

How Environmental Litigation Can Block Renewable Projects

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Recent lawsuits show that renewable energy projects are not immune from environmental challenges. There is broad support for deploying more wind and solar assets to reduce greenhouse gas emissions. However, environmental statutes are being used to attempt to slow or block renewable development.

This resistance can come from nearby residents. Yet other renewable energy companies may sue putative competitors as well. Two recently filed cases illustrate potential environmental litigation risks. The proposed revocation of the Migratory Bird Treaty Act rule enacted earlier this year is another potential roadblock—one coming with possible criminal penalties.

Allco Renewable Energy Ltd. v. Haaland

In May, the U.S. Department of the Interior and the U.S. Department of Commerce approved the construction and operation of the Vineyard Wind project, the first commercial offshore wind project in the U.S.[1] On July 18, Allco Renewable Energy Ltd., a solar energy company, filed a lawsuit in the U.S. District Court for the District of Massachusetts challenging the approval.[2]

Allco argues that the federal agencies' approval of the project violated the National Environmental Policy Act, or NEPA, the Outer Continental Shelf Lands Act, or OCSLA, the Clean Water Act, or CWA, and the Marine Mammal Protection Act. 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, or EIS, which can take many years.

For Vineyard Wind, NEPA was triggered because the development requires federal action in the form of the approval of its construction and operation plan from the Bureau of Ocean Energy Management, or BOEM, under 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, or NMFS, under the Marine Mammal Protection Act. The final EIS for Vineyard Wind was issued in March.[3]

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

- BOEM failed 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; and

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." [4]

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 Allco's opportunities and ability to develop [qualifying facility] 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.[5]

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 other coming battles between wind and solar energy developers.

Nantucket Residents' Challenge

The project is also facing a challenge from Nantucket residents. On Aug. 25, Nantucket Residents Against Turbines, or ACKRATs, filed a request for declaratory and injunctive relief in the District of Massachusetts.[6] It, too, challenges BOEM's failure to comply with NEPA and the Endangered Species Act.

ACKRATs contends that BOEM and the 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.

Migratory Bird Treaty Act Considerations

Another developing environmental legal risk for renewable developers is the potential impact on birds and bats. Public comment closed in June on the U.S. Fish and Wildlife Service's proposal to revoke the regulation finalized earlier this year regarding the scope of the Migratory Bird Treaty Act, or MBTA. This regulation excluded the incidental take of migratory birds from coverage.

First enacted in 1918, the MBTA prohibits the take—including hunting, killing, capturing, selling, trading and transporting—of protected migratory bird species without prior authorization by the service. The MBTA packs a punch, with the threat of criminal penalties for violations of the act.

For example, in 2013, Duke Energy Corp. was the subject of criminal enforcement of the MBTA for the death of over 150 protected birds at two of its wind projects.[8] The government charged Duke Energy with failure to make reasonable efforts to construct the wind projects to avoid risk of avian deaths.

Duke Energy paid a \$400,000 fine, in addition to restitution payments. This required contribution to a conservation fund, and the cost of implementing a migratory bird compliance plan. Notably, industry, conservationists and academics have noted the potential for solar power arrays to incidentally take birds, and other species as well.[9]

In December 2017, the DOI addressed whether the MBTA authority extends to a take that is incidental to an otherwise lawful activity. In an official opinion from the DOI solicitor's office, known as an M opinion, Principal Deputy Solicitor Daniel Jorjani stated that the MBTA does not prohibit incidental take, a departure from the position taken in the Duke Energy case.

This opinion was challenged by environmentalists. On Aug. 11, 2020, the U.S. District Court for the Southern District of New York vacated the legal opinion. It held that the DOI's interpretation was contrary to the plain language of the MBTA.[10]

Nevertheless, on Jan. 7 of this year, the USFWS published a final rule codifying the interpretation initially articulated in the December 2017 M opinion. The rule's rationale mirrors the DOI opinion. It establishes that the MBTA does not criminalize takings that occur incidentally to otherwise lawful activities, such as the operation of renewable energy facilities.

The Trump administration's MBTA rule became an immediate target for reconsideration by the Biden administration. The new administration announced a delay in the effective date of the regulation in February. Then, in March, it revoked the 2017 M opinion.

In May, the Biden administration formally proposed a rule to revoke the regulation limiting MBTA enforcement to purposeful take.[11] Revoking the rule will mean a return to certain prosecutors and regulators interpreting the MBTA as prohibiting incidental, not just purposeful, take. The intervening federal rule may, however, implicate the due process rights and liabilities of renewable power facilities, and create the opportunity for other constitutional defenses for conduct predating any repeal.

Key Takeaways

Though renewable energy projects can reduce greenhouse gas emissions, these projects are not immune from environmental challenges. Federal agency actions enabling renewable development under NEPA, OCSLA, the CWA, the Endangered Species Act 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. The MBTA poses another potential roadblock for renewable energy projects, as the DOI proposes to revoke regulations limiting the act to prohibiting only purposeful take.

Project developers should plan their environmental and permitting reviews carefully, particularly as they relate to NEPA. Developers should anticipate litigation, and potentially intervene in these cases to defend business-critical government approvals.

[1] 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>.

[2] Allco Renewable Energy Ltd. v. Haaland, No. 1:21-cv-11171 (D. Mass.) (filed July 18, 2021).

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

[4] Compl. at 4.

[5] Id. at 10.

[6] Nantucket Residents Against Turbines v. BOEM, No. 1:21-cv-111390 (D. Mass.) (filed Aug. 25, 2021).

[7] Compl. at 3.

[8] U.S. Dep't of Justice, Utility Company Sentenced in Wyoming for Killing Protected Birds at Wind Projects (Nov. 22, 2013), <https://www.justice.gov/opa/pr/utility-company-sentenced-wyoming-killing-protected-birds-wind-projects>.

[9] Avian Solar Work Group, <http://www.aviansolar.org/>.

[10] Nat. Res. Def. Council Inc. v. U.S. Dep't of the Interior , 478 F. Supp. 3d 469 (S.D.N.Y. 2020).

[11] U.S. Fish and Wildlife Serv., Interior Department Takes Steps to Revoke Final Rule on Migratory Bird Treaty Act Incidental Take (May 6, 2021), https://www.fws.gov/news/ShowNews.cfm?ref=interior-department-takes-steps-to-revoke-final-rule-on-migratory-bird-&_ID=36902.

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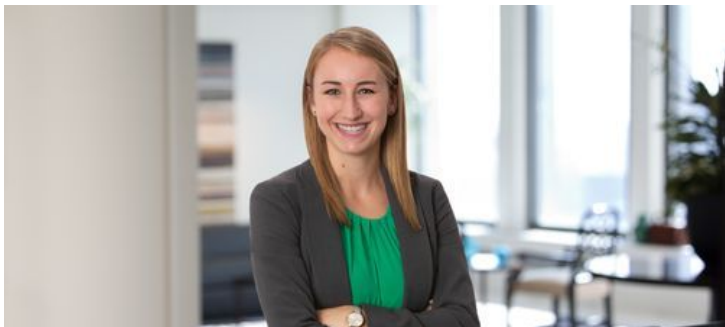
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