



A Robinson+Cole Legal Update

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First Circuit Rejects Challenges to Federal Permits for Vineyard Wind 1

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In companion rulings favoring offshore wind developers and federal agencies, the First Circuit Court of Appeals recently affirmed rulings issued by the District Court (D. Mass.) and dismissed challenges brought by two Vineyard Wind opponents concerning the project's potential impact on the endangered North Atlantic right whale.[1] In both cases, a panel of the same three judges addressed challenges to the administrative procedures followed by the National Marine Fisheries Service (NMFS) and the Bureau of Ocean Energy Management (BOEM) in issuing a biological opinion and an Incidental Harassment Authorization (IHA) for the project that would directly impact the right whale. In two decisions authored by Judge Kayatta analyzing aspects of the federal permit approval process, the Court ruled that the agencies properly evaluated potential impacts to the right whale and did not violate the authorizing statutes or otherwise act arbitrarily or capriciously.

The Endangered Species Act (ESA) requires the NMFS to prepare a biological opinion determining whether the proposed federal action is "likely to jeopardize the continued existence" of the endangered species.[2] Plaintiffs alleged that NMFS's biological opinion was invalid because it failed to cite to a particular report highlighting the growing importance of regional waters to the right whales' survival. While not every available report must be cited, NMFS and BOEM are required to consider all the "best available information regarding marine mammal densities in the project area" as predicted by "habitat-based density models" in their decision-making. Here, although the agencies do not include in their analysis the specific report cited by plaintiffs, they did discuss the phenomenon of regional waters by reference to other reports, and as a result, the biological opinion was valid.

In conjunction with the biological opinion, the Marine Mammal Protection Act (MMPA) requires NMFS to issue an IHA. The MMPA calls for prohibitions on "takings" and "harassment" of marine mammals.[3] Plaintiffs challenged the validity of the IHA on the grounds that NMFS relied on a proportional method of calculating potential impacts, which they claimed was arbitrary and failed to adequately protect right whales. In rejecting this argument, the Court highlighted that the IHA specifically allows only for the non-lethal harassment of the whales, such as increased acoustic levels as a result of pile-driving activities, and not a lethal taking of the endangered species. The Court also found that NMFS's use of a proportional method to determine how many right whales could be impacted was sufficient when issuing an IHA because the method had been accepted previously.

Once BOEM issues a permit for offshore wind development, the Outer Continental Shelf Lands Act requires the agency to review and approve a site assessment plan and a construction and operations plan before work can begin. In addition to that review, BOEM must also issue an environmental impact statement (EIS) under the National Environmental Policy Act. Part of the EIS process involves reviewing the biological opinion issued by NMFS.

In this case, BOEM approved the required plans from Vineyard Wind and published an EIS that included several mitigation measures intended to limit the harm to the right whale, such as speed limits on vessels through the work areas, seasonal construction timetables, and the hiring of protected species observers. By including these conditions, and by properly relying on and utilizing the biological opinion and IHA from NMFS, the Court found that BOEM properly considered all relevant and available information when issuing its EIS.

Throughout both opinions, the Court emphasized the completeness of the administrative record and the deference granted to administrative agencies when considering technical and scientific matters within their areas of expertise.

These decisions will likely set a strong precedent in future lawsuits that seek to challenge the approval of offshore wind projects, including in an action recently filed in the D.C. District Court by a group of Rhode Island residents and environmental groups who oppose the development of Revolution Wind, a project neighboring Vineyard Wind. The plaintiffs claim that Revolution Wind must desist due to similar claims of alleged violations of the ESA and the potential impacts the project may have on the right whale.

For more information, please contact the authors above.

FOOTNOTES

1. [Nantucket Residents Against Turbines v. U.S. Bureau of Ocean Energy Mgmt. et al., No. 23-1501 \(1st Cir. Apr. 24, 2024\)](#); [Melone v. Coit No. 23-1736 \(1st Cir. Apr. 25, 2024\)](#).
2. 50 C.F.R. §402.14(h)(iv).
3. 16 U.S.C. §§ 1362(13); 1362 (18) (A)..

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