outer Continental Shelf Lands Act (OCSLA), and a variety of other statutes and regulations by issuing the Project's lease and its final approvals. The plaintiffs filed a motion for stay under Section 705 of the Administrative Procedure Act (APA) or alternatively for preliminary injunction more than a year after initially filing the case and only one day before they alleged the Project's long-established monopile installation schedule was set to begin. The plaintiffs argued they would be irreparably harmed by the offshore construction because, they alleged, construction would preclude bottom-trawl commercial fishing throughout the Project's lease area.

In response, the federal government argued that the plaintiffs would be able to fish in the lease area during offshore construction and were advised by the Coast Guard to give construction vessels a wide berth during construction activities in the lease area. The agencies further argued that the plaintiffs would not be irreparably harmed by the Project's construction, as they had only asserted financial losses, which can be redressed by payments from one of the

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compensation funds that were established as a condition of the federal government's approvals of the Project. Finally, the agencies argued that the plaintiffs' delay in seeking the injunction weighed against the arguments that they will be imminently harmed by construction, as the plaintiffs initially filed the suit in December 2021 and installation of scour protection material for the Project's turbine locations has been ongoing since March 2023. Vineyard Wind also filed a response in opposition, agreeing with the federal government's arguments and explaining that an injunction stalling construction would imperil the Project's ability to draw on \$2.4 billion in financing.

After hearing oral argument during which the federal government and Vineyard Wind called witnesses to the stand, the Court issued an opinion denying the motion for stay and for a preliminary injunction. The Court found neither form of relief was warranted. The Court concluded that the plaintiffs did not have standing to sue under NEPA as they raised "purely economic" harms. Similarly, the Court found no likelihood of success on plaintiffs' OCSLA claims because the robust administrative record demonstrated that BOEM properly considered the key OCSLA factors. Further, the Court found that the delay in filing the motion was fatal to the plaintiffs' arguments that they would suffer irreparable harm if offshore construction were to begin. The Court also noted that the plaintiffs put forth purely economic injuries compensable by money damages and failed to show that compensation funds would be insufficient to address their claimed economic injuries. Finally, the Court found that the public interest weighed in favor of denying the request for stay or injunctive relief given that "Congressional and Executive policy have identified a public interest in promoting renewable energy initiatives for the public's benefit."^[3]

The fishing groups' motion for summary judgment remains pending before the Court, but the opinion bodes well for the Project. The Court's decision on injunctive relief comes less than a week after Judge Talwani dismissed a separate lawsuit against the Project filed by Nantucket residents citing concerns related to the Project's impact on the endangered North Atlantic right whale. Meanwhile, the first major turbine components for the Vineyard Wind Project have sailed into New Bedford Harbor, and the Project is anticipated to install its first turbines this summer.

^[1] *Seafreeze Shoreside, Inc. et al. v. US Department of the Interior et al.*, No. 1-22-cv-11091, Dkt. No. 128 (May 25, 2023) ("Opinion").

^[2] Plaintiffs include Seafreeze Shoreside, Inc., Long Island Commercial Fishing Association, Inc., XIII Northeast Fishery Sector, Inc., Heritage Fisheries, Inc., Nat. W. Inc., and Old Squaw Fisheries, Inc.

^[3] Opinion at 15.

