

# Locke Lord QuickStudy: Vineyard Wind Makes It a Clean Sweep ?in First Circuit ?Offshore Wind Decision

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On December 5, 2024, the U.S. Court of Appeals for the First Circuit handed the U.S. offshore wind industry a decisive win in its eagerly awaited ruling on the remaining challenges to the Vineyard Wind 1 project's federal approvals, *Seafreeze Shoreside Inc. (Seafreeze) v. U.S. Dep't of the Interior and Responsible Offshore Development Alliance (RODA) v. U.S. Dep't of the Interior*. The decision comes in the midst of a turbulent time for the project, and extends a litigation winning streak at a crucial juncture for the offshore wind sector.

## An Ocean of Litigation

Vineyard Wind 1 is an 800-megawatt offshore wind project currently under construction 12 miles off the coast of Massachusetts that is expected to power over 400,000 homes upon completion.<sup>[1]</sup> The project received its federal approvals in 2021 after over 12 years of environmental review, public comment, and stakeholder engagement. Soon thereafter, Vineyard Wind 1 was targeted with a barrage of four lawsuits from residents of affluent Nantucket, the commercial seafood industry, and a local solar developer asserting that key federal agencies—the Bureau of Ocean Energy Management (BOEM), the National Marine Fisheries Service (NMFS), and the U.S. Army Corps of Engineers (the Corps)— failed to adequately analyze the project's environmental impacts under (among other things) the Outer Continental Shelf Lands Act (OCSLA), National Environmental Policy Act (NEPA), Endangered Species Act (ESA), Marine Mammal Protection Act (MMPA), and the Clean Water Act (CWA).

In 2023, Judge Indira Talwani of the District of Massachusetts issued three opinions dismissing all claims. The first two rulings, *Nantucket Residents Against Offshore Wind (ACKRATS) v. BOEM* and *Melone v. Coit*, held that in approving the project, BOEM and NMFS properly considered the project's impacts to the endangered North Atlantic right whale under NEPA, the ESA, and the MMPA.<sup>[2]</sup> Judge Talwani's third opinion, consolidating *Seafreeze* and *RODA*, dismissed the commercial fishing industry plaintiffs' OCSLA and CWA claims and held that they lacked standing to challenge the project under NEPA or the ESA.<sup>[3]</sup>

The plaintiffs appealed all of these rulings to the First Circuit, which in April of this year issued twin rulings affirming in full Judge Talwani's dismissal of *ACKRATS* and *Melone*.<sup>[4]</sup> The *ACKRATS* plaintiffs have since filed a petition for a writ of certiorari with the U.S. Supreme Court.<sup>[5]</sup> That left *Seafreeze* and *RODA* as the Vineyard Wind 1 cases still awaiting a First Circuit ruling.

## A Less-Than-Appealing Appeal

## Standing

In its December 5 opinion, the First Circuit agreed with Judge Talwani that the commercial fishermen had failed to demonstrate Article III standing to bring its ESA and MMPA claims. The commercial fishing plaintiffs alleged largely procedural defects in NMFS's consultation process under Section 7 of the ESA, claiming that its first biological opinion (BiOp) in September 2020 was deficient.<sup>[6]</sup> But NMFS reinitiated ESA consultation on the project and issued a revised BiOp in October 2021, which plaintiffs did not challenge and which was the basis for BOEM's final approval of the project's construction and operations plan (COP).<sup>[7]</sup> The First Circuit agreed with the trial court's opinion (discussed in depth in our [March 2024 QuickStudy](#)) that this superseding action broke the chain of causation between any hypothetical deficiencies in the initial BiOp and any injury that plaintiffs may have suffered, as well as mooted any concerns with the initial BiOp.<sup>[8]</sup> The court also affirmed that the commercial fishing plaintiffs failed to demonstrate sufficient non-economic interest in endangered species such as the North Atlantic right whale.<sup>[9]</sup>

By contrast, the First Circuit reversed Judge Talwani's holding that the commercial fishing plaintiffs lacked standing to bring their NEPA claims. The trial court had determined that plaintiffs failed to "put forth competent evidence as to an environmental harm that would impact their commercial fishing."<sup>[10]</sup> The First Circuit disagreed, holding that for purposes of NEPA's "zone of interest" standing test, it was sufficient that the record showed that the project would discharge fill material that may harm certain species of fish and mollusks.<sup>[11]</sup>

## National Environmental Policy Act

The First Circuit's reversal on NEPA standing ended up redounding to the benefit of BOEM, Vineyard Wind 1, and the offshore wind industry as a whole, because it opened the door to three key merits holdings that will support offshore wind projects in future litigation:

- **Alternatives.** The First Circuit held that in determining a reasonable range of NEPA alternatives, BOEM had appropriately considered the "needs and goals of the parties involved in the application or permit as well as the public interest."<sup>[12]</sup> The court emphasized that "where the agency is not itself the project's sponsor, it may give substantial weight to an applicant's preferences" in deciding which alternatives to consider—including technical and economic feasibility and the ability to "bring about the ends of the proposed action."<sup>[13]</sup> This holding validates BOEM's general policy regarding identification of a reasonable range of alternatives,<sup>[14]</sup> and helps insulate BOEM and project proponents from risk in future litigation.
- **COP Withdrawal and Resubmittal.** Vineyard Wind 1 withdrew its COP in late 2020 to determine whether a change in wind turbine technology required substantive changes, and BOEM permitted them to rescind their withdrawal three months later without an additional notice and comment period under NEPA. The First Circuit held that plaintiffs lacked standing to challenge the resubmittal of the COP because the process had caused plaintiffs no conceivable harm, and also expressed skepticism that any additional notice and comment would have been required even if plaintiffs had demonstrated standing.<sup>[15]</sup> This holding could make it easier for project proponents to briefly "pause" their permit review and restart it without subjecting the project to unnecessary delays for notice and comment.
- **Cumulative impacts.** The First Circuit summarily rejected plaintiffs' allegations that BOEM had improperly analyzed the incremental impact of the Vineyard Wind 1 project in combination with other future, reasonably foreseeable offshore wind projects.<sup>[16]</sup> This is fitting, given that the federal approvals for Vineyard Wind 1 were delayed for nearly a year when the first Trump Administration directed BOEM to supplement its draft environmental impact statement (EIS) with an expansive cumulative impacts analysis that included potential offshore wind projects at every stage of the permitting process.<sup>[17]</sup> Given that BOEM has used its Vineyard Wind 1 cumulative impact analysis as a template for every subsequent offshore wind EIS, this holding has beneficial

implications for other projects facing similar challenges.

## **Clean Water Act**

The First Circuit also affirmed the trial court's dismissal of plaintiffs' claim that the U.S. Army Corps of Engineers ("the Corps") had violated the law in issuing a dredge and fill permit for the project under CWA Section 404. Plaintiffs had asserted that the Corps issued its permit under the erroneous belief that project impacts would be minor. In rejecting this argument, the First Circuit excoriated plaintiffs for citing cherry-picked statements from the final EIS and omitting key context regarding the temporary nature of certain impacts and the benefits of mandatory mitigation measures.<sup>[18]</sup>

## **Outer Continental Shelf Lands Act**

Perhaps most importantly, the First Circuit affirmed the trial court's holding that BOEM properly considered OCSLA's standard for approving the Vineyard Wind 1 COP, including that it appropriately "balanced" the twelve statutory criteria in OCSLA Section 8(p)(4) with the statute's "mandate to develop energy projects on the Outer Continental Shelf" as set forth in OCSLA Section 3.<sup>[19]</sup> The court appears to be referencing Congress's statement that the Outer Continental Shelf (OCS) is a "vital national resource reserve" that "should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs."<sup>[20]</sup> The First Circuit decisively rejected the plaintiffs' "absolutist" argument that BOEM must disapprove an offshore wind project if it "is likely to have any modicum of impact on one or more of the twelve OCSLA criteria."<sup>[21]</sup> The court emphasized:

A statute encouraging the development of offshore wind projects but obligating the BOEM to ensure that such projects be carried out in a manner that provides for safety, for example, cannot be read to prohibit project approval simply because one could imagine the project being involved in an accident. If that is the plaintiffs' position, we reject it.<sup>[22]</sup>

In affirming that BOEM appropriately approved the COP, the First Circuit pointedly noted that plaintiffs' briefing ignored the myriad mitigation requirements that BOEM had imposed in response to safety and environmental concerns raised by plaintiffs and many other stakeholders, as well as the extensive justifications for each OCSLA factor that BOEM provided in its record of decision.<sup>[23]</sup>

Finally, the First Circuit court rejected the admission of evidence regarding the recent failure of one of the Vineyard Wind 1 blades that resulted in a temporary suspension of its construction activities, noting that the blade incident occurred after the challenged agency decisions and was not relevant to the appeal.<sup>[24]</sup>

## **A Strong Signal: The Feds Issue Defensible Permits**

Vineyard Wind 1 was the first competitively leased, utility scale offshore wind project to receive its federal permitting approvals. As such, it was always expected to be a litigation magnet. But as the end of the Biden Administration draws nearer, BOEM has approved nine COPs for offshore wind projects between Massachusetts and Virginia and at least six of those projects are presently the target of at least one federal lawsuit. In a very real sense, litigation is just another stage in the offshore wind authorization process here in the U.S.

Developers have thus far been able to fend off these challenges. The First Circuit’s final Vineyard Wind 1 decision represents the latest win, but the federal government and developers have also scored initial victories for projects off the coasts of Rhode Island and Virginia.<sup>[25]</sup>

For plaintiffs, these cases are not always about winning—or even bringing meritorious claims. Long-time observers of the U.S. offshore wind industry will recall that the Cape Wind project—140 wind turbines approved for construction in Nantucket Sound, also off Massachusetts—prevailed in nearly every court decision but nevertheless met its demise, in no small part due to the cumulative delays and drain of resources incurred over a decade of nonstop litigation.

But there is reason to believe this time is different. BOEM and its partner federal agencies have a much more well-defined and routinized process than they did during the Cape Wind era, and this process has already survived judicial review in multiple jurisdictions. Moreover, the substantive environmental analyses underlying the permitting process have become more sophisticated over time as the federal agencies continue to synthesize an increasingly robust set of scientific studies—even as the agencies and developers road-test and fine-tune the mitigation measures that are terms and conditions of project approval. What is more, after each legal victory, subsequent projects will be able to cite to a growing body of case law showing that offshore wind permits pass legal muster. It is possible that the wave of offshore wind litigation may one day abate as the prospects of halting projects in court become increasingly remote—and (of course) as everyone grows more accustomed to the presence of offshore wind turbines off our coasts.

These early wins will be particularly valuable as we enter another presidential transition. The First Circuit decisions show that the existing permitting process adequately addresses potential environmental impacts of offshore wind farms under the prevailing statutory standards. They should also provide comfort to developers who may be concerned that the incoming administration will not be as forceful in defending subsequent projects’ federal approvals.

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[1] See [Vineyard Wind 1](#).

[2] *Nantucket Residents Against Turbines, et al. v. United States Bureau of Ocean Energy Mgmt., et al.*, 675 F.Supp. 3d 28 (D. Mass. 2023); *Melone v. Coit, et al.*, No. 1:21-cv-11171-IT, Dkt. No. 178 (D. Mass. Aug. 4, 2023).

[3] *Seafreeze Shoreside, Inc. v. United States Dep’t of the Interior*, No. 1:22-CV-11091-IT, 2023 WL 6691015 (D. Mass. Oct. 12, 2023).

[4] *Melone v. Coit*, 100 F. 4th 21 (1st Cir. 2024); *Nantucket Residents Against Offshore Wind v. BOEM*, 100 F. 4th 1 (1st Cir. 2024).

[5] *Nantucket Residents Against Offshore Wind and Vallorie Oliver v. U.S.*, Petition for a Writ of Certiorari, Sept. 23, 2024.

[6] *Seafreeze Shoreside, Inc., et al. v. U.S. Dep’t of the Interior, et al.*, No. 23-1853, 23-2051 (1st Cir. Dec. 5, 2024), *Slip Op.* at 24.

[7] *Id.* at 25-26.

[8] *Id.* at 26, 31-35.

[9] *Id.* at 26-31, 37-78.

[10] *Id.* at 36.

[11] *Id.* at 38-39.

[12] *Id.* at 40, citing 43 C.F.R. § 46.420(a)(2).

[13] *Seafreeze* at 40, citing *Beyond Nuclear v. U.S. Nuclear Regul. Comm'n*, 704 F.3d 12, 19 (1st Cir. 2013), *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. (1991)).

[14] *Process for Identifying Alternatives for Environmental Reviews of Offshore Wind Construction and Operations Plans pursuant to the National Environmental Policy Act (NEPA)*, Bureau of Ocean Energy Management (June 2022)

[15] *Seafreeze* at 41-42.

[16] *Id.* at 42-43.

[17] See *Vineyard Wind 1 Offshore Wind Energy Project, Supplement to the Draft EIS*, Bureau of Ocean Energy Management (June 2020).

[18] *Seafreeze* at 44-47.

[19] *Id.* at 49. 1337(p)(4) (setting forth the twelve factors that BOEM must ensure are “provide[d] for” with respect to any offshore wind activity carried out on the OCS).

[20] 43 U.S.C. §§ 1332(3); *see also*

[21] *Seafreeze* at 50.

[22] *Id.* at 51.

[23] *Id.* at 49, 51.

[24] *Id.* at 51-52; *see also*, [BSEE Issues New Order to Vineyard Wind in Continuing Investigation](#).

[25] See, e.g., *Comm. for a Constructive Tomorrow v. U.S. Dep’t of the Interior*, No. CV 24-774 (LLA), 2024 WL 2699895, at \*1 (D.D.C. May 24, 2024), *dismissed sub nom. Comm. for Constructive Tomorrow v. U.S. Dep’t of Interior*, No. 24-5151, 2024 WL 3208464 (D.C. Cir. June 27, 2024); *Green Oceans, et al. v. U.S. Dep’t of the Interior*, No. 24-cv-00141-RCL (D.D.C. April 30, 2024).

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