

# A Scorecard on the Cases Seeking to Stop Atlantic Offshore Wind

**H**uge offshore wind turbines will be going up soon on the Eastern Seaboard. These projects will help provide electricity to areas of high demand while also enabling a move away from fossil-fuel-fired generation. For example, the South Fork Wind project, which is being built off the coast of Rhode Island between Block Island and Martha's Vineyard, is slated to produce electricity sufficient to power 70,000 homes and replace 300,000 tons of carbon emissions each year. Another project, Vineyard Wind, will produce enough electricity for 400,000 homes in Massachusetts.

Neither project will be visible from land. And yet both have drawn a slew of legal actions which can best be described as NIMBY challenges. Several courts have issued decisions in these cases this year, helping to illustrate the legal thicket that these projects must navigate.

The South Fork project drew challenges in state and federal court. One of the federal challenges (*Kinsella v. Bureau of Ocean Management*) has to do with an underground transmission cable that will be placed onshore in the town of Wainscott on Long Island, where the groundwater is contaminated with PFAS.

The plaintiff, a resident of that town, tried to get the project blocked, arguing that the Bureau of Ocean Energy Management had not conducted an adequate analysis of the impact of digging the line's trench on PFAS in the ground water before issuing permits for the project. But to get an order blocking the project, the plaintiff had to show a threat of irreparable harm. And given the mitigation measures that were included in the construction plan, the court found that the plaintiff had not met the standard.

In another lawsuit, this one filed at the state level (*Matter of Citizens for the Preservation of Wainscott v. New York State Public Service Commission*), Wainscott residents challenged a different permit asserting the same arguments. But the state court also rejected the challenge, citing the same mitigation measures.

The Vineyard Wind project has also drawn its fair share of challenges. In one of the challenges (*Seafreeze Shoreline v. Department of the Interior*), a group of fishing trade associations challenged the federal permits under the Clean Water Act, the Endangered Species Act, the Marine Mammal Protection Act, and the National Environmental Policy Act. They argued that the new wind farm would affect their fishing trips and their enjoyment of marine wildlife. A federal district court in Massachusetts dismissed several of the claims on standing, after finding that the plaintiffs had not made a sufficient showing that the permitted activities would harm them.

For example, for the NEPA claim, plaintiffs had only shown potential economic injury, and possible environmental harm is required. The court did address the merits of two of the claims, brought under the CWA and the Outer Continental Shelf Lands Act, but found that those arguments were mistaken. For example, for the clean water claim, the court found that the plaintiffs had relied on a misreading of the relevant regulation.

In another federal case (*Nantucket Residents Against Turbines v. Bureau of Ocean Energy Management*), residents of Nantucket Island challenged the project's permits, arguing that the relevant agencies had not properly assessed the air emissions of the project or the project's impact on the North



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Atlantic Right Whales. The court dismissed the air emissions claims, finding that the plaintiffs had not proved that any increase in emissions would affect them, in part because those emissions would never reach Nantucket Island. Plaintiffs also complained about the agencies' assessment of the scientific evidence about environmental impacts, arguing that the agencies ignored or did not adequately assess a pile of studies. But the court found that the agencies had engaged in the evidence and had not ignored those studies.

Finally, in a lawsuit related to both Vineyard Wind and South Fork (*Melone v. Coit*), Thomas Melone, another Nantucket resident and a solar energy developer, brought a number of claims under the Marine Mammal Protection Act and the Administrative Procedure Act. His main argument was that the project would harm the Right Whales. While the court found that Melone satisfied the standing requirements, it rejected all of his substantive arguments and dismissed the case. An appeal is pending.

Recently, after defeating all these lawsuits, the companies announced that they started to put "steel in the ground." Overall, these decisions help illustrate how much work the relevant agencies and developers have been putting into building a robust record to support each of the permits required for these projects—and that with a robust record, the legal challenges can be overcome.

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