

## Federal Judge Rules for Vineyard Wind in First of Four Pending Actions

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On May 17, 2023, the US District Court for the District of Massachusetts granted [summary judgment](#) to federal government defendants and intervenor Vineyard Wind in the first of four lawsuits pending in that court challenging the development of Vineyard Wind, a 62-turbine offshore wind project being built off the coast of Massachusetts, approximately 14 nautical miles south of Nantucket and Martha's Vineyard at its nearest point. Vineyard Wind—which is slated to be the nation's first commercial-scale offshore wind project, with capacity to power over 400,000 homes and businesses—has been under development for several years and has met opposition from a range of constituencies, including local residents and the fishing industry.

Plaintiffs in the case just decided—Nantucket Residents Against Turbines and Vallorie Oliver, a founding member of that group—challenged the adequacy of environmental reviews conducted by the Bureau of Ocean Energy Management (BOEM) and the National Marine Fisheries Service (NMFS) resulting in the decision to approve the Vineyard Wind project. Specifically, Plaintiffs claimed that (i) the biological opinion issued by NMFS failed to adequately consider project impacts on the endangered North American Right Whale, including by failing to rely on the best available science; (ii) NMFS and BOEM violated the Endangered Species Act (ESA) by failing to ensure through consultation that BOEM's approval of project impacts will not jeopardize the continued existence of the right whale; and (iii) BOEM violated the National Environmental Policy Act (NEPA) by failing to take the "hard look" at environmental consequences, as required under that statute, with respect to impacts to right whales, as well as air quality impacts, including increases in greenhouse gas that may contribute to the effects of climate change.

The court held the Plaintiffs' claims of standing to present their ESA claims and their NEPA claims concerning impacts to right whales—which were based on Ms. Oliver's assertions that she had seen right whales in the past and had "concrete plans" to observe them in the future—was "marginally sufficient." *Opn.* at 25. However, the court held that Plaintiffs lacked standing to bring a NEPA challenge concerning air quality and the emission of greenhouse gases, finding that Plaintiffs' asserted injuries on these points were too generalized to support a claim of standing, as the record indicated that emissions associated with the project would be relatively limited and would not affect onshore air quality. The court also held that Plaintiffs had waived certain ESA claims asserted in the

litigation by failing to provide adequate notice as to those claims in their 60-day letter before filing their complaint.

The court then considered the merits of each of the Plaintiffs' remaining claims, and found each to be lacking. With respect to Plaintiffs' argument that BOEM and NMFS failed to consider the best scientific and commercial data available in analyzing project impacts, the court held that the agencies are entitled to deference in determining which data and studies are the best available, and that BOEM and NMFS had considered many of the studies put forth by Plaintiffs and concluded that they were not the best available. The court found each of the Plaintiffs' other arguments to be speculative or unsupported.

While Defendants have prevailed in this action, three related challenges to the Vineyard Wind project remain pending in the District of Massachusetts. These cases are all assigned to the same judge who issued the May 17 order, and summary judgment motions have been briefed and argued in each case.

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