

Environmental Challenges Seek to Block Renewable Projects

SEPTEMBER 1, 2021

Recent lawsuits against renewable energy projects show that they are not immune from environmental challenges. Many support deploying more wind and solar assets to reduce greenhouse gas emissions. NEPA and other environmental statutes are, however, being used by some to slow or block wind and solar development. This resistance can come from nearby residents. And other renewable energy companies may sue putative competitors. The recently filed cases *Allco Renewable Energy Ltd. v. Haaland*^[1] and *Nantucket Residents Against Turbines v. BOEM*^[2] illustrate potential environmental litigation risks renewable energy developers should consider.

Allco Renewable Energy Ltd. v. Haaland

In May 2021, the U.S. Department of the Interior and Department of Commerce approved the construction and operation of the Vineyard Wind project (the “Project” or “Vineyard Wind”), the United States’ first commercial offshore wind project.^[3] On July 18, 2021, Allco Renewable Energy Limited (“Allco”), a solar energy company, and its owner filed a lawsuit challenging the approval. Allco argues that the federal agencies’ approval of the Project violated the National Environmental Policy Act (“NEPA”), the Outer Continental Shelf Lands Act (“OCSLA”), the Clean Water Act (“CWA”), and the Marine Mammal Protection Act (“MMPA”). As the owner, operator, and developer of various solar electric–generating facilities located in New England, Allco is a competitor to Vineyard Wind.

NEPA requires federal agencies to incorporate environmental considerations into their planning and decision-making. Subject to certain exclusions and exceptions, agencies must assess the environmental impact of, and alternatives to, major federal actions significantly affecting the environment. This may require developing an environmental impact statement (“EIS”), which takes many years to prepare.

For Vineyard Wind, NEPA was triggered because the development requires federal action in the form of the approval of the Construction and Operation Plan (“COP”) from the Bureau of Ocean Energy Management (“BOEM”) under the OCSLA, permitting from the U.S. Army Corps of Engineers under the CWA, and the issuance of an Incidental Harassment Authorization by the National Marine Fisheries Service (“NMFS”) under the MMPA. The final EIS for Vineyard Vine was issued in March 2021.^[4]

Allco's complaint raises 18 counts. It alleges numerous flaws in the federal agencies' EIS and ultimate approval of the COP. These include:

- Criticism of BOEM's failure to issue a supplemental EIS to account for Vineyard Wind's adoption of a new type of turbine late in the planning process.
- The government's review failed to assess two key considerations related to the effect of climate change on hurricanes.
- The agencies failed to appropriately assess the impacts on fisheries and fishing.
- The EIS does not fully assess the Project's impact on marine species, particularly endangered species.
- The Project relies on a biological opinion issued by the NMFS in September 2020 that itself is "based upon an unlawful standard created by unlawful changes to regulations in 2019."^[5]

In addition, Allco is challenging the Vineyard Wind approval because of its impact on onshore renewable energy projects. Allco says that Vineyard Wind will reduce "opportunities and ability to develop QF solar projects because the Project is one of many projects in process of approval through which offshore wind energy producers intend to decimate U.S. onshore renewable energy producers in the Northeastern United States."^[6] Allco points out that the EIS assumes that not constructing the Project would have a negative effect on climate change. Allco says that this is incorrect, stating that an onshore renewable energy project, such as one of its solar farms, would fill this gap. These claims may foreshadow coming battles between wind and solar energy developers.

Nantucket Residents' Challenge

The Project is also facing challenge from Nantucket residents. On August 25, 2021, Nantucket Residents Against Turbines ("ACKRATs") filed a request for declaratory and injunctive relief. It, too, challenges BOEM's failure to comply with NEPA and the Endangered Species Act ("ESA"). ACKRATs contends that BOEM and NMFS did not adequately assess impacts to the endangered North Atlantic right whale and other species. The complaint zeroes in on the NMFS biological opinion, calling it "analytically deficient and not supported by the best available data."^[7] ACKRATs alleges that the biological opinion assumes Project parameters different from those discussed in the supplemental EIS issued in June 2020. That contemplated the cumulative impacts of Vineyard Wind as one project within a constellation of wind farms proposed for future development in the area.

Key Takeaways

- Though renewable energy projects can reduce greenhouse gas emissions, these projects are not immune from environmental challenges.
- Federal agency actions under NEPA, the ESA, the CWA, the OCSLA, and other statutes are being attacked, with collateral impacts on project development.
- Challenges may come from more than just NIMBY groups. Wildlife organizations, and even renewable energy competitors, are using environmental statutes to block project development.
- Project developers should strategize their environmental and permitting reviews carefully, particularly as they relate to NEPA review. Developers should anticipate litigation and potentially intervene in these cases to defend business-critical government approvals.

For further information or questions about environmental challenges and how they may impact your project development, please contact Jonathan D. Brightbill* (partner, Environmental Litigation/White Collar, Regulatory Defense and Investigations), Madalyn Brown (associate, Environmental), or your Winston relationship attorney.

** Jonathan D. Brightbill was acting assistant attorney general for the Environment and Natural Resources Division of the Department of Justice. The Division defended federal agencies in environmental litigation challenging their permits, approvals, and other actions.*

Please note that government orders on the federal, state, and local level are changing every day, and the information contained herein is accurate only as of the date above.

¹¹ No. 1:21-cv-11171 (D. Mass.) (filed July 18, 2021).

¹² No. 1:21-cv-111390 (D. Mass.) (filed Aug. 25, 2021).

¹³ U.S. Dep't of the Interior, *Biden-Harris Administration Approves First Major Offshore Wind Project in U.S. Waters* (May 11, 2021), <https://www.doi.gov/pressreleases/biden-harris-administration-approves-first-major-offshore-wind-project-us-waters>.

¹⁴ U.S. Dep't of the Interior, *Interior Completes Environmental Review for Offshore Wind Project* (Mar. 8, 2021), <https://www.doi.gov/pressreleases/interior-completes-environmental-review-offshore-wind-project>

¹⁵ Compl. at 4.

¹⁶ *Id.* at 10.

¹⁷ Compl. at 3.

4 Min Read

Authors

[Jonathan D. Brightbill](#)

[Madalyn Brown Feiger](#)

Related Locations

Charlotte

Chicago

Dallas

Houston

Los Angeles

New York

San Francisco

São Paulo

Washington, DC

Related Topics

Renewable Energy

Energy

NEPA

Endangered Species

Related Capabilities

Environmental

Environmental Litigation & Enforcement

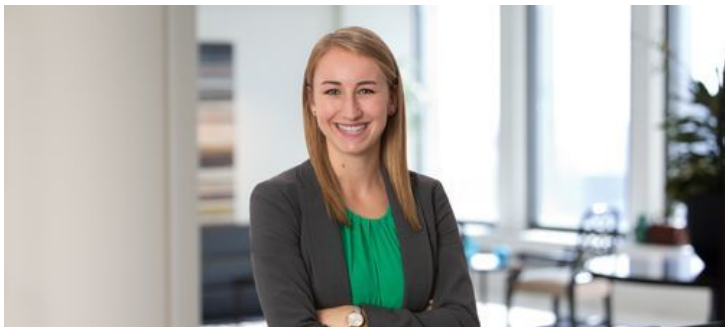
Related Regions

North America

Related Professionals



Jonathan D. Brightbill



Madalyn Brown Feiger

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.