

October 19, 2021

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Re: 60-day Notice of Intent to Sue

Dear Secretary Haaland, Secretary Raimondo, Secretary Wormuth, Director Lefton, Administrator Spinrad, Acting Assistant Secretary Pinkham, Attorneys General, and Mr. Pedersen:

In its haste to implement a massive new program to generate electrical energy by constructing thousands of turbine towers up and down the eastern seaboard and laying hundreds of miles of high-tension electrical cables undersea, the United States has shortcut the statutory and regulatory requirements that were enacted to protect our nation's environmental and natural resources, its industries, and its people.

The purpose of this letter is to bring to your attention the violations of law committed by the federal agencies in the course of approving the lease, easement, and Construction and Operations Plan for the Vineyard Wind 1 Project ("the Project"), with emphasis on the injuries those violations of law will cause to our nation's fishing industry, those who rely on it for their livelihood (both onshore and on the open sea), and the finfish, shellfish, and marine mammals that live in the thousands of square miles slated to be transformed into offshore wind farms in the near future.

Should these statutory and regulatory violations not be remedied within the next 60 days, Responsible Offshore Development Alliance (the "Alliance") and its members will file suit under the citizens' suit provisions of the Outer Continental Shelf Lands Act, Clean Water Act, and Endangered Species Act (as well as other relevant statutes) to require your departments and agencies to comply with their legal obligations.

The Vineyard Wind 1 Project

On July 15, 2021, the Secretary of Interior, acting through the Bureau of Ocean Energy Management (the "Bureau"), approved Vineyard Wind 1 LLC's ("Vineyard Wind") Construction and Operations Plan for an offshore renewable energy project off the coasts of Massachusetts and Rhode Island, authorizing the construction of up to 84 turbine towers covering 65,296 acres of seabed.¹ That same day, the Bureau also granted Vineyard Wind an easement to construct 23 miles of high-tension electrical cable to carry power from the turbines to an electrical substation to be constructed in Barnstable, Massachusetts.²

¹ Bureau of Ocean Energy Management Approval of Vineyard Wind 1 LLC Construction and Operations Plan ("Approval Letter") (July 15, 2021), available at <https://www.boem.gov/vineyard-wind>.

² *Id.*

Throughout the process the Alliance has provided thoughtful analysis and suggestions to lessen the adverse impact of the Project on the fishing industry and the marine environment but, to our dismay, our comments and proposals have gone mostly unacknowledged by your departments and agencies as they rush to approve the Project. Consequently, the Project, as approved, fails not only to protect the fishing industry and the environment, but also falls far short of the statutory and regulatory provisions enacted to protect these and related national interests.

The Record of Decision for the Project was issued May 10, 2021.³ The administrative record for this final agency action also includes the Final Environmental Impact Statement,⁴ the Section 404 Clean Water Act permit,⁵ the Biological Opinion,⁶ and the Incidental Harassment Authorization.⁷

The Project, in turn, is only the first of a score of enormous offshore wind facilities that the Government has permitted under its plan to produce 30,000 megawatts of wind energy by 2030, covering millions of acres of ocean.⁸ Each of the thousands of turbines will stand at least 837 feet tall above the ocean surface, and require up to 2,500 square meters of scour protection at each turbine foundation in the ocean's floor, and require additional materials with regard to cable protection, electric substations, and more.⁹ While the Alliance and its members do not oppose responsible offshore development, they believe that turbine tower and associated infrastructure construction should not take precedence over other ocean resources and activities—including commercial fishing, navigation, and the marine physical, biological, and ecological environment, which the law protects.

³ Record of Decision (May 10, 2021), available at <https://www.boem.gov/vineyard-wind>.

⁴ Bureau of Ocean Energy Management, Vineyard Wind 1 Offshore Wind Energy Project Final Environmental Impact Statement (March 12, 2021), available at <https://www.boem.gov/vineyard-wind>.

⁵ See Record of Decision at 30.

⁶ National Marine Fisheries Service, Final Biological Opinion (Sept. 11, 2020), available at <https://www.boem.gov/renewable-energy/state-activities/consultation-documents-associated-vineyard-wind-construction-and>.

⁷ National Marine Fisheries Service, Incidental Harassment Authorization (June 25, 2021), available at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-vineyard-wind-1-llc-construction-vineyard-wind-offshore-wind>.

⁸ *Tackling the Climate Crisis at Home and Abroad*, Exec. Order 14008, 86 Fed. Reg. 7619, 7624 (Jan. 27, 2021).

⁹ See Vineyard Wind 1 Construction and Operations Plan, Section 3.0, available at <https://www.boem.gov/renewable-energy/state-activities/vineyard-wind-construction-and-operations-plan-cop-volume-i>.

The Responsible Offshore Development Alliance

The Alliance is a membership-based coalition of fishing industry associations and fishing companies with an interest in improving the compatibility of new offshore development with their businesses.¹⁰ The Alliance's Board of Directors consists of representatives of commercial fishing businesses and vessels from federally and state-permitted Atlantic fisheries from North Carolina to Maine.¹¹ The Alliance's membership includes major Atlantic fishing associations, dealers, seafood processors, and affiliated businesses, in addition to over 120 vessels across nine states operating in approximately 30 fisheries.¹² The Alliance does not advocate for or represent any one fishery; rather, it actively endorses only those positions that are common among commercial fishing industry participants.¹³ The Alliance also offers a platform for gathering input from a broad range of fishery representatives when multiple viewpoints exist.¹⁴

Statutory violations

1. The Secretary of Interior's and the Bureau's violations of the Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act declares that "the policy of the United States . . . shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected."¹⁵

In approving the Construction and Operations Plan and easement for the Project, the Secretary of Interior violated this provision and will seriously obstruct navigation and fishing within and around the Project area during its construction, operation, and decommissioning over the 25-year term of the lease.¹⁶ Despite the requests of the Alliance and other commenters, the Secretary of Interior and the Bureau failed to require

¹⁰ Responsible Offshore Development Alliance, *About Us* (last visited Oct. 4, 2021), <https://rodafisheries.org/who-we-are/>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 43 U.S.C. § 1332(2).

¹⁶ *See supra* note 3, Record of Decision at 39 ("While Vineyard Wind is not authorized to prevent free access to the entire wind development area, due to the placement of the turbines it is likely that the entire 75,614 acre area will be abandoned by commercial fisheries due to difficulties with navigation.").

Vineyard Wind to design, construct, and operate the Project to accommodate the needs of fishermen and others navigating the area, impairing the fishing industry and endangering navigation, particularly during poor weather conditions, at night, and in instances of equipment failure.¹⁷

1.1 Failure to ensure a fair return under Section 1337(p)(2)(a) and (p)(4)(H)

Section 1337(p)(2)(a) of the Outer Continental Shelf Lands Act requires that, in granting a lease, easement or right-of-way for offshore wind energy production: “The Secretary shall establish royalties, fees, rentals, bonuses, or other payments to ensure a fair return to the United States for any lease, easement, or right-of-way granted under this subsection.”¹⁸ Section 1337(p)(4)(H) similarly requires that “the Secretary shall ensure . . . a fair return to the United States for any lease, easement, or right-of-way under this subsection[.]”¹⁹

The Secretary of Interior has violated these provisions, by granting to Vineyard Wind a 65,296-acre annual lease for only \$195,888 (\$3/acre).²⁰ The Secretary of Interior has also violated these provisions by requiring only \$17,155 for the Project easement that is 3,592 acres (approximately \$5/acre).²¹ Simply put, Vineyard Wind will be allowed to generate 800 megawatts of electricity, a \$2.3 billion project.²² In the entire 30 years (the lifetime of the Project), the United States will have received less than \$3.5 million for the Project, which is merely .15% of the \$2.3 billion Project, despite the substantial public financial and environmental resources upon which it relies.

¹⁷ See *id.*; see also Final Environmental Impact Statement at 313 (“Impacts on navigation and vessel traffic would be moderate, lasting only as long as severe storms or repair or remediation activities necessary . . .”).

¹⁸ 43 U.S.C. § 1337(p)(2)(A).

¹⁹ 43 U.S.C. § 1337(p)(4)(H).

²⁰ U.S. Bureau of Ocean Energy Management Approval Letter at A-2.

²¹ *Id.* at D-4.

²² Nichola Groom, *Vineyard Wind secures \$2.3 bln loan, allowing construction to start*, Thomson Reuters (Sept. 15, 2021), available at <https://www.reuters.com/business/energy/vineyard-wind-secures-23-bln-loan-allowing-construction-start-2021-09-15/>.

In sharp contrast, in oil and gas leases, also subject to the Outer Continental Shelf Lands Act, the United States requires royalties be paid to it from the production of wells.²³ Here, there is no such arrangement.

1.2 Failure to ensure that activities will be carried out safely under Section 1337(p)(4)(A)

The Secretary of Interior has violated this provision of the Outer Continental Shelf Lands Act by approving a design for the Vineyard Wind 1 Project that imperils working fishermen and other vessels operating in the Project area.

For most fisheries and gear types found in the area, 1x1 nautical mile spacing between turbines is too narrowly spaced to conduct fishing operations, as the Bureau was made aware.²⁴ Nor is the justification of a 1x1 gridded turbine placement correct in at least two ways.²⁵ One, the analysis fails to use the U.S. Coast Guard's own guidance for Closest Point of Approach for a fixed hazard.²⁶ Second, in using this alternative methodology to calculate adequate spacing between fixed hazards, the calculations fail to include an United Nations Convention on the Law of the Seas Safety Zone (of 500m) on each side of the "transit lane."²⁷

The risk to fishing vessels' safety is too high to operate within the wind energy area.²⁸ Unlike service vessels, fishing vessels cannot safely transit within a grid layout

²³ See U.S. Dep't of Interior, *Natural Resources Revenue Data* (last visited Oct. 5, 2021), available at <https://revenuedata.doi.gov/how-revenue-works/offshore-oil-gas/>; see e.g., Thomson Reuters, *U.S. lawmakers ask Interior to cut offshore oil royalty rates due to market slump* (Mar. 20, 2020), available at <https://www.reuters.com/article/us-global-oil-usa-royalties/u-s-lawmakers-ask-interior-to-cut-offshore-oil-royalty-rates-due-to-market-slump-idUSKBN2173GO> ("There is a 12.5% royalty rate for leases in water depths of less than 200 meters and a royalty rate of 18.75% for all other leases.").

²⁴ See Responsible Offshore Development Alliance, *Comments on Supplement to Draft Environmental Impact Statement* at 12-13 (July 27, 2020).

²⁵ See *id.* at 14.

²⁶ *Id.*

²⁷ *Id.* There are also other errors identified in the Alliance's, Dr. Sproul's, and others' comments submitted on the draft Massachusetts and Rhode Island Port Access Route Study, and yet the agency's final version of the study failed to address any of those errors or provide an explanation as to why no corrections were made in the responses to comments section. See *id.*

²⁸ Responsible Offshore Development Alliance, *Comments on Port Access Route Study: The Areas Offshore of Massachusetts and Rhode Island* at 3 (Mar. 16, 2020), available at

with the 1x1 spacing.²⁹ The 1x1 is too narrow to operate most fishing gear, including most mobile gear that is towed behind a boat. If a vessel is transiting through an array (i.e. without gear deployed), the vessel needs a four mile-wide transit lane overlaid on the 1x1 grid.³⁰ Insufficient spacing for transit through a turbine array force fishing vessels to transit around wind energy areas, regardless of the weather conditions.³¹ This will result in greatly increased transit time, increased fuel use, lost fisheries yield, and safety risks (including forcing foul weather transit across shoals, which are normally avoided, and bottlenecks in zones deemed safe for transit) due to vessels being rerouted by the existence of wind energy areas.³² Many fishing vessels frequently make active trips averaging 5-10 days in length.³³ Some fisheries operate on a “days at sea” management regime, which means that, once they commence a trip, they have a running clock when they are allowed to catch fish. More transit means less fishing for these fisheries.³⁴ The nature of these trips, and of the work of fishing, will lead to significant crew fatigue.³⁵ Insufficient spacing directly increases the risk to fishermen’s safety when transiting during poor weather conditions—strong winds and high seas.³⁶ Fishing vessels may fish until they are forced to return home because of weather and are distinctly different to service vessels, which cannot service turbines in poor weather conditions and are less likely to be deployed in those conditions.³⁷

Search and rescue paths are not ensured. Because predominant wind patterns include summer winds tending to blow from the southwest and winter winds from the northwest, a drifting boat in need of rescue would likely need to be searched for along the

<https://rodafisheries.org/wp-content/uploads/2020/07/200727-RODA-VW-SEIS-w-appendices.pdf>.

²⁹ *Id.*

³⁰ *Id.*; see also Responsible Offshore Development Alliance, *Proposal for New England wine energy project layout with transit lanes for safe passage of vessels* (Jan. 3, 2020), available at https://rodafisheries.org/wp-content/uploads/2020/01/200103-MA_RI-layout-proposal.pdf.

³¹ Responsible Offshore Development Alliance, *Comments on Port Access Route Study: The Areas Offshore of Massachusetts and Rhode Island* at 4 (Mar. 16, 2020), available at <https://rodafisheries.org/wp-content/uploads/2020/07/200727-RODA-VW-SEIS-w-appendices.pdf>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

diagonal.³⁸ Expanding the diagonal spacing to 1.0 nautical mile would require 1.41 nautical mile grid spacing.³⁹ The Coast Guard's search and rescue operations would be limited, that is to conduct search and rescue operations safely the Coast Guard would be limited to the diagonal only in the straight east-west and north-south corridors.⁴⁰ In the most heavily transited direction, the Coast Guard would not have the straightaway needed for effective rescues.⁴¹

Further, the Bureau's consultation with the Federal Aviation Administration stated it assessed radar impacts. However, the Federal Aviation Administration states it only assessed whether the height of fixed structure poses a threat to airspace use and any antenna and frequency transmission, not any radar interference.⁴²

The effect that ice buildup on turbine blades may have on safe passage around a turbine was not considered.⁴³ Ice buildup on the turbines is a known issue for wind energy areas in cold climates.⁴⁴ Rime icing is also a major concern for wind turbines, and once temperatures rise, the ice is likely to dislodge from the blades.⁴⁵ Layouts with minimal spacing between turbines increase the risk to transiting vessels from falling ice.⁴⁶ The distance from the turbine that the ice can travel varies, dependent on whether the blades are active or locked down.⁴⁷ Some of the additional factors affecting the distance travelled include the rotor diameter, hub height, size of the ice fragment, rotor position,

³⁸ *Id.* Appendix 1, Thomas Sproul, Ph.D., *Comments on Draft Massachusetts and Rhode Island Port Access Route Study* (Mar. 16, 2020).

³⁹ *Id.* at 6.

⁴⁰ Final Environmental Impact Statement at ES-8 n. 6.

⁴¹ Responsible Offshore Development Alliance, *Comments on Port Access Route Study: The Areas Offshore of Massachusetts and Rhode Island* at 6 (Mar. 16, 2020), available at <https://rodafisheries.org/wp-content/uploads/2020/07/200727-RODA-VW-SEIS-w-appendices.pdf>.

⁴² *See e.g.*, Federal Aviation Administration Form 7460-1, available at https://www.faa.gov/documentLibrary/media/Form/FAA_Form_7460-1_042023.pdf.

⁴³ Responsible Offshore Development Alliance, *Comments on Port Access Route Study: The Areas Offshore of Massachusetts and Rhode Island* at 14 (Mar. 16, 2020), available at <https://rodafisheries.org/wp-content/uploads/2020/07/200727-RODA-VW-SEIS-w-appendices.pdf>. Problems with radar interference is discussed further in Section 1.6 and the effect on safety.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

and wind speed.⁴⁸ The Government failed to ensure that recommended turbine spacing maintains a high level of safety, year-round, for vessels operating in proximity to wind energy areas, abdicating its oversight role by only stating that “evaluat[ing] the potential for icing events and develop[ing] both predictive and operational strategies . . . is the basic responsibility of a prudent operator and its state regulator (i.e., public utilities commission).”⁴⁹

The threat to safety from infrastructure placement is ignored for mobile gear vessels. “Fisheries that use bottom trawls and dredge may find it challenging to deploy gear, maneuver, and fish in the [wind development area] or along the [Offshore Export Cable Corridor] where cable protection measures have been deployed.”⁵⁰ These vessels must navigate around existing hangs to avoid snags on the seafloor, such as large rocks and shipwreck debris. Introduction of the additional hangs via the infrastructure required for the Project, including so-called “scour protection” around the base of the wind platforms, makes navigation particularly dangerous for bottom trawl vessels. Thus, “the chance of snagging mobile gear on Project infrastructure is much greater than if—in the case of fixed gear—gear were set on the infrastructure or waves or currents pushed the gear into the infrastructure.”⁵¹

Electric cables are also among the infrastructure required for the Project. “Protections placed over cables or around foundations of turbines and electric service platforms may catch or entangle fishing gear.”⁵² Those cables are not only located within the Wind Development Zone, but also to and from the coast and the Zone. While those cables could initially be buried under the ocean floor, composed primarily of cobble, boulder, and other substrate than just high energy sand, burial in such a dynamic environment is necessarily short-lived. The Army Corps has stated that, if the cables cannot be buried, rocks can be placed on the cables.⁵³ Over time, cables will become

⁴⁸ *Id.*

⁴⁹ Letter from A. Lefton to Responsible Offshore Development Alliance (Aug. 6, 2021), available at https://rodafisheries.org/wp-content/uploads/2021/08/RODA-Response-April-2021_Final_08092021-1.pdf.

⁵⁰ Vineyard Wind 1 Offshore Wind Energy Project Supplement to Draft Environmental Impact Statement at 3-183.

⁵¹ Draft Environmental Impact Statement at 3-96.

⁵² Supplement to Draft at 3-183.

⁵³ Record of Decision at 37.

exposed, with substantial danger to both the vessels and their occupants likely to result from contact between vessels constructed mostly of metal and these electrified cables.⁵⁴

Likewise, the process of boulder relocation and clearing of other objects of the ocean floor introduces additional safety concerns. This practice of relocating existing hangs to new locations on the seafloor without any requirement to inform vessels of the change or update existing navigational charts is reckless.

1.3 Failure to protect the environment under Section 1337(p)(4)(B)

Given that vessel strikes are a common source of injury or mortality to cetaceans, vessel traffic associated with the Project has the potential to pose a high-frequency, high-exposure collision risk to marine mammals especially the North Atlantic Right Whale,⁵⁵ other baleen whales, and calves that spend considerably more time at or near the ocean surface.⁵⁶ The agencies have overlooked the impact on the environment, including coastal habitats, benthic resources, finfish, invertebrates, essential fish habitat, sea turtles, and marine mammals, by concluding that the impacts are negligible to moderate and even just moderate.

However, a total of approximately 122 vessel round trips, approximately five round trips per month, are anticipated over the two-year construction schedule.⁵⁷ At the peak of project construction from 2022 to 2023, up to 230 vessels associated with offshore wind development along the east coast may be operating in the area.⁵⁸ And, cumulatively, there could be thousands of vessels a year for all the offshore wind projects on the East Coast.⁵⁹ Vineyard Wind stated that the components, as well as offshore export cables, would be shipped from overseas ports, either directly to the Project area or through a U.S. port.⁶⁰

⁵⁴ Bloomberg, *Wind Power Giant's Profit Hit by Rocks on the Seabed* (Apr. 29, 2021), available at <https://www.bloomberg.com/news/articles/2021-04-29/wind-power-giant-s-profit-hit-by-rocks-on-the-seabed>.

⁵⁵ See *infra* Section 3.3.

⁵⁶ Final Environmental Impact Statement at 1-164 (March 2021).

⁵⁷ *Id.*

⁵⁸ *Id.* at 3-106.

⁵⁹ See U.S. Bureau of Ocean Energy Management, *Atlantic OCS Renewable Energy-Massachusetts to South Carolina* (Aug. 13, 2021), available at <https://www.boem.gov/renewable-energy/mapping-and-data/renewable-energy-gis-data>.

⁶⁰ Final Environmental Impact Statement at 3-94.

Pile driving during construction and wind turbine operation emit low frequency noise impacting the North Atlantic Right Whales and other species. Low frequency noise is known to induce behavioral changes and mortality in squid egg, larval, and adult life stages.⁶¹ On a cumulative scale, there is scientific evidence to indicate that these impacts (along with other impact factors) could incur population level effects that the Government neither considered nor mitigated. Additional impact producing factors that will go unmitigated include: lights, heat, electromagnetic forces, sedimentation, siltation, habitat conversion, crushing, shadowing, pressure changes, and wake effect, all of which will impact marine organisms and some will “impact oceanographic and atmospheric conditions including potential changes in ocean stratification.”⁶² Peak sound pressure from pile driving will kill several marine species and generally interfere with their anti-predator alarm responses, further disturbing the marine population in the Project area. Squid require a sandy ocean bottom to grow to maturity. This Project will change that environment to concrete, boulders, and electrified cables, making it uninhabitable by squid. In addition to biological effects, this “conversion of soft sediment habitat to hard bottom via protective cover”⁶³ is likely to have the effect of “generally decreasing trawlable habitat.”⁶⁴

Further, no offshore wind turbine that exists today can survive a Category 3 or greater Atlantic hurricane. Neither the Record of Decision nor the Final Environmental Impact Statement issued on March 12, 2021, examine any safety or engineering issues with respect to the new Haliade-X wind turbines. With all the government regulation in place to ensure the safety of virtually every other product and structure in the United States, here there is none. No engineering reports, no tests, nothing was done to review the structural integrity and safety of the 84 Haliade-X wind turbines relative to the New England marine environment, each of which is the height of the former John Hancock Tower on Clarendon Street. An adverse weather event of a Category 3 or greater hurricane could lead to a catastrophic release of the oil and contaminants from the wind turbine generators, thus causing the take, and possibly jeopardy, of multiple endangered species, and destroying the fishing grounds off the coast of Rhode Island and Massachusetts for generations. With more than 2,000 turbines forecasted for the Northeast and Mid-Atlantic Outer Continental Shelf, a Category 4 or 5 storm could result in an oil spill greater than that of the Exxon Valdez, which was 10 million gallons of

⁶¹ Ian T. Jones et al., *Changes in feeding behavior of longfin squid (*Doryteuthis pealeii*) during laboratory exposure to pile driving noise*, 165 Marine Env’t Rsch. 105250 (2021).

⁶² NOAA Fisheries, North Atlantic Right Whale (last visited Sept. 24, 2021), available at <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>.

⁶³ Final Environmental Impact Statement at 3-219.

⁶⁴ *Id.*

oil.⁶⁵ The evidence is overwhelming that climate change will result in more frequent and more intense tropical storms in the Atlantic Ocean.

Also lacking from the Secretary of Interior's and the Bureau's approval are the effects decommissioning would have on the Project and any protection measures at the decommissioning phase.

1.4 Failure to ensure the prevention of waste under Section 1337(p)(4)(C)

The Secretary of Interior and the Bureau have violated this provision by not considering the decommissioning of the Project. Notably absent from the record is the decommissioning phase and what Vineyard Wind and the Government will do with up to 84 of these enormous turbines, their components, and the other project structures, nor the cumulative impacts of decommissioning each of the projects planned in the geographic region.

1.5 Failure to ensure the conservation of natural resources under Section 1337(p)(4)(D)

The Secretary of Interior and the Bureau have violated this provision by failing to take conservation measures of the North Atlantic Right Whale and fishery habitats. The construction of the Project includes pile driving, the installation of the large turbines, increased presence of vessels, and other activities all of which will injure the North Atlantic Right Whale and fishery habitats as discussed in Sections 1.2, 3.1, and 3.3.

1.6 Failure to ensure the protection of the national security interests under Section 1337(p)(4)(F)

The Secretary of Interior and the Bureau have violated this provision by approving the Project despite the substantial impact the turbines would cause on radars, critical to safety and national security.

The approved plan arbitrarily ignores concerns associated with radar interference. The Department of Defense has repeatedly raised concerns that "radar clutter (i.e. false targets) from the wind turbine blades would seriously impair the agency's ability to

⁶⁵ See e.g., U.S. Bureau of Ocean Energy Management, *Offshore Wind in the US Gulf of Mexico: Regional Economic Modeling and SiteSpecific Analyses*, at 15 (Feb. 2020), available at https://espis.boem.gov/final%20reports/BOEM_2020-018.pdf (noting hurricane survival issues).

detect, monitor, and safely conduct air operations.”⁶⁶ These concerns were not addressed nor did the Bureau consider the dangers of terrorism or foreign vessels coming to the United States while radar interference occurs.

An entire interagency Memorandum of Understanding has created the Wind Turbine Radar Interference Working Group dedicated to identifying mitigation strategies for radar interference.⁶⁷ The Coast Guard has also compiled, studied, and documented a significant amount of information demonstrating marine radar degradation from offshore wind turbines in its review of the Cape Wind project as far back as over a decade ago.⁶⁸ Yet, no accommodations were considered or made in the Project to protect against or mitigate this known risk.

1.7 Failure to prevent the interference with reasonable uses of the exclusive zone, the high seas, and the territorial seas and consider fisheries under Section 1337(p)(4)(I) and Section 1337(p)(4)(J)

The Secretary of Interior and the Bureau have violated these provisions by failing to prevent interference with commercial fisheries’ use of the Outer Continental Shelf and failing to consider fisheries. The impact on fisheries is major, as the Final Environmental Impact Statement and the Record of Decision acknowledge.⁶⁹ Because of the Project, fisheries will lose their fishing grounds, there will be longer transits to avoid impact with the turbines, and fisheries will be unable to maneuver in the wind development area. The disruption in fishing grounds will increase operating costs for vessels, increase safety risk, and lower revenue.

⁶⁶ Responsible Offshore Development Alliance, *Comments on Draft Environmental Impact Statement*, at 15-16 (Feb. 22, 2019). Similar concerns have been expressed by the National Security Council and by several European countries with existing wind arrays. See Sandia National Laboratories, *IFT&E Industry Report: Wind Turbine-Radar Interference Test Summary*, SAND2014-19003 (Sept. 2014), available at https://www.energy.gov/sites/prod/files/2014/10/f18/IFTE%20Industry%20Report_FINALE.pdf.

⁶⁷ Responsible Offshore Development Alliance, *Comments on Draft Environmental Impact Statement*, at 15 (Feb. 22, 2019).

⁶⁸ *Id.* The Alliance discussed the Coast Guard Study in its comments. See Letter from Responsible Offshore Development Alliance to U.S. Coast Guard (Mar. 16, 2020), available at <https://rodafisheries.org/wp-content/uploads/2020/07/200727-RODA-VW-SEIS-w-appendices.pdf>.

⁶⁹ See Record of Decision at 16; Final Environmental Impact Statement at ES-13.

Offshore wind structures and hard coverage for cables would have long-term impacts on commercial fishing operations and support businesses such as seafood processing. The disruption from cable installation may occur concurrently or sequentially, with similar impacts on commercial fishery resources.⁷⁰ Disruption may result in conflict over other fishing grounds, increased operating costs for vessels, and lower revenue (e.g., if the substituted fishing area is less productive, supports less valuable species, poses greater challenges for minimizing bycatch, or risks increased interactions with protected resources).⁷¹ If vessels must cut a trip short, or if it takes extra time “on the clock” to navigate around the Project because it is unsafe to transit through, the vessel owner and crew will realize a direct financial loss. Once a trip has ended, vessels need to return to port as quickly as possible to sell the freshest product. These reasons limit a vessel’s ability to ride out a storm at sea and are why a vessel prefers the most direct route to their port.

The spacing between wind turbines as provided in the Construction and Operations Plan is insufficient to permit safe passage by bottom trawl and other fishing vessels that must transverse the area. “The location of the proposed infrastructure within the wind development area could impact transit corridors and access to preferred fishing locations.”⁷² Accordingly, “commercial and for-hire recreational fishing fleets may find it more challenging to safely transit to and from homeports as there may be less space for maneuverability and greater risk of allision or collision if there is a loss of steerage.”⁷³

If commercial fisheries experience decreased catch due to the inability to operate in the area or being unsuccessful in finding alternative fishing locations that provide comparable catch and fishing revenue, seafood processors and distributors will see lower volumes and/or quality of product. This will impact other businesses that supply the commercial fishing industry and seafood markets themselves including consumers. And, as discussed further in Section 3.3, disruption of the National Marine Fisheries Stock assessment surveys and in general impacts to the ability to set sustainable fishing quotas interferes with the uses of the area.

Notably, the Secretary of Interior’s and the Bureau’s approval recognizes Vineyard Wind’s multi-million-dollar compensation fund during the lifespan of the Project to compensate some fisheries.⁷⁴ Compensatory funding does not prevent interference with fishing, nor does it accommodate access to healthy, sustainable protein

⁷⁰ Final Environmental Impact Statement at 3-126.

⁷¹ *Id.*

⁷² *Id.* at 3-214.

⁷³ *Id.*

⁷⁴ Approval Letter at 72; *see also* Record of Decision at Appendix A.

or preservation of coastal communities' heritage. The existence and the amount of the fund shows not only that there is an interference of the fishermen's use, but also the gravity of the interference—significant. Moreover, the announced funds do not compensate all impacted fishermen, and even today—months after the Record of Decision—there are insufficient details as to its structure and eligibility that could possibly have informed the Bureau with regard to its outcomes. Also not considered by the Secretary of Interior, was the likelihood that vessels' insurance companies will increase premiums, or not cover claims, for incidents that will likely occur within the Project area.

Ultimately, fisheries will have to abandon the Project area, as the Army Corps recognized in the Record of Decision.⁷⁵ Despite the comments and data available regarding the significant losses fisheries will suffer, the Secretary of Interior and the Bureau approved the Project at the expense of fisheries.

1.8 Failure to ensure public notice and comment on the easement issued under Section 1337(p)(4)(K)

The Secretary of Interior and the Bureau have violated this provision because absent from the administrative record is any opportunity for the public to comment on the easement the Secretary of Interior and the Bureau issued in conjunction with the approval dated July 15, 2021.

2. The Secretary of the Army and the Army Corps' violation of the Clean Water Act

Section 404(a) of the Clean Water Act authorizes the Secretary of the Army, acting through the Army Corps of Engineers, to issue permits for the discharge of dredged or fill material into navigable waters “after notice and opportunity for public hearings.”⁷⁶ By deciding to issue a permit for the massive discharge of dredge and fill material onto the ocean floor for the Project, the Secretary of the Army, acting through the Corps of Engineers, has violated the Clean Water Act and its applicable regulations in multiple respects.

⁷⁵ Record of Decision at 39 (“[D]ue to the placement of the turbines it is likely that the entire 75,614 acre area will be abandoned by commercial fisheries due to difficulties with navigation.”).

⁷⁶ 33 U.S.C. § 1344(a).

2.1 Unacceptable adverse impacts

The Secretary of the Army and the Corps have violated the requirement that “dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.”⁷⁷ Applicable regulations specifically identify significant losses or damage to fisheries or shellfishing as unacceptable adverse impacts that preclude the issuance of a Section 404 permit:

Unacceptable adverse effect means impact on an aquatic or wetland ecosystem which is likely to result in . . . significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas. In evaluating the unacceptability of such impacts, consideration should be given to the relevant portions of the section 404(b)(1) guidelines.⁷⁸

Here, as more fully detailed in the Section 1, the impact of the Project on fisheries and shellfish is significant. The Army Corps violated the Clean Water Act by allowing significant losses or damages to fisheries. The millions of dollars in compensation funds also demonstrates that there will be devastating losses and significant damage to fisheries.

In making permitting decisions, the Corps must follow Clean Water Act regulations, which require that “dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.”⁷⁹

2.2 The Secretary of the Army and the Corps failed to analyze practicable alternatives to the Project

The regulations prohibit the Army Corps from granting a Section 404 permit if there is a practicable alternative: “[N]o discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.”⁸⁰ For purposes of this regulation,

⁷⁷ 40 C.F.R. § 230.1(c).

⁷⁸ *Id.* § 231.2(e).

⁷⁹ *Id.* § 230.1(c).

⁸⁰ *Id.* § 230.10(a).

“practicable alternative” is defined as “[a]ctivities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters,”⁸¹ and

an alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.⁸²

Under the regulatory definitions, there are numerous practicable alternatives to offshore wind production that do not require discharges of dredge or fill material into navigable waters. These include not only traditional fossil fuel plants such as natural gas and coal, nuclear plants, but perhaps more importantly other forms of renewable energy such as onshore wind turbines and solar panels and efforts to improve energy efficiency. The record does not indicate that the Secretary of the Army or the Corps gave any consideration to these practicable alternatives, none of which require discharge of pollutants into navigable waters.

2.3 The production of electricity is not a water-dependent activity

Under Clean Water Act regulations, where an activity is not water dependent:

[P]racticable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.⁸³

Since the production of electricity, renewable or otherwise, is not a water-dependent activity (e.g., land-based wind and solar projects), the Secretary of the Army and the Corps violated this regulatory requirement by failing to demonstrate that no practicable alternative exists for the production of electricity, renewable or otherwise, that did not require discharge of dredge or fill material into a special aquatic site.

⁸¹ *Id.* § 230.10(a)(1)(i).

⁸² *Id.* § 230.10(a)(2).

⁸³ *Id.* § 230.10(a)(3).

2.4 Failure to consider cumulative effects

Before issuing a Section 404 permit, the Secretary of the Army and the Corps “shall collect information and solicit information from other sources about the cumulative impacts on the aquatic ecosystem. This information shall be documented and considered during the decision-making process concerning the evaluation of individual permit applications, the issuance of a General permit, and monitoring and enforcement of existing permits.”⁸⁴

To comply with Clean Water Act regulations, the “cumulative impacts analysis must include:

- (1) [T]he area in which the effects of the proposed project will be felt;
- (2) [T]he impacts that are expected in that area from the proposed project;
- (3) [O]ther actions - past, present, and reasonably foreseeable proposed - that have had or are expected to have impacts in the same area;
- (4) [T]he impacts or expected impacts from these actions; and
- (5) [T]he overall impact that can be expected if the individual impacts are allowed to accumulate.⁸⁵

In issuing the Section 404 permit for the Project, the Secretary of the Army and the Corps failed to gather or consider information about the cumulative effects of the multiple offshore wind projects that the Government has announced for the East Coast (not to mention West Coast) of the United States:

The Secretary of the Interior shall review siting and permitting processes on public lands and in offshore waters to identify to the Task Force steps that can be taken, consistent with applicable law, to increase renewable energy production on those lands and in those waters, with the goal of doubling offshore wind by 2030 while ensuring robust protection for our lands, waters, and biodiversity and creating good jobs.⁸⁶

Further, on March 29, 2021, the White House announced its goals for offshore wind:

⁸⁴ *Id.* § 230.11(g).

⁸⁵ *Ga. River Network v. U.S. Army Corps of Eng’rs*, 334 F. Supp. 2d 1329, 1341 (S.D. Ga. Mar. 19, 2012), *aff’d*, 517 F. App’x 699 (11th Cir. 2013).

⁸⁶ *Tackling the Climate Crisis at Home and Abroad*, Exec. Order 14008, 86 Fed. Reg. 7619, 7624 (Jan. 27, 2021).

The Departments of Interior (DOI), Energy (DOE), and Commerce (DOC) are announcing a shared goal to deploy 30 gigawatts (GW) of offshore wind in the United States by 2030, while protecting biodiversity and promoting ocean co-use. . . . It will also generate enough power to meet the demand of more than 10 million American homes for a year. . . . To position the domestic offshore wind industry to meet the 2030 target, DOI's Bureau of Ocean Energy Management (BOEM) plans to advance new lease sales and complete review of at least 16 Construction and Operations Plans (COPs) by 2025, representing more than 19 GW of new clean energy for our nation. . . . Achieving this target also will unlock a pathway to 110 GW by 2050.⁸⁷

As of August 13, 2021, there are 18 approved offshore wind leases along the East Coast, 10 of which are located near the Project, totaling about 1.8 million acres.⁸⁸ This Project alone is authorized to construct and operate up to 84, 8 to 14 MW capacity turbines with blades extending up to 837 feet above mean lower low water to be installed in 100 locations in the Project area.⁸⁹ The Project area consists of 65,296 acres, plus, to export the electricity onshore, there will be a 23.3-mile offshore transmission cable corridor that passes through Nantucket Sound to link the Project to the shoreside transmission grid.⁹⁰ Build out of approximately 1.8 million acres of oceanscape, with similar infrastructure specifications, will undoubtedly cause far reaching impacts beyond the footprint of any single Project. Failure to conduct adequate cumulative analysis violates the Clean Water Act.

2.5 Significant degradation of the waters of the United States

Clean Water Act regulations flatly prohibit the issuance of a Section 404 permit that would result in significant degradation of the waters of the United States—"no discharge of dredged or fill material shall be permitted which will cause or contribute to

⁸⁷ White House: Briefing Room, *Fact Sheet: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs* (Mar. 29, 2021), available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs/?utm_source=link.

⁸⁸ U.S. Bureau of Ocean Energy Management, *Atlantic OCS Renewable Energy-Massachusetts to South Carolina* (Aug. 13, 2021), available at <https://www.boem.gov/renewable-energy/mapping-and-data/renewable-energy-gis-data>.

⁸⁹ See Approval Letter.

⁹⁰ See *id.*

significant degradation of the waters of the United States.”⁹¹ Significant degradation includes:

- (1) Significantly adverse effects of the discharge of pollutants on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites;
- (2) Significantly adverse effects of the discharge of pollutants on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal site through biological, physical, and chemical processes;
- (3) Significantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy⁹²

As described in Section 1 of this Letter, the discharges from the Project will significantly and adversely affect the fishing and shellfish grounds where the turbines, platforms, cables, and associated structures will be located—and these adverse effects will be multiplied as new offshore wind projects accumulate up and down the Atlantic Outer Continental Shelf.

2.6 Failure to mitigate injury to waters of the United States

Clean Water Act regulations flatly prohibit the “discharge of dredged or fill material . . . unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.”⁹³ The Secretary of the Army and the Corps violated this regulatory requirement by failing to mitigate the impacts of the discharge on the aquatic system. The record lacks any discussion on any efforts to improve fisheries, mammals, or achieve no net loss.

⁹¹ 40 C.F.R. § 230.1.

⁹² *Id.* § 230.11(c).

⁹³ *Id.* § 230.11(d).

2.7 Failure to require that the cooling water intake structures reflect the best technology to mitigate injury to waters of the United States

Section 316(b) of the Clean Water Act requires “the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.”

Absent from the administrative record is any discussion from the agencies on the cooling structures that will be used for the electronic service platforms, which were mentioned in the Construction and Operations Plan.⁹⁴

3. The United States, its departments, and agencies, have violated the Endangered Species Act

The Supreme Court has described the endangered Species Act as

the most comprehensive legislation for the preservation of endangered species ever enacted by any nation. Its stated purposes were “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,” and “to provide a program for the conservation of such . . . species” 16 U.S.C. § 1531(b) (1976 ed.). In furtherance of these goals, Congress expressly stated in § 2(c) that “all Federal departments and agencies shall seek to conserve endangered species and threatened species” 16 U.S.C. § 1531(c) (1976 ed.). . . . Lest there be any ambiguity as to the meaning of this statutory directive, the Act specifically defined “conserve” as meaning “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” § 1532(2).⁹⁵

The Supreme Court has concluded that: “The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”⁹⁶ Specifically applicable here, Section 7(a) of the ESA requires:

⁹⁴ See Vineyard Wind 1 Construction and Operations Plan, Section 3.1.4, available at <https://www.boem.gov/renewable-energy/state-activities/vineyard-wind-construction-and-operations-plan-cop-volume-i>.

⁹⁵ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

⁹⁶ *Id.* at 184.

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species⁹⁷

Following this consultation, “the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary’s opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat.”⁹⁸

3.1 The agencies have violated the ESA because the Construction and Operations Plan, or the permits issued, do not protect whales

The North Atlantic Right Whale is one of the world’s most endangered large whale species, with less than 400 individuals remaining, as the National Marine Fisheries Service states:

North Atlantic right whales primarily occur in Atlantic coastal waters on the continental shelf, although they also are known to travel far offshore, over deep water. Right whales migrate seasonally and may travel alone or in small groups. In the spring, summer, and into fall, many of these whales can be found in waters off New England and further north into Canadian waters, where they feed and mate. Each fall, some right whales travel more than 1,000 miles from these feeding grounds to the shallow, coastal waters of their calving grounds off of South Carolina, Georgia, and northeastern Florida, though migration patterns vary.⁹⁹

“North Atlantic Right Whales primarily occur in Atlantic coastal waters on the continental shelf.”¹⁰⁰ As discussed in Section 2.4, the United States has announced its policy to establish wind projects along the Atlantic shelf and has already granted leases for such projects, totaling almost 2 million acres. This policy will block much of the migration route of the whales, but this has not been considered by the agencies.

⁹⁷ 16 U.S.C. § 1536(a).

⁹⁸ *Id.* § 1531.

⁹⁹ NOAA Fisheries, *North Atlantic Right Whale* (last visited Sept. 24, 2021), available at <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>.

¹⁰⁰ *Id.*

Further, although these whales have stocky black bodies with no dorsal fins, the agencies have simply assumed that whale watchers on vessels will be an appropriate, effective way of protecting this endangered species.¹⁰¹

Approval of the Construction and Operations Plan further endangered the North Atlantic Right Whale population because the construction of turbines and other Project infrastructure will limit the ability of National Marine Fisheries Service to conduct critical population surveys. These surveys are conducted through aerial observations, and the airplanes will be unable to fly at the necessary heights in or around the turbine arrays. They are a necessary component to understanding North Atlantic Right Whale population status and measuring impacts or biological changes, and their disruption is likely to greatly increase scientific uncertainty regarding the whales. The National Marine Fisheries Service has determined that there is no way to calibrate to higher altitudes, and with no strategy in place to mitigate this loss, there will be a loss of continuity of this critical long-term data set.

Even though noise significantly impacts the North Atlantic Right Whales' ability to communicate, the Project was approved putting the endangered species at risk. Right whales communicate using low-frequency moans, groans, and pulses, which may maintain contact between individuals, communicate threats, signal aggression, or be used for other social reasons.¹⁰² The Secretary of Commerce and the National Marine Fisheries Service have nevertheless authorized the incidental take of 10 of these mammals, even though the species is on the verge of extinction.¹⁰³ Since 2017, North Atlantic Right Whales have experienced an ongoing Unusual Mortality Event affecting 50 individual right whales.¹⁰⁴ Thirty-four whales have been documented dead and 16 seriously injured.¹⁰⁵ This represents more than 10% of the population, which is a significant impact on such a critically endangered species where deaths are outpacing births.¹⁰⁶

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Incidental Harassment Authorization at 14 (July 21, 2021).

¹⁰⁴ NOAA Fisheries, *North Atlantic Right Whale* (last visited Sept. 24, 2021), available at <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

3.2 On May 7, 2021, the Bureau requested to reinstate the Section 7 consultation for the Project, and, on May 27, 2021, National Marine Fisheries Service agreed

In response to the enclosed sixty-day notice of intent to sue—whose allegations the Alliance adopts—the Bureau determined in the enclosed letters that the potential impacts from monitoring surveys to be conducted by Vineyard Wind, if the Construction and Operations Plan is approved, were not fully assessed in the Secretary of Commerce’s (acting through the National Marine Fisheries Service) 2019 Biological Assessment and the subsequent September 11, 2020, Biological Opinion pursuant to section 7 of the ESA. In light of the recent proposed rulemaking by the National Marine Fisheries Service on Modification of the Atlantic Large Whale Take Reduction Plan,¹⁰⁷ the potential impacts of using vertical mooring lines in the proposed Vineyard Wind 1 lobster trap survey deserve closer analysis. In addition, new information regarding the status of the North Atlantic Right Whale had become available since the publication of the 2019 Biological Assessment and subsequent Biological Opinion. The Bureau stated in the enclosed letter that it anticipated that a result of the reinstated consultation will be a new biological opinion that replaces the 2020 Biological Opinion.¹⁰⁸

But on July 15, 2021, prior to completing this consultation and prior to the issuance of the anticipated new Biological Opinion, the federal parties approved the Construction and Operation Plan and the issuance of the Section 404 Clean Water Act permit, authorizing actions that jeopardize the endangered whale.

3.3 The measures identified in the September 11, 2020 Biological Opinion fail to adequately protect the North Atlantic Right Whale

Approximately 100 North Atlantic Right Whales, comprising approximately 25% of worldwide population, have been recently sighted in the Vineyard Wind lease area. In addition, the National Marine Fisheries Service released a study, after the Secretary of Interior approved the Construction and Operations Plan, that the whales’ use of the wind energy areas in Southern New England has been increasing: “We found that right whale use of the region increased during the last decade, and since 2017 whales have been sighted there nearly every month, with large aggregations occurring during the winter and

¹⁰⁷ 85 Fed. Reg. 86878 (Dec. 31, 2020).

¹⁰⁸ *Id.*

spring,”¹⁰⁹ said Tim Cole, lead of the whale aerial survey team at the Northeast Fisheries Science Center and a co-author of the study.¹¹⁰

The North Atlantic Right Whale is the most iconic marine animal on the eastern seaboard of the United States. It is also one of the most imperiled species in the entire world, with fewer than 400 individuals known to exist in the wild. The North Atlantic Right Whale is on the verge of extinction. However, one of its safe havens – where there is ample food and protective areas for birthing and rearing young – is the area immediately south-southwest of Nantucket Island. Unfortunately, this is the exact place that the Bureau has selected for purposes of constructing the largest offshore wind array ever assembled.

Associated increases in noise from pile driving, turbine operations, and vessels could contribute to the suite of ongoing stressors impacting the population. Noise has been found to interfere with North Atlantic Right Whale communication and increase their stress levels. In turn, “females that undergo energetic stress from reproduction may be more susceptible than males to dying from chronic injuries such as those from entanglement or vessel strikes.”¹¹¹ Noise from human activities, such as that which would occur with the wind energy installation and operation of the proposed project, will disrupt normal behavior of right whales and further reduce their ability to identify physical surroundings, find food, navigate, and find mates.¹¹² Harm to endangered North Atlantic Right Whales, which are now sometimes inadvertently taken by ship strikes, would be substantially exacerbated by the increased activities attendant to the construction, operation and decommissioning of the Project, especially pile driving for this Project and cumulatively with other offshore wind projects in the vicinity, which will create massive sound for years, thereby having major impacts on this endangered species likely leading to takes.

A substantial threat to the North Atlantic Right Whale is vessel strikes. Numerous vessels are expected to be involved in the construction of the Project, including but not limited to tugboats, barge cranes, and hopper scows, many of which would be substantially larger and faster than fishing vessels.

¹⁰⁹ NOAA Fisheries, *Right Whale Use of Southern New England Wind Energy Areas Increasing* (July 29, 2021), available at <https://www.fisheries.noaa.gov/feature-story/right-whale-use-southern-new-england-wind-energy-areas-increasing>.

¹¹⁰ *Id.*

¹¹¹ NOAA Fisheries, *North Atlantic Right Whale* (last visited Sept. 24, 2021), available at <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>.

¹¹² *Id.*

The loss of physical space available to the North Atlantic Right Whale, resulting from the construction and operations of the Project, has not been adequately analyzed. Nor has the cumulative effects of the Project and the larger plan to develop wind farms up and down the coast been evaluated.

Temperatures in the area of wind farms are raised around one degree Celsius by the projects themselves, meaning the ocean around the location of various offshore wind farms proposed for New York, Connecticut, Massachusetts, and Rhode Island would be warming at a greater rate than would otherwise occur.¹¹³ Notwithstanding this readily available best scientific and commercial data, the agencies did not account for the additional stress on the North Atlantic Right Whale, fish, and their habitats caused by the localized increase in temperatures attributable to the Project, coupled with similar wind power projects in the area, including potential impacts on essential food supply for the North Atlantic Right Whale and fish.

Conclusion

Please be advised that the Alliance intends to bring suit to seek a judicial remedy unless these statutory violations are resolved. If you wish to contact the Alliance regarding this Notice, Counsel for the Alliance can be contacted by the phone or email listed below.

Yours truly,



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¹¹³ Responsible Offshore Development Alliance, *Comments on Draft Environmental Impact Statement*, at 15-16 (Feb. 22, 2019).

Letter from Responsible Offshore Development Alliance

October 19, 2021

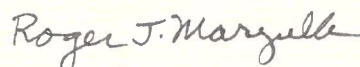
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Enclosures:

Letters from Federal Agencies re: Consultation

Nantucket Residents Against Turbines 60-day Notice of Intent to Sue

I declare under penalty of perjury that the foregoing is true and correct on this 19th day of October 2021.

Handwritten signature of Roger J. Marzulla in cursive script.

Roger J. Marzulla