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May 26, 2023

### District Court Dismisses Case Challenging Offshore Wind Project



The U.S. District Court for the District of Massachusetts granted the government's motion for summary judgment on May 17, 2023, in a case seeking to invalidate agency approvals of the first utility-scale offshore wind project in the United States.<sup>[1]</sup> The plaintiffs, Nantucket Residents Against Turbines (ACK RATs) and its founding member, sued the Bureau of Ocean Energy Management (BOEM) and the National Marine Fisheries Service (NMFS), alleging the agencies violated the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), and Administrative Procedure Act (APA) in approving Vineyard Wind's Construction and Operations Plan (COP). Judge Indira Talwani's decision represents a major win for the offshore wind industry because it comes as opponents are ramping up claims that the Biden administration is ignoring legal protections for endangered species to meet its ambitious goal of deploying 30 gigawatts (GW) of offshore wind by 2030. The decision also bodes well for the additional three challenges to the government's approval of the Vineyard Wind project, which Judge Talwani is also considering.<sup>[2]</sup>

## **Background**

BOEM approved Vineyard Wind's COP in July 2021 following an extensive environmental review that culminated in a joint Record of Decision (ROD) issued by BOEM, NMFS, and the U.S. Army Corps of Engineers. The ROD adopted the agencies' Final Environmental Impact Statement (FEIS) and reflected that COP approval would be subject to numerous mitigation and monitoring measures. These measures included "any terms and conditions and reasonable and prudent measures resulting from a BOEM-reinitiated consultation" for the November 2021 Biological Opinion (2021 BiOp) issued by NMFS. The 2021 BiOp determined that the Vineyard Wind project (the Project) was not likely to jeopardize the continued existence of North Atlantic right

whales (NARW).[3] The plaintiffs sued BOEM and NMFS, focusing on alleged deficiencies under NEPA and the ESA in the FEIS and 2021 BiOp, particularly as related to the Project's impact on NARW.

## Decision

On summary judgment, the district court found that plaintiffs made "marginally sufficient" allegations to establish standing for the ESA and NEPA claims, based on the founder's claim that she had seen right whales in waters off of Nantucket and had concrete plans to see them in the future.[4] However, the court denied standing for plaintiffs' NEPA claims related to air quality and greenhouse gas emissions because there was no evidence that the Project would "even marginally" increase the risk of respiratory health problems or negatively impact the health of the region from climate change associated with greenhouse gas emissions.[5] The court separately agreed with the government's contention that some of the plaintiffs' ESA claims were waived because they were not stated in sufficient detail in the plaintiffs' 60-day notice letter.[6]

Turning to the merits, the court addressed the remaining ESA and NEPA claims together because they all turned on the adequacy of the 2021 BiOp.[7] The court denied each of those claims, concluding that:

1. NMFS was entitled to deference in relying upon the "best scientific and commercial data available" for the 2021 BiOp, including its decision that certain scientific studies were not the best available and that alternative studies were superior and more recent.[8]
2. NMFS and BOEM adequately considered risks associated with vessel strikes, operational noise, loss of foraging opportunities, and fishing entanglement. Specifically, plaintiffs' claims associated with these risks were speculative; challenges to individual mitigation measures could not be considered in a vacuum when a suite of mitigation measures adequately protect against risk; the record demonstrated that the agencies' consideration of these risks was rational; and plaintiffs' critiques amounted to "disagreements with the agencies' conclusions that cannot serve as a basis for determining the agency action is invalid." [9]
3. The plaintiffs did not offer any arguments specific to their claim that the 2021 BiOp failed to consider cumulative impacts on the NARW from other potential offshore wind farm projects in the area; the claims, therefore, failed for the same reason as the other challenges to the 2021 BiOp.[10]
4. The description of environmental baseline conditions in the 2021 BiOp and FEIS was adequate because plaintiffs failed to point to any scientific information or statutory or regulatory requirement that NMFS or BOEM did not consider as part of the baseline.[11]

## Implications

The district court's decision reflects judicial deference to agency scientific judgments, indicating that courts reviewing APA claims related to offshore wind projects can look past sensationalized (though sympathetic) claims related to impacts on marine mammals and instead focus on whether agency action is rationally supported by the administrative record. This is a notable victory for offshore wind development, particularly given the Biden administration's ambitious goals and the number of COPs in progress or under review by BOEM.

## Endnotes

[1] *Nantucket Residents Against Turbines, et al. v. BOEM et al.*, No. 1:21-cv-11390-IT, Dkt. No. 130 (May 17, 2023) (Order).

[2] *See Melone v. Coit et al.*, 1:21-cv-11171-IT; *Seafreeze Shoreside, Inc. et al. v. Dep't of Interior et al.*, 1:22-cv-11091-IT; *Responsible Offshore Development Alliance v. Dep't of Interior et al.*, 1:22-cv-11172-IT.

[3] NMFS issued its first Biological Opinion (the 2020 BiOp) under ESA Section 7(a)(2). In May 2021, BOEM requested that NMFS reinitiate its biological consultation in order "to consider (i) the effects of monitoring surveys identified in the Joint ROD by BOEM at NMFS's recommendation, as conditions of COP approval, which were not considered in the 2020 BiOp, and (ii) new information concerning the status of the right whale." The 2021 BiOp analyzed the direct and indirect effects of the approved COP, the modifications proposed by BOEM, and those proposed by NMFS in its May 2021 Incidental Harassment Authorization. The 2021 BiOp also was updated to reflect the best scientific information available concerning the NARW and explained whether any of the new information affected the analysis.

[4] Order, at 23-28.

[5] Order, at 28-30.

[6] *Id.* at 34-37 (Citizens planning to sue the government for ESA violations are required to provide written notice of the alleged violations, plus 60 days for the government to cure, prior to filing a lawsuit).

[7] *See id.* at 38 ("Because Plaintiffs' sole surviving claim under NEPA is that the Final EIS 'parrots the flawed analysis and conclusions set forth in the BiOp,' the court considers Plaintiff's ESA and NEPA claims together.").

[8] *Id.* at 37-43.

[9] *Id.* at 43-49.

[10] *Id.* at 49.

[11] *Id.* at 50-52.

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