

Updates

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Escalating Stakes in Battle for Ocean Wind

Offshore wind development in the United States continues to draw opposition from coastal landowners, businesses, organizations, and other users of ocean waters, as it has since the industry first emerged here. However, several pieces of recent litigation reveal serious competition over the United States' marine territory between incumbent marine resource industries and the relative newcomers from the renewable energy industry. One user group versus another is a theme that runs through the country's history of public lands policy and law: rancher versus homesteader, forester versus hiker, irrigator versus fisherman, and hunter versus birder. The exceedingly difficult history associated with evolving uses of public lands and waters foreshadows the gravity of the contest now underway. The outcome of this competition may very well shape the use of ocean resources for years to come.

Five of the six recent cases involve the first federally approved commercial-scale ocean wind farm, the Vineyard Wind I project off Massachusetts. The Bureau of Ocean Energy Management (BOEM) issued a final decision approving the project in May 2021, and onshore construction began in November 2021. BOEM's decision followed a comprehensive site selection process, a competitive lease auction held in January 2015 and subsequent environmental review by almost two dozen federal, state, and local agencies. Vineyard Wind's owners report investing over \$300M in the project so far. As first of its type, Vineyard Wind will be precedential for the entire industry. The fifth case concerns leasing planned for the waters off New York and New Jersey, potentially the most valuable ocean wind development area in the country.

The recent cases are:

- *ACK Residents Against Turbines v. Bureau of Ocean Energy Management*, No. 21-11390 (D. Mass. Aug. 25, 2021). ACK RATs (named for the local airport code) is an organization of local residents that "will be able to view [Vineyard Wind I] from public and private vantage points on Nantucket" and is concerned about the coastal waters, species, and cultural and historic resources that would be affected by the project. The plaintiffs allege that BOEM and the National Marine Fisheries Service (NMFS) violated the National Environmental Policy Act (NEPA) by failing to prepare an adequate Environmental Impact Statement (EIS) for the Vineyard Wind project. The plaintiffs also allege that BOEM violated the Endangered Species Act (ESA) by preparing a Biological Opinion (BiOp) that failed to adequately address impacts to the North Atlantic right whale and other ESA-listed species and failing to ensure that the project will not jeopardize those species.
- *Responsible Offshore Development Alliance v. Haaland*, No. 21-1660 (1st Cir. Sept. 13, 2021). The Responsible Offshore Development Alliance (RODA) is a coalition of fishing industry associations and fishing companies. The association's [website](#) states that:

RODA and the fishing industry stand willing to use our knowledge about ocean ecosystems to create innovative, effective solutions for climate and environmental change. There are opportunities for mutual wins, however, offshore wind development is an ocean use that directly conflicts with fishing and primary food production, while imposing significant impacts on marine habitats, biodiversity, and physical oceanography.

The plaintiffs filed a petition in the U.S. Court of Appeals for the First Circuit alleging that the secretaries of the departments of the Interior, Commerce, and Army violated the Outer Continental Shelf Lands Act (OCSLA), NEPA, Clean Water Act (CWA), Administrative Procedure Act, ESA, Marine Mammal Protection Act (MMPA), and Merchant Marine Act of 1920 by issuing authorizations for the Vineyard

Wind project, including the Construction and Operations Plan (COP), MMPA Incidental Harassment Authorization (IHA), and Section 404 permit. It appears the plaintiffs may have misfiled their petition, which under the OCSLA can only be filed in the circuit courts for certain actions related to offshore mineral leases.

On January 31, the plaintiffs filed a complaint with similar allegations in the U.S. District Court for the District of Columbia described below.

- *Allco Renewable Energy Limited v. Haaland*, Case 1:21-cv-11171-IT (D. Mass. Sept. 16, 2021). Allco Renewable Energy Limited and Allco Finance Limited, which own, operate, and develop solar generating facilities in Connecticut, Vermont, and Massachusetts, and the president and senior general counsel of Allco Renewable Energy (a part-time resident of Martha's Vineyard) claim that Interior, FWS, the Army Corps of Engineers, NOAA Fisheries, and BOEM violated NEPA, OCSLA, CWA, the ESA, and the MMPA. The plaintiffs have asked the court to vacate the approvals of the Vineyard Wind project and enjoin the defendants from taking any action until defendants remedy the alleged violations.
- *Seafreeze Shoreside, Inc. v. Haaland*, Case 1:22-cv-00055-DLF (D.D.C. Dec. 15, 2021). Commercial fishermen, trade associations, and a shoreside business (Seafreeze) assert claims against BOEM, the Corps, and NMFS, under OCSLA, ESA, CWA, MMPA, and NEPA. The plaintiffs have asked the court to enjoin the lease and COP for Vineyard Wind 1, and to enjoin any leasing or construction under the Obama-era "Smart from the Start" planning initiative. The complaint relies heavily on the project's alleged economic impacts to the fishing industry, as well as alleged impacts to North Atlantic right whales. The plaintiffs are represented by the [Texas Public Policy Foundation](#), a "non-profit, non-partisan research institute [whose] mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation." The foundation's [website](#) description of its energy policy-related initiative emphasizes the economic and social benefits of domestic fossil fuels. The defendants have moved to transfer venue from Washington, D.C., to the Massachusetts district court, where the *Allco* and *ACK RATs* cases currently are pending.
- *Save Long Beach Island v. Haaland*, Case 1:22-cv-00055 (D.D.C. Jan. 10, 2022). Save Long Beach Island, a New Jersey nonprofit, and its president, Dr. Robert Stern, seek to set aside BOEM's decision designating final Wind Energy Areas in the New York Bight, alleging that BOEM violated NEPA by failing to conduct a programmatic environmental impact statement (EIS) addressing the cumulative impacts of the five Wind Energy Areas selected for the New York Bight and other connected Wind Energy Areas in New Jersey, and by failing to conduct an EIS in advance of the lease sale for the area (subsequently announced on January 12, 2022). The plaintiffs also allege that BOEM violated the ESA by failing to consult with NMFS prior to selecting the Wind Energy Areas to determine if installation of wind arrays in these locations would affect listed species, including the North Atlantic right whale.
- *Responsible Offshore Development Alliance v. Haaland*, Case 1:22-cv-00237 (D.D.C. Jan. 31, 2022). Asserting claims similar to its petition for review in the First Circuit, RODA's suit against the departments of the Interior, Commerce, and the Army alleges OCSLA, APA, CWA, ESA, NEPA, MMPA, and Jones Act violations. RODA seeks to set aside approvals of the COP, IHA, and Section 404 permit for the Vineyard Wind project.

If successful, the plaintiffs' claims in these cases would cause significant setbacks to development of offshore wind energy. In addition to potentially delaying the Vineyard Wind project, BOEM's Wind Energy Area planning process and leasing procedures could be significantly affected, potentially delaying development of other leases and requiring BOEM to undertake programmatic environmental reviews much earlier in the planning and leasing process. The cases could establish precedents under NEPA, OCSLA, ESA, and other statutes that would create new difficulties for other ocean development activities, including but not limited to ocean wind. Given the long lead time and supply chain complexities of this nascent industry, any delay in implementation of BOEM decisions can have widespread impacts to business relationships and stakeholder

agreements.

While the cases today involve developments in the northeast and mid-Atlantic, the potential effects of the litigation extend to all federal waters, including prime potential ocean wind development areas off the West Coast. It is an open question whether the national and cross-industry implications of the cases will be presented to the courts hearing the Vineyard Wind and New York Bight claims.

Incumbent users of ocean areas outside of the mid-Atlantic and New England may not be inclined to adopt the same approach taken by the plaintiffs in the *RODA* and *Seafreeze* cases. The institutional cultures of the commercial fishing sectors on the East, Gulf, and West coasts are not entirely the same, which may suggest a different dynamic for interaction by that industry with the renewable energy sector. It is yet to be seen how offshore mineral interests will weigh the stakes of litigation in California and other West Coast courts.

In sum, these new cases represent a heightened level of opposition to renewable energy developments, with coastal landowners and other parties joined by incumbent commercial users of federal marine areas in efforts to stop ocean wind farms. The future of the new industry sector will be directly influenced by the outcome of the cases, and the history of competition over public lands and waters suggests that the contest will be long and hard-fought.

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