DC Circuit Affirms Crucial FAA No Hazard Determination for Cape Wind Project

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On January 22, 2014, the DC Circuit upheld the Federal Aviation Administration's (FAA) 2012 determination of no hazard, clearing the final FAA hurdle to construction of the 130-wind turbine Cape Wind project in Nantucket Sound.

The $2.6 billion Cape Wind project has drawn considerable attention and controversy as the first offshore wind farm in US waters. Opponents have been eager to see the Cape Wind project killed or relocated and have brought multiple lawsuits, including an unsuccessful challenge under state environmental law and current litigation in federal court over claimed impacts on cultural resources, alleging harm to views of Nantucket Sound important in Native American rituals. After four rounds of FAA determinations of no hazard (DNHs) and two appellate challenges, the multi-year obstruction review process has finally been resolved – concluding that the proposed turbines would not be a hazard to air navigation. The multiple challenges have delayed the controversial project by more than 13 years.

In 2011 the DC Circuit vacated and remanded the FAA's prior DNHs, finding that the FAA failed to follow its own handbook in determining whether the proposed turbines would have a "substantial adverse effect" on air navigation (See prior Client Alert)[1]. This decision gave significant weight to the FAA's own internal guidance, even though the FAA argued that the handbook "largely consists of criteria rather than rules to follow." Although the court agreed with the FAA on the point, it nevertheless noted that "any sensible reading of the handbook... would indicate that there is more than one way in which the wind farm can pose a hazard" and faulted the FAA for abandoning its own established procedure and catapulting "over the real issues and analytical work required by its handbook."

In 2012, after reevaluation, the FAA (for the fourth time) issued DNHs, finding that the turbines would have no adverse effect on air navigation. The Town of Barnstable filed its second judicial appeal of the FAA DNHs.

On January 22, 2014, the DC Circuit, in a unanimous decision, sided with the FAA and affirmed the FAA's determination. In this decision the court showed considerable deference to the FAA, which this time

[1] DC Circuit Vacates Crucial FAA Determinations for Cape Wind Project at http://www.pillsburylaw.com/publications/dc-circuit-vacates-crucial-faa-determinations-for-cape-wind-project

backed its determinations with multiple studies. The court concluded that "multiple studies of record analyzing the anticipated impact of wind turbines on the radar systems in Nantucket Sound and on radar in general support the FAA's findings that the wind turbines will neither 'have physical or electromagnetic radiation effect on' nor 'cause electromagnetic interference to air navigation.'"

The court held that the FAA, in this situation, was not required to assess the environmental impacts of its no hazard determination because National Environmental Policy Act's (NEPA) "rule of reason" does not require the FAA to prepare an environmental impact statement because it would "serve no purpose" due to the non-binding nature of Part 77 decisions.

A final procedural note: the DC Circuit found the Town of Barnstable had standing due to potential injury given the location of the town and its concerns that the wind farm would adversely affect noise or traffic, or degrade views or coastal areas. Accordingly, the court dismissed intervener Cape Wind Associates' challenges to petitioners' standing to raise the NEPA objections as unpersuasive.

Despite this legal victory, the Cape Wind project is still plagued with lawsuits as opponents of the Cape Wind project filed another suit on Jan. 21, 2014, this time alleging the state discriminated against out-of-state power companies and that state regulators exceeded their authority in setting wholesale rates for the contract. Nonetheless, this latest DC Circuit decision re-affirms that when the FAA does its homework and supports its hazard determinations with studies in record evidence, courts are highly likely to defer under *Chevron* and uphold the agency decision[2].

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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