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Vineyard Wind 1 Prevails Again in the First Circuit

Update

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The US Court of Appeals for the First Circuit has affirmed the dismissal of two additional legal challenges to the Vineyard Wind 1 Project (the Project). On December 5, 2024, a First Circuit panel issued a consolidated opinion in *Seafreeze Shoreside v. DOI* and *RODA v. DOI*[1] affirming the Massachusetts District Court's decisions to grant summary judgment in favor of the federal government in two underlying cases challenging the Project's federal permits. The court's opinion marks the second time the federal government has successfully defended its approval of the Project in the First Circuit.[2] The Project is currently under construction offshore Martha's Vineyard, Massachusetts, and is scheduled for completion in early 2025. Once complete, the Project will be capable of generating up to 800 megawatts of renewable energy.

Summary Judgment in District Court

Both cases were initially filed by commercial fishing and trade associations on the Atlantic coast seeking to challenge various federal agencies' approvals of the Project. The plaintiffs asserted that the Project's federal approvals violated several environmental statutes. The plaintiffs in *Seafreeze v. DOI* alleged violations of the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), and the Outer Continental Shelf Lands Act (OCSLA), while the plaintiffs in *RODA v. DOI* alleged violations of the ESA, NEPA, OCSLA, the Marine Mammal Protection Act (MMPA), the Clean Water Act (CWA) and the Rivers and Harbors Act (RHA).

The District Court concluded in a consolidated opinion that the plaintiffs' ESA claims were moot and non-justiciable under Article III of the Constitution, that the plaintiffs' claims were outside of the zone of interests protected by NEPA,

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and that the plaintiffs failed to identify a genuine issue of material fact as to whether the Bureau of Ocean Energy Management's (BOEM) approval of the project under OCSLA was unlawful. The District Courtadditionally concluded that the plaintiffs in *RODA v. DOI* lacked standing under the MMPA on the basis that their claims were outside the zone of interests protected by the statute, and that the plaintiffs failed to identify a genuine issue of material fact as to whether the Army Corps of Engineers' (USACE) issuance of the CWA Section 404/RHA Section 10 permit was unlawful.

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The Appeal

Plaintiffs appealed the District Court's decision on all 39 claims. The First Circuit heard oral arguments on July 25, 2024, and approximately four months later the First Circuit affirmed the District Court's decision on all claims. The First Circuit held, in part, the following:

- The First Circuit affirmed the District Court's conclusion that plaintiffs did not have standing under NEPA, but took a different path to reach this conclusion. Unlike the District Court, the First Circuit found the plaintiffs were within NEPA's zone of interest because the agencies' record of decision (ROD) under NEPA acknowledged the impact that the discharge of fill material associated with the Project would have on fish and mollusks. The court found that the plaintiffs plausibly linked these impacts to the alleged economic effects of the Project on their commercial fishing interests. Nevertheless, the First Circuit agreed with the District Court that plaintiffs lacked standing because they failed to show injury resulting from the government's alleged violations of NEPA.
- The First Circuit affirmed the District Court's conclusions that plaintiffs' challenges to a superseded biological opinion from the National Marine Fisheries Service were not justiciable.
- The First Circuit agreed with the District Court that RODA did not have standing under the MMPA because "the protection of marine mammals such as the right whale is not germane to [RODA]'s purpose, which is to represent the interests of commercial fisheries and related organizations."
- On the merits, the First Circuit found that USACE's decision to issue the Project's CWA and RHA permit was well supported by the record and not arbitrary or capricious. Specifically, the court found that USACE properly accounted for the effect of the Project's dredge and fill activities on commercial fisheries, wildlife and the marine environment.
- Finally, the court also found that BOEM's construction and operations plan (COP) approval under OCSLA was well supported by the record and not arbitrary and capricious. The court agreed with the District Court's conclusion that BOEM properly balanced the twelve criteria enumerated by Section

1337(p)(4) of OCSLA, including safety and the protection of the environment, when it issued the Project's COP approval, stating that "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 providers for safety, for example, cannot be read to prohibit project approvals simply because one could imagine the project being involved in an accident."

Looking Ahead

The First Circuit's decision follows two similar opinions reached by other First Circuit panels earlier this year in *Melone v. Coit* and *ACKRATs v. BOEM*, in which the court affirmed the validity of the federal government's review of the Project and other offshore wind projects.[3] The government's continued success in the First Circuit is setting a strong precedent to support the development of offshore wind projects in the United States.

[1] *Seafreeze Shoreside, Inc., et al. v. United States Dep't of Interior, et al.* and *Responsible Offshore Development Alliance (RODA), et al., v. United States Dep't of Interior, et al.*, 2024 U.S. App. LEXIS 30741 (1st Cir. 2024) (*Seafreeze v. DOI* and *RODA v. DOI*).

[2] *See Nantucket Residents Against Turbines (ACKRATS), et al. v. United States Bureau of Ocean Energy Mgmt., et al.*, 100 F.4th 1 (1st Cir. 2024); *Melone, et al. v. Coit, et al.*, 2024 U.S. App. LEXIS 10079 (1st Cir. 2024) (previously *Allco Renewable Energy Ltd., et al. v. Haaland, et al.*, the case caption changed on appeal to the First Circuit).

[3] *See infra* fn 2.