How Justices' Chevron Ruling May Influence Wind Projects

By **Peter Knight, John Casey and Eden Yerby** (June 25, 2024)

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Advocacy groups opposed to offshore wind development have continued their efforts to derail projects along the East Coast. Nearly a decade ago, vocal opposition played a role in ultimately derailing Cape Wind — New England's first utility-scale offshore wind project.

Given the complexity of the applicable permitting schemes and statutes, the number of federal agencies involved in the approval process, and the variety of interest groups with a stake in the outcome, litigation often ensues, and the federal courts have proven to be the final arbiter for project development.

For projects that have stayed the course through the trial and appellate levels, the courts have largely sided with developers and permitting authorities. This trend, however, has not prevented interest groups, often backed by conservative legal activists, from challenging agency approvals.

Recently, the U.S. Court of Appeals for the First Circuit upheld the dismissal of such a challenge brought against the Vineyard Wind project, which is expected to generate up to 800 megawatts of renewable energy in the Nantucket Sound off the coast of Cape Cod.[1]

Project developers like those backing Vineyard Wind have fared well in the courts largely due to the high degree of deference that courts afford to agency decision making, particularly in cases involving the highly technical and scientific issues that arise in the siting and construction of large-scale wind farms.

Change might be on the horizon for that paradigm, however. Parties on both sides of the debate are watching the U.S. Supreme Court closely, as a ruling in two combined cases challenging long-standing principles of agency deference, Loper Bright Enterprises v. Raimondo and Relentless Inc. v. U.S. Department of Commerce, is expected shortly.

The court's decision could influence the agencies' rulemaking process, how agencies interpret their statutory authority, and the deference that courts apply to those interpretations. In the heavily regulated and litigated realm of offshore wind development, each of those dynamics is in play.

Under existing law, Chevron review, derived from the Supreme Court's 1984 Chevron v. Natural Resources Defense Council decision, requires courts to defer to reasonable agency interpretations of the statutes they administer.[2]

Chevron established a two-part test for deciding when federal courts must defer to agency interpretations of such statutes. First, the court must determine whether Congress spoke to the issue at hand in unambiguous legislation.

If so, agency interpretations of the statute are afforded deference. If not, the court must next determine whether the agency's interpretation is reasonable. Accordingly, unless challengers allege ambiguity in the underlying statute, the court typically will apply the standard "arbitrary and capricious" level of review.

Statutes that play a role in offshore wind permitting, such as the Endangered Species Act, have been the subject of Chevron challenges in the past in other contexts.

While several commentators have speculated on how the Supreme Court will rule in Loper Bright, the general consensus is that unless the court leaves Chevron in place, federal judges will be charged with a more rigorous review of agency decision making.

The two recent First Circuit cases provide examples of how the appellate courts currently review and evaluate approvals of, and challenges to, federal permits for offshore wind projects.

In companion rulings favoring developers and federal agencies, the First Circuit affirmed summary judgment rulings issued by the district court and dismissed challenges brought by two Vineyard Wind opponents concerning the project's potential impact on the endangered North Atlantic right whale.

In both appeals, a panel of the same three judges addressed challenges to the administrative procedures followed by the National Marine Fisheries Service, or the NMFS, and the Bureau of Ocean Energy Management, or the BOEM, in issuing a biological opinion and an incidental harassment authorization for the project, as it applied to right whales.

In two decisions authored by U.S. Circuit Judge William Kayatta analyzing aspects of the federal permit approval process, the court ruled that the agencies properly evaluated potential impacts on the right whale, and did not violate the authorizing statutes or otherwise act arbitrarily or capriciously when considering permit applications.

The Endangered Species Act 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.[3] The plaintiffs alleged that NMFS' biological opinion was invalid because it failed to cite to a particular report that highlighted the growing importance of the regional waters where the project is to be sited for the right whales' survival.

While not every available report must be incorporated into the agencies' analysis, the NMFS and the 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 did not cite to the specific report in their analysis, they did discuss the phenomenon of regional waters by reference to other reports and, as a result, the court found the biological opinion valid.

In conjunction with the biological opinion, the Marine Mammal Protection Act, requires the NMFS to issue an incidental harassment authorization. The Marine Mammal Protection Act calls for prohibitions on so-called takings and harassment of marine mammals.[4]

The plaintiffs challenged the validity of the incidental harassment authorization on the grounds that the 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 incidental harassment authorization specifically allows only for the nonlethal harassment of the whales, such as increased acoustic levels as a result of pile-driving activities, but not a lethal taking of the endangered species.

The court found that the NMFS' use of a proportional method to determine how many right whales could be affected was sufficient when issuing an incidental harassment authorization, because the method had been accepted previously.

Once the 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, the BOEM must also issue an environmental impact statement, or EIS, under the National Environmental Policy Act.

Part of the EIS process involves reviewing the biological opinion issued by NMFS.

In this case, the 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 incidental harassment authorization from the NMFS, the court found that the BOEM properly considered all relevant and available information when issuing its EIS.

Throughout both appellate opinions, as well as the opinions of the lower court on summary judgment, the court emphasized the completeness of the administrative record and the deference traditionally granted to administrative agencies when considering technical and scientific matters within their areas of expertise.

In light of the courts' narrow standard of review under the Administrative Procedures Act, and the high bar for vacating agency decisions, even if a court could find evidence in the record that undermines an administrative decision, it cannot substitute its judgment for that of the agency if the evidence in the record supports the agency's decision.

These decisions will likely set a strong precedent in future lawsuits that seek to challenge the approval of offshore wind projects, at least under the current standards of judicial review of agency-permitting decisions.

The plaintiffs brought a similar challenge in a case recently filed in the U.S. District Court for the District of Columbia 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's approval is invalid due to alleged violations of the Endangered Species Act and the potential impacts the project may have on the right whale.[5]

In their opposition to the plaintiffs' claims, the federal agencies highlighted a recent ruling involving the Coastal Virginia Offshore Wind project, where the trial court denied the plaintiffs' request for an injunction based on similar alleged impacts to the right whale.[6]

While the statutes and regulations governing the approval process for offshore wind projects will remain constant, at least for the time being, the federal courts' framework for reviewing agencies' decision making based on those rules could be subject to upheaval.

The Supreme Court heard arguments in the Loper Bright cases at the beginning of the year, and a ruling on what could be the future of judicial deference to agency action is expected shortly.

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[1] Nantucket Residents Against Turbines v. U.S. Bureau of Ocean Energy Mgmt. et al., 100 F. 4th 1 (1st Cir. 2024); Melone v. Coit, 100 F. 4th 21 (1st Cir. 2024).

[2] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[3] 50 C.F.R. § 402.14(h)(iv).

[4] 16 U.S.C. §§ 1362(13); 1362(18)(A).

[5] Green Oceans et al. v. U.S. Dep't of the Interior et al., 1:24-cv-00141 (D.D.C. April 30, 2024).

[6] Comm. for a Constructive Tomorrow, et al. v. U.S. Dep't of the Interior, Case No. 1:24-cv-00774 (D.D.C. May 24, 2024).