

Locke Lord QuickStudy: Offshore Win(d): D.C. Circuit Dismisses Challenge to BOEM Leasing Program

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On May 20, 2021, the D.C. Circuit affirmed a U.S. District Court ruling dismissing an appeal brought by the Fisheries Survival Fund, Garden State Seafood Association and seaside municipalities (“Appellants”) challenging the Bureau of Ocean Energy Management’s (“BOEM”) decision to issue an offshore lease for a wind energy facility off the coast of New York. Although the dismissal was purely on procedural grounds, in this case those procedures represent the very framework of BOEM’s offshore wind leasing process. Thus, the dismissal represents an important validation of the BOEM process, providing certainty to future lease applicants while insulating holders of already-issued leases against similar procedure-based challenges that might have been brought against other projects.

History of the Dispute

In 2016, BOEM issued a lease of a portion of the continental shelf to Equinor Wind US LLC (“Equinor”) for the development of an offshore wind farm. The lease authorizes Equinor to prepare and submit a Site Assessment Plan (“SAP”) and a Construction and Operation Plan (“COP”) for its project, but allows BOEM to preclude further development of the leased area until BOEM formally approves the SAP or COP submitted by Equinor.

BOEM did not prepare an environmental impact statement (“EIS”) under the National Environmental Policy Act (“NEPA”) prior to issuing the lease to Equinor. The Appellants have argued throughout the proceeding that BOEM’s lease award represented a significant enough step in the development process that it triggered BOEM’s obligations to conduct a NEPA review. The Appellants appealed the issuance of the lease under both NEPA and the Outer Continental Shelf Lands Act (“OCSLA”), claiming BOEM’s lease award amounted to a proposed development plan for Equinor’s future wind energy facility. The Appellants based their arguments on the significant financial commitment made by Equinor in the bidding process, as well as subsequent actions taken by certain states and third parties entering into agreements in anticipation of the wind farm’s construction.

BOEM disagreed with the Appellants’ position, arguing that the NEPA and OSCLA environmental review requirements are not triggered until it considers a proposed development plan, as BOEM has the discretion to deny the proposed plan. BOEM likewise rejected the Appellant’s suggestion that it failed to consider the manner in which the lease award and future project development impacted the environment. BOEM argued that the Appellants had ample opportunity to participate throughout the leasing process, and that it will continue to seek

stakeholder input throughout the process.

Basis for the Decision

The D.C. Circuit agreed with BOEM, rejecting the Appellants' NEPA claim as unripe and their OCSLA claim as defective. With respect to the NEPA claim, the court noted that an agency's NEPA obligations apply only when it reaches a critical point in the decision process that will result in "irreversible and irretrievable commitments of resources" to an action. The court cited established precedent that issuance of an energy lease does not meet that threshold if the lease "reserves both the authority to preclude all activities pending submission of site-specific proposals and the authority to prevent proposed activities if the environmental consequences are unacceptable." The Equinor lease specifically reserves the authority to preclude and prevent all activities pending submission of a SAP and a COP, each of which BOEM has the discretion to accept or reject. Likewise, the court observed that investments and actions of Equinor, states and third parties based on an expectation of ultimate approval do not obligate BOEM to issue such approval, and therefore do not constitute an irretrievable commitment of resources. Thus, the D.C. Circuit concluded that the issuance of the lease itself did not trigger BOEM's NEPA obligation.

With respect to the OCSLA claims, the court noted that OCSLA requires plaintiffs to provide 60 days' notice of an alleged violation prior to commencing legal action, while the Appellants waited just seven days, making their claims unripe. The Appellants argued that OCSLA provides an exception to the 60 day notice requirement when the alleged violation would immediately affect the legal interest of the plaintiff, but the D.C. Circuit rejected that argument on the same factual basis as the NEPA claim – the issuance of the lease itself did not authorize any activity other than submission of a SAP and COP. Accordingly, the D.C. Circuit found all of the Appellants' claims to be without merit.

A Win for Offshore Wind

The D.C. Circuit's decision is significant for BOEM and the offshore wind industry. It validates the process established by BOEM for offshore wind leasing, which defers the NEPA analysis until after the SAP or COP have been submitted. Conducting a NEPA analysis is both extremely costly and time-consuming. Requiring it to be undertaken prior to issuance of a lease would have imposed a significant burden on BOEM and lease applicants. Moreover, it would require analysis of a hypothetical project and range of alternatives that might bear little resemblance to the project that would ultimately be developed on the lease. Significant time and money would therefore be spent that would result in an incomplete assessment of the impacts and would potentially need to be repeated once a proposed project had been designed.

In addition to providing certainty regarding BOEM's process and the Equinor lease, the D.C. Circuit's decision validates previous leases that BOEM has issued to other offshore wind developers. It also provides important clarity to developers of offshore wind projects as well as interested stakeholders regarding the offshore wind leasing process and when in that process the comprehensive assessment of environmental impacts mandated by NEPA will occur. Offshore wind developers should be mindful, however, that BOEM does indeed retain discretion to deny easements or approval of a SAP or COP, which in and of themselves require a substantial investment of time and resources, on the basis of its evaluation of the environmental impacts of the proposed project.

For further information on the requirements of the BOEM regulations or questions regarding the offshore wind

development process, please contact the author.

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