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## Cape Wind District Court Ruling Illustrates Challenges Faced in Coordinating Large-Scale Development across Multiple Agencies, Resources and Statutes

### Background of the Cape Wind Project

Cape Wind is the first offshore wind project of its kind in the United States, and one of the largest offshore wind projects in the world. Located on the Outer Continental Shelf in Nantucket Sound off the coast of Massachusetts, the proposed wind park would consist of 130 offshore wind turbine generators, each of which would produce electricity that was transmitted to a centrally located electric service platform offshore. This platform would then transform and transmit electric power to the Cape Cod mainland area about 12 miles away via submerged lines that would ultimately connect with the existing power grid.

The project has been under development since 2000, and has faced fierce opposition from local residents, environmental groups, and Native American tribes from its inception. As one would imagine, project proponents are required to obtain regulatory approvals and permits from several Federal agencies under numerous environmental laws. The regulatory processes required to obtain these approvals and permits present opportunities for opposition groups to legally challenge the project.

Although the recent D.C. District Court ruling on aspects of Cape Wind specifically applies to that project, the case illustrates challenges that developers of large-scale infrastructure projects such as wind farms face when coordinating multi-resource issues with multiple agencies throughout the lifecycle of a major project proposal. The lessons learned throughout the development of the Cape Wind project and subsequent litigation over the past thirteen years will be invaluable to the development process for similar projects in various industries. Venable attorneys have had considerable experience coordinating amongst various agencies and navigating the permitting and development process for infrastructure projects in the railroad, mining, and utility industries, and have successfully dealt with challenges similar to those represented by Cape Wind.

### Summary of Challenges to Federal Agency Actions

In *Public Employees for Environmental Responsibility v. Beaudreu*, the U.S. District Court for the District of Columbia ruled in a consolidated case comprising four sets of interrelated claims concerning several administrative decisions made by federal agencies involved with the approval of construction of various aspects of the project. Several plaintiff organizations challenged approval of the project by alleging noncompliance with various federal laws, including:

1. Section 414 of the Coast Guard and Maritime Transportation Act;
2. The Outer Continental Shelf Lands Act (OCSLA);
3. The Endangered Species Act (ESA);
4. The Migratory Bird Treaty Act;
5. The National Historic Preservation Act; and
6. The National Environmental Policy Act (NEPA).

Because the case involves comprehensive legal challenges to this first of its kind project, the court's decision will set important precedent and provide some regulatory guidance for proponents of future domestic offshore wind projects.

## The Court Ruling

On March 14, 2014, the court issued an opinion granting summary judgment to Defendant federal agencies on all counts, with the exception of certain claims against the Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) regarding each agency's responsibilities under the Endangered Species Act (ESA). In ruling for the Defendants, the court granted the approving agencies significant discretion and ruled that Plaintiffs had failed to show that the agencies' actions had been arbitrary or capricious. On the claims against FWS, the court found the agency had failed in its duty under the ESA to make an independent determination relating to actions to minimize the incidental take of certain bird species in the area of the project. Regarding the claims against NMFS, the court found that the agency violated ESA by failing to issue an incidental take statement for the North Atlantic right whale.

## Discussion of Specific Issues in Ruling

### **Coast Guard's Responsibility under Section 414 of the Coast Guard and Maritime Transportation Act**

Under Section 414 of the Coast Guard and Maritime Transportation Act, the Coast Guard is charged with setting forth reasonable terms and conditions necessary to ensure navigational safety relating to a lease, easement, or right-of-way for an offshore wind energy facility in Nantucket Sound as well as for each alternative to the proposed lease, easement, or right-of-way. In granting a lease, easement or right-of-way for an offshore wind energy facility in Nantucket Sound, the Secretary of the Interior is required to incorporate such reasonable terms and conditions. Plaintiffs argued that (1) the terms and conditions issued by the Coast Guard under Section 414 for the Cape Wind project did not adequately ensure navigational safety and (2) the Coast Guard did not consider a sufficiently broad range of alternatives because it relied on an impermissibly narrow interpretation of the meaning of "alternatives."

Section 414 was enacted in 2006 and was primarily intended to address the pending Cape Wind project. Thus, the D.C. District court decision analyzing the Cape Wind project is one of first impression for Section 414. Recognizing this, the court turned to the analysis applied by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*. Under *Chevron*, in analyzing an agency's construction of a statute that it administers, the court asks two questions. First, the court must determine whether Congress has clearly expressed its intent in the statute, applying traditional tools of statutory construction. If so, then the agency must give that intent effect. Second, if Congressional intent is unclear, the court must defer to the agency's interpretation of the statute as long as it is based on a permissible construction of the statute.

Here, the court held that the statute leaves no discretion to the Commandant of the Coast Guard to issue terms and conditions for navigational safety or to the Secretary of the Interior regarding the decision to include those terms and conditions in the lease. Analogizing Section 414 to the Federal Power Act, the court found that so long as the terms and conditions imposed by the Coast Guard are reasonably related to its goal of ensuring navigational safety, are otherwise consistent with the Outer Continental Shelf Lands Act (OCSLA), and are supported by substantial evidence, the court had no choice but to sustain those terms and conditions. The court then found that the terms and conditions issued by the Coast Guard satisfied these criteria.

In addition, the court found that the Coast Guard's interpretation of the term "alternatives" in Section 414 was not arbitrary or capricious. Plaintiffs argued that "alternatives" was meant to be defined as it is defined in the NEPA, meaning that the Coast Guard would have had to provide terms and conditions for all alternatives included in the Environmental Impact Statement for the Cape Wind project that had been issued by the Bureau of Ocean Energy Management (BOEM), the agency within the Department of the Interior that administers the offshore lease program. The court, however, rejected this argument, stating that if the drafters of Section 414 intended for the alternatives to be defined as argued by the plaintiffs, NEPA would have been expressly referenced in the language of the statute. Because Section 414 does not refer to NEPA and because the court determined it would be odd to require the Coast Guard to provide conditions for each NEPA alternative, the court held that the Coast Guard was reasonable in interpreting the term alternatives to constitute a more narrow range of options.

## Outer Continental Shelf Lands Act

Plaintiffs argued that BOEM violated the OCSLA because (1) it relied on the Coast Guard's arbitrary and capricious conclusions regarding navigational safety, and (2) it approved Cape Wind's Construction and Operations Plan without first receiving additional geotechnical and geophysical studies from Cape Wind.

The court found that the BOEM was justified in relying on the Coast Guard's finding that the project's impact on navigational safety would be moderate because those findings were intended to inform BOEM (and were not a final agency action as required for review by the court under the Administrative Procedures Act). Moreover, even if the Coast Guard's findings were to be considered final agency action, the court found the Coast Guard's conclusions were based on substantial evidence and were entitled to deference based on its expertise in maritime safety. The court stated that it could not discern from the evidence that the Coast Guard, in reaching its conclusions regarding navigational safety, had engaged in improper behavior or acted in bad faith, and plaintiff's disagreement with the agency's ultimate findings is not reason enough to deem the findings arbitrary or capricious. Thus, BOEM's reliance on the Coast Guard's conclusions did not violate the OCSLA.

In addressing whether BOEM violated the OCSLA because it approved the Cape Wind Construction and Operations Plan without obtaining necessary geotechnical and geophysical studies, the court considered whether the BOEM appropriately approved a departure from the requirements set forth in its regulations (including what the plaintiffs deemed to be necessary additional studies) when it approved Cape Wind's Construction and Operations Plan. Initially, the court noted that BOEM regulations allowed for departures from its own regulations as long as they are consistent with OCSLA, protect the environment and public safety, do not impair the rights of third parties, and are documented in writing. BOEM regulations further provide that approval of a departure is appropriate to, among other things, facilitate appropriate activities on a lease or a grant. The court noted that the record showed, while the BOEM wanted Cape Wind to conduct additional and more detailed surveys than what it had provided, Cape Wind also represented to BOEM that such surveys required additional financing, and such financing was not available absent approval of its Construction and Operations Plan. The court found that financing geophysical and geotechnical surveys was consistent with the facilitation of appropriate activities, and that BOEM could appropriately allow for collection of required data after approving the Construction and Operations Plan. Thus, the court found BOEM complied with the OCSLA regulations.

## Endangered Species Act

Opponents of the Cape Wind project alleged that the FWS and NMFS committed various violations of the Endangered Species Act (ESA).

First, plaintiffs alleged that the FWS violated the ESA by improperly relying on Cape Wind and BOEM decisions concerning minimization of effects on certain species without making an independent determination on the issue. Again applying the *Chevron* two-step analysis as it did with the challenge to the Coast Guard's actions as discussed above, the court first noted that the ESA tasks the FWS with administering the ESA for certain species, and further that the ESA requires the FWS to issue an incidental take statement when it finds that agency action will adversely impact a listed species. The court stated that the statute also clearly requires the FWS to specify reasonable and prudent measures necessary or appropriate to minimize such impact.

The court acknowledged that neither the ESA nor the implementing regulations explicitly state that the FWS is required to render independent determinations concerning reasonable and prudent minimization measures in incidental take statements. However, the court noted that the statute requires that incidental take statements must include measures that the FWS considers necessary or appropriate. In assessing the incidental take statement issued by the FWS for the Cape Wind project, the court found the FWS discussed a potential "operational adjustment" that would require temporary and seasonal shut down of the wind turbine generators as a reasonable and prudent measure. However, the FWS discarded such potential "operational adjustment" because "it was determined by BOEM and Cape Wind" to not be reasonable and prudent, while the take statement failed to indicate that the FWS itself had made an independent determination on this issue. Acknowledging that collaboration with other agencies and entities regarding reasonable and prudent measures is appropriate under the ESA, the court said such collaboration did not allow the FWS to defer to BOEM or Cape Wind when discarding the operational adjustment without making clear it was doing so based on its own independent

determination. The Court therefore, remanded the case to FWS to make an independent determination on this point.

Plaintiffs also alleged that NMFS violated the ESA in various ways when it (1) improperly concluded in its biological opinion that the Cape Wind project was unlikely to adversely affect right whales, (2) failed to establish appropriate terms and conditions related to an incidental take of right whales, and (3) failed to analyze the effect of preconstruction geological surveys on sea turtles, a species listed under the ESA.

The court initially noted that under Supreme Court precedent, review under the arbitrary and capricious standard is deferential and that a court will not vacate an agency's decision unless the agency relied on factors Congress had intended it not to consider, entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

As to the plaintiff's first challenge regarding the biological opinion, the court could not, based on the record, find that NMFS had entirely failed to consider an important aspect of the impact that the Cape Wind project might have on right whales as alleged by the plaintiffs. The court said its role was not to second-guess NMFS, but instead to ascertain whether the administrative record demonstrated the agency had considered the relevant data and articulated a satisfactory explanation for its action, and whether the agency's choice reflected a rational connection between the facts found and the choice made. After examining the record, the court concluded that NMFS had considered the relevant required information, and found that the agency's conclusion that the project is not likely to adversely affect listed whales in the action area was rationally connected to the facts.

However, the court agreed with plaintiffs' second assertion that the NMFS failed to establish appropriate terms and conditions related to an incidental take of right whales, and remanded the matter to the NMFS so that it could issue an incidental take statement for the take of right whales. In making this determination, the Court found that a determination that a "take is not reasonably certain" is not the same as a determination that no incidental takes will occur. Thus, the Court held that even where a take is unlikely, an incidental take permit is required under the ESA.

As to the plaintiff's final assertion that NMFS failed to adequately consider the effect of noise from the preconstruction surveys on the population of sea turtles, the predominant issue was a considerably increased number of anticipated survey hours and whether the NMFS adequately considered the potential effects in its biological opinions. NMFS had done two biological opinions regarding this issue approximately two years apart. During that time, the survey hours associated with the project had increased 10 to 20 times from the original proposal, and the survey area had increased. The court found, however, that while there was a considerable difference in the anticipated number of survey hours between the two opinions, there remained a rational connection between the facts found and the choices made by the agency regarding this issue. Thus, NMFS' analysis was appropriate and was not arbitrary or capricious.

### **Migratory Bird Treaty Act**

Plaintiffs also argued that BOEM violated the Migratory Bird Treaty Act by approving the project without first obtaining a permit from the FWS for the taking of migratory birds. The court rejected this argument, stating that "on its face," the MBTA does not extend to agency actions that only "potentially" or "indirectly" may result in the taking of migratory birds. Rather, the MBTA makes it unlawful to take migratory birds without a permit, and thus, there is no violation of the MBTA unless and until a taking occurs without a permit. The court also noted that, even if the MBTA requires BOEM to apply for a permit from the FWS, it is not clear that BOEM must do so before the project is operational or before a potential taking is "considerably more imminent."

### **National Historic Preservation Act**

Section 106 of the National Historic Preservation Act is a procedural statute that required federal agencies to take into account the effect of their action on structures and properties eligible for inclusion in the National Register of Historic Places. The Plaintiffs alleged that the BOEM violated the NHPA by engaging in untimely and meaningless Section 106 consultation and had failed to identify on-shore historic properties in good faith. Noting that Section 106 provides "little statutory guidance as to the appropriate timeline" for the Section 106 review and that the statute does not prohibit an agency from conducting or authorizing "nondestructive project planning activities" before completing the review process, the court

rejected the Plaintiffs' argument on the timeliness of the review.

Regulations implementing the NHPA also state that when the undertaking involves historic properties of significance to Indian Tribes, the agency taking action must also consult and consider the views of the affected tribes. One plaintiff, the Wampanoag Tribe of Gay Head (Aquinnah), argued that BOEM had dismissed its position that Nantucket Sound itself, rather than the specific locations from which they viewed it, was a Traditional Cultural Property. The court noted that the NHPA does mandate a particular outcome, but only requires an agency to consider the impact of its action. The court determined that the BOEM took the Wampanoag Tribe of Gay Head's views on the eligibility of the Nantucket Sound into account in its EIS and Record of Decision. Further, a subsequent determination that Nantucket Sound was in fact eligible for listing in the National Register of Historic Places did not change the court's conclusion in this regard.

The court also rejected Plaintiffs' argument that BOEM violated the NHPA by failing to obtain additional geotechnical and geophysical surveys required by the OCSLA. The court found that, while there was undoubtedly some overlap between the surveys required for compliance with the NHPA and the OCSLA, the NHPA does not require completion of OCSLA surveys prior to concluding surveys for subsurface archeological resources.

### **National Environmental Policy Act**

Plaintiffs also raised a variety of claims under the National Environmental Policy Act. The court recognized that NEPA, like Section 106, is a procedural statute that does not mandate a specific outcome. The court, relying on *Chevron*, deferred to the agencies' discretion, and found that:

1. the purpose and need statement was not unreasonably narrow, as the objectives cited in the EIS were much broader and more general than the Cape Wind proposal;
2. given the detailed and thorough analysis, BOEM selected a reasonable range of alternatives;
3. the EIS was based on information sufficient to characterize the environmental impacts of the project;
4. the EIS adequately addressed cumulative impacts on wildlife, as an assessment of inter-regional effects is not required where there is no other simultaneous development in the geographic area;
5. the Construction and Operations Plan for the Cape Wind project did not constitute a new major federal action that required either an additional EIS or a supplemental EIS; and
6. BOEM's decision that there was no new information, such as the determination that Nantucket Sound was eligible for inclusion on the National Register, sufficient to require a supplemental EIS was not arbitrary or capricious.

### **Conclusion**

Although the court's decision is important to the future of the Cape Wind project, it also has important lessons for all large-scale infrastructure projects. The Cape Wind project and the challenges its developers faced illustrate the difficulties developers, investors, and proponents of any large-scale infrastructure projects will need to address when multiple agencies, parties, resources and statutes are involved.

Large-scale infrastructure projects such as Cape Wind usually involve coordination between many state and federal agencies. To best serve the interests of a proposed project, the developer and attorneys must efficiently coordinate amongst various state and federal agencies throughout the entire process. Establishing a cooperative relationship at the outset of project development will help developers and agencies avoid litigation or other challenges later in the process.

The Cape Wind project and subsequent litigation not only involved many different agencies, but also evoked multiple state and federal statutes. For example, the most recent litigation involved aspects of the Coast Guard and Maritime Transportation Act, the Outer Continental Shelf Lands Act, the Endangered Species Act, the Migratory Bird Treaty Act, the National Historic Preservation Act and the National Environmental Policy Act, as well as other federal and state statutes. Similar to Cape Wind, most large-scale development projects will necessarily involve the application of numerous laws in differing contexts and

in interaction with one another.

Finally, the Cape Wind project illustrates the need to work with agencies to anticipate potential criticisms about a project. Over the last thirteen years, the Cape Wind project has gone through many comment periods and has been subject to various stages of litigation. These challenges can draw out the development process over many years, and can significantly delay the start of a developer's project. While the decision in this case was primarily a victory for the Cape Wind proponents, it should not be forgotten that this decision comes approximately 14 years after the project was initiated, and the administrative process that would allow initial construction to begin has still not been completed. The ability to anticipate potential criticisms during project planning and during the permitting process, in advance of administrative actions that can be challenged by project opponents, is beneficial to all of the parties because it saves the time and effort necessary to respond to comments later in the development process.

Although the D.C. District Court's decision has many important implications for the Cape Wind project and for other similar wind farm developments in the future, it also illustrates the challenges that pervade all large-scale infrastructure projects.

Venable attorneys have had significant experience working on projects that involve this type of coordination and collaboration. Many members of our group have held positions within federal and state agencies that permit or approve major infrastructure projects, or have worked on issues before these agencies or on the Hill on behalf of clients involved with the development of major infrastructure projects. Venable's experience coordinating projects involving multiple resources, agencies and statutes is an essential asset in the development process and can assist clients dealing with challenges like those faced by Cape Wind's proponents. Venable's lawyers are also fully prepared to defend a project in court, if necessary, and have successfully litigated such cases in federal courts around the country.

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