

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

RESPONSIBLE OFFSHORE
DEVELOPMENT ALLIANCE

Plaintiff,

v.

THE UNITED STATES DEPARTMENT OF
THE INTERIOR, *et al.*

Defendants,

and

VINEYARD WIND I, LLC

Intervenor Defendant.

Civil Action No. 1:22-cv-11172-IT

Hon. Indira Talwani

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

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Plaintiff's Memorandum in Support of Motion for Summary Judgment

Throughout the administrative and rulemaking process, the Alliance has provided thoughtful analysis and suggestions to lessen the adverse impact of the Vineyard Wind 1 Project on the fishing industry and the marine environment. Unfortunately, however, the Government has largely ignored these comments and proposals in its rush to approve the Project. As a result, the Project fails not only to protect the fishing industry and the environment, but to comply with the statutory and regulatory provisions enacted to protect these important national interests.

To date, two offshore wind turbines are operating in U.S. federal water. That is poised to change—a lot. The Biden Administration has announced a goal of 30 gigawatts of production by 2030, which will require around 2,100 turbines and foundations, 6,800 miles of cables, and thousands of trips from dozens of new—fossil fuel-powered—vessels and barges.¹ And, that's just the beginning; after 2030, the national goals call for 15 gigawatts of floating wind by 2035 and 110 gigawatts by 2050. At Vineyard Wind's proposed turbine size and spacing, that would be approximately 11,000 turbines taking up 11,000 square miles of ocean space—an area bigger than the Commonwealth of Massachusetts. Atlantic, BOEM is processing eleven construction and operations plans and expects to receive at least seven additional ones by February 2023. It plans to issue nine final EISs in 2023. On top of these existing projects under development, BOEM sold

¹ Eduardo Garcia, *U.S. Invests in Multi-State Offshore Wind Hubs to Narrow Supply Gaps*, REUTERS (Sept. 14, 2022), <https://www.reuters.com/business/energy/us-invests-multi-state-offshore-wind-hubs-narrow-supply-gaps-2022-09-14/>.

six new leases in the New York Bight for a record-breaking \$4.37 billion in February 2022, followed by two lease sales off North Carolina in May and the sale of five leases off California scheduled this December. Additional auctions for the Gulf of Maine, Mid-Atlantic, Gulf of Mexico, and off of Oregon are well into the planning pipeline. Rather than taking a regional approach to evaluate cumulative impacts or increase its scrutiny of projects due to their large size and volume, the Government is, in fact, streamlining and weakening its review, including through standardizing criteria for alternatives under consideration.² It is also processing permits and conducting NEPA review with well-known capacity limitations,³ as evidenced in its FY 2023 budget request to nearly double appropriations toward its renewable energy program.⁴

Factual and Procedural Background

On October 19, 2021, the Alliance sent a 60-day Notice of Intent to Sue to the appropriate Government officials.⁵ Having received no response or curative action, on

² BOEM, *Process for Identifying Alternatives for Environmental Reviews of Offshore Wind Construction and Operations Plans pursuant to the National Environmental Policy Act (NEPA)* (June 22, 2022)

<https://www.boem.gov/sites/default/files/documents/renewable-energy/BOEM%20COP%20EIS%20Alternatives-2022-06-22.pdf>.

³ Iulia Gheorghiu, *BOEM Needs Staffing Help with Offshore Wind Permitting Regardless of Election Results, Experts Say*, UTILITYDIVE (Oct. 15, 2020)

<https://www.utilitydive.com/news/boem-interior-staffing-help-with-offshore-wind-permitting-election/587092/>.

⁴ BOEM, *The United States Department of the Interior Budget Justifications and Performance Information Fiscal Year 2023*,

<https://www.doi.gov/sites/doi.gov/files/fy2023-boem-greenbook.pdf> at 7 (last visited Nov. 8, 2022).

⁵ 60 Notice of Intent to Sue Letter, *Responsible Offshore Development Alliance v. United States Dep't. of the Interior*, Case No. 1:22-cv-00237-IT (D.D.C. Jan. 31, 2022), ECF No. 1-3.

January 31, 2022, the Alliance filed its Complaint in the District Court for the District of Columbia.⁶ On February 11, 2022, Vineyard Wind, LLC filed its unopposed Motion to Intervene (subsequently granted on June 27, 2022), together with its Proposed Answer to the Complaint.⁷ On February 18, 2022, the Government moved to transfer this case to the District of Massachusetts.⁸ The Government filed its Answer on April 18, 2022. On June 27, 2022, the District Court for the District of Columbia granted the Government's Motion to Transfer, ordering the case transferred to this Court.⁹

This Court held a Status Conference on August 17, 2022 and issued a Scheduling Order providing deadlines for filing summary judgment motions and other matters.¹⁰ This Motion for Summary Judgment is filed in accordance with that Order.

Incorporation By Reference of Other Parties' Briefs

To avoid unnecessarily duplicating the discussion of the numerous issues raised by the Government's various permits and other approvals that have enabled the commencement of construction of the Vineyard Wind Project, the Alliance incorporates by reference the Memoranda in Support of Summary Judgment already submitted by plaintiffs in *ACK Nantucket Residents Against Turbines*,¹¹ *Allco Renewable Energy*

⁶ Compl. for Declaratory and Injunctive Relief, No. 22-00237 (D.D.C. Jan. 31, 2022), ECF No. 1.

⁷ Vineyard Wind 1 LLC's Mot. for Leave to Intervene, No. 22-00237 (D.D.C. Feb. 11, 2022), ECF No. 5.

⁸ Defs.' Mot. to Transfer Venue to the District of Massachusetts, No. 22-00237 (D.D.C. Feb. 18, 2022), ECF No. 10.

⁹ Op. and Order, No. 22-00237 (D.D.C. June 27, 2022), ECF 25.

¹⁰ Scheduling Order (Aug. 30, 2022), ECF No. 42.

¹¹ *ACK Residents Against Turbines v. U.S. Bureau of Ocean Energy Management*, Case No. 1:21-cv-11390-IT (July 15, 2022), ECF No. 89.

Limited,¹² and *Seafreeze Shoreside, Inc.*¹³ In addition, the Alliance and the Seafreeze Plaintiffs have agreed to divide up the issues each will brief and incorporate by reference each other's briefs to streamline their motions and avoid discussing the same issues in both briefs.

Issues Presented

1. The Bureau approved the lease, easement, and Construction and Operations Plan even though (1) the Project would result in the exclusion of commercial fishermen from the Vineyard Wind Project area, in violation of OCSLA;¹⁴ (2) the ongoing Section 7 consultation had not yet determined whether the proposed action would jeopardize the endangered North Atlantic Right Whale;¹⁵ and (3) the Final Environmental Impact Statement failed to adequately discuss alternatives to the Project, its cumulative effects on the marine environment, and measures that would mitigate the detrimental impacts on

¹² *Allco Renewable Energy Limited v. Haaland*, Case No. 1:21-cv-11171-IT (Sept. 7, 2022), ECF No. 145.

¹³ *Seafreeze Shoreside, Inc. v. United States Dept. of the Interior*, Case No. 1:21-cv-11091-IT (Nov. 7, 2022), ECF No. 67 (hereinafter "*Seafreeze Mem.*").

¹⁴ See 43 U.S.C. § 1337(p)(4)(J)(ii) (requiring the Secretary of the Interior to ensure that any activity under the OCSLA provides for consideration of any other use of the sea or seabed, including use for a fishery, a sealane, a potential site of a deepwater port, or navigation."); see also 43 U.S.C. § 1332 ("[T]his subchapter 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 16 U.S.C. § 1536(d) (forbidding the federal agency from making "any irreversible or irretrievable commitment of resources with respect to the agency action" once consultations have been initiated.).

the fishing community, in violation of NEPA.¹⁶ Should the Bureau's action be reversed and set aside as provided in the Administrative Procedure Act?¹⁷

2. The Army Corps of Engineers issued a dredge-and-fill permit authorizing Vineyard Wind to discharge pollutants into the waters of the United States, even though (1) the project the Corps analyzed was much smaller than the Vineyard Wind Project for which it issued the permit; (2) the Corps failed to analyze alternatives to this non-water-dependent project, its cumulative effects, or to require mitigation, as required by Corps regulations;¹⁸ (3) The Corps had not yet completed consultation regarding jeopardy to the endangered North Atlantic Right Whale, as required by Section 7 of the Endangered Species Act; and (4) the Environmental Impact Statement failed to adequately discuss alternatives to the Project, its cumulative effects on the marine environment, and measures that would mitigate the detrimental impacts on the fishing community, in violation of NEPA.¹⁹ Should the Corps' action be reversed and set aside as provided in the Administrative Procedure Act?²⁰

3. NMFS issued an Incidental Harassment Authorization for the Vineyard Wind Project without complying with the timing, procedural, and substantive

¹⁶ 42 U.S.C. §§ 4321-4370h.

¹⁷ 5 U.S.C. §§ 701-706.

¹⁸ *See* 40 C.F.R. § 230.10.

¹⁹ *See* 42 U.S.C. § 4332(C).

²⁰ 5 U.S.C. §§ 701-706.

requirements of the Marine Mammal Protection Act.²¹ Should the NMFS action be reversed and set aside as provided in the Administrative Procedure Act?²²

4. NMFS issued a Supplemental Biological Opinion analyzing newly discovered information that might jeopardize the Right whale even though (1) all of the necessary permits and authorizations, the lease, and seabed easement had already been issued months or years before NMFS completed its analysis and (2) the Supplemental Biological Opinion failed to analyze facts that might threaten the continued existence of the whale. Should NMFS's Supplemental Biological Opinion be reversed and set aside as provided in the Administrative Procedure Act?²³

ARGUMENT

1. Standard of Review

The Alliance incorporates by reference the Administrative Procedure Act Standard of Review as stated in the Seafreeze brief in the section titled "Standard of Review,"²⁴ and further states:

Each of the agency actions that the Alliance challenges is reviewed under the Administrative Procedure Act,²⁵ which authorizes a court to "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law."²⁶ In deciding whether to rule that an agency

²¹ See 16 U.S.C. §§ 1371-1423h.

²² 5 U.S.C. §§ 701-706.

²³ *Id.*

²⁴ *Seafreeze Mem.* at 3-4.

²⁵ 5 U.S.C. §§ 501-504; 551-559; 571-584; 701-706.

²⁶ 5 U.S.C. § 706.

action is invalid and should be set aside, the Administrative Procedure Act requires the Court to “consider whether the agency acted within the scope of its legal authority, whether the agency adequately explained its decision, whether the agency based its decision on the facts in the record, and whether the agency considered other relevant factors.”²⁷ Although the judgment of the agencies is entitled to deference, “[t]he deference a court must accord an agency’s scientific or technical expertise is not unlimited”²⁸ Indeed, the reviewing court should not simply “rubber-stamp” the agency’s decision.²⁹

2. The Alliance has Both Organizational Standing and Membership Standing to Protect Fishing Interests in the Federal Waters off Southern New England

In this Circuit, “[i]t is well-accepted in the standing context that organizations may have interests of their own, separate and apart from the interests of their members.”³⁰ To establish Article III standing, an organization must show (1) an injury-in-fact that is actual or imminent, (2) that is fairly traceable to the challenged action, and (3) that can likely be “redressed by a favorable decision.”³¹ An association or an organization can establish an injury-in-fact by showing that it was perceptively impaired by the defendant’s actions.³²

²⁷ *Defs. of Wildlife v. Babbitt*, 958 F. Supp. 670, 679 (D.D.C. 1997).

²⁸ *Id.*

²⁹ *See Ethyl Corp. v. Env’t Prot. Agency*, 541 F.2d 1, 34 (D.C. Cir. 1976).

³⁰ *Massachusetts Delivery Ass’n v. Coakley*, 671 D.3d 33, 45 n.7 (1st Cir. 2012).

³¹ *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561 (1992).

³² *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

In addition to the Alliance having standing to sue on behalf of its own interests, the Alliance can sue on behalf of its members, provided that:

(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose, and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.³³

A. Plaintiff, Responsible Offshore Development Alliance, Has Standing to Maintain This Suit

Plaintiff, Responsible Offshore Development Alliance, is a not-for-profit trade association organized under the Internal Revenue Code § 501(c)(6) and headquartered in Washington, D.C. Its members consist of fishing industry associations and fishing companies committed to improving the compatibility of new offshore development with their fishing-related businesses. The Alliance's members also consist of 150 vessels operating in more than 30 fisheries throughout the country, including the area slated for the Vineyard Wind Project construction.³⁴

The Alliance's goals include:

- Provide a unified voice regarding issues of mutual interest to the commercial fishing industry related to the siting and operations of new and proposed offshore developments to promote seafood sustainability;
- Act as a bridge between offshore developers and fishermen to mandate, design, and implement a fair, equitable, and effective fisheries mitigation framework addressing potential direct and indirect fisheries impacts;

³³ *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

³⁴ See Decl. of Anne Hawkins ¶ 2, attached as Ex. 1.

- Coordinate among existing local, project-specific, and state advisory groups to streamline advice and minimize duplication of effort, and increase awareness of the need for improved interagency coordination on matters related to ocean planning and development;
- Work to achieve adequate funding for scientific research to inform leasing processes, support mitigation programs, and guide future offshore development planning; and
- Serve as a clearinghouse of scientific information and project updates for a better-informed industry and communicate with Fishery Management Councils regarding industry needs and concerns.³⁵

For several years, the Alliance has been a party to a Memorandum of Understanding with the Bureau of Ocean Energy Management and the National Marine Fisheries Service dealing specifically with regard to offshore wind energy development. The Memorandum identifies areas of mutual benefit to each of the three entities to support responsible planning, siting, and development of offshore wind power that considers impacts on the fishing industry, fisheries resources, protected resources, and the marine habitats upon which fishery resources depend.³⁶

The Alliance has taken multiple approaches to achieve its mission of “improving the compatibility of new offshore development with their businesses.”³⁷ The Alliance has

³⁵ Ex. 1 ¶ 3.

³⁶ Ex. 1 ¶ 4.

³⁷ Ex. 1 ¶ 5.

provided federal partners with recommendations on how to minimize impacts to fisheries operations and resources in the construction and operation of offshore wind facilities and recourse for mitigation. The Alliance has submitted dozens of comment letters with tangible recommendations, requests, and opportunities for mutual protection of the fishing and offshore wind energy industries.³⁸

The Alliance and its members have participated extensively in the Vineyard Wind 1 permitting process at the federal and state levels and through direct communications with the developer. And they also participated in similar processes in nearly every region in the country for offshore wind energy planning.³⁹

The federal government's approval of the Vineyard Wind Project has directly and palpably frustrated the very purpose for which the Alliance was formed: to promote cooperation and reasonable development standards in the deployment of offshore wind facilities, consistent with the continued operations of the fishing industry in the area of the Project.⁴⁰ Rather than accommodate fishing interests, the Government has unnecessarily burdened them by refusing to adopt a Construction and Operations Plan that will protect the safety of fishermen and their already difficult and dangerous occupations.⁴¹ Instead of balancing the interests of the fishing industry with those of offshore wind production, the Government has simply forged ahead with the Vineyard Wind development, giving little or no consideration to the destruction of the marine

³⁸ *Id.*

³⁹ Ex. 1 ¶ 6.

⁴⁰ Ex. 1 ¶ 8.

⁴¹ *Id.*

environment, fishing stocks, and the centuries-old profession of the fishermen who supply our nation with seafood.⁴²

B. The Alliance has Standing Derived From Its Members

The Alliance also has standing based on the protected interests of its members, which include a number of fishing industry associations, fishing companies, and more than 150 vessels that operate in more than 30 fisheries throughout the United States.⁴³ As detailed in this brief, in the declaration of Executive Director Anne Hawkins, and in the declarations of the Plaintiffs in the *Seafreeze* case,⁴⁴ the Government's approved plan for the Vineyard Wind Project runs rough-shod over the fishing interests that have plied these waters for centuries—and now will be wholly excluded or, at a minimum, severely challenged in their efforts to continue providing fresh, wholesome seafood for the nation's tables. As fishing trips become longer, more dangerous, and more expensive, more and more fishermen will find themselves unable to support themselves and their families in what will become, at least in and around Southern New England, a dying way of life.

This injury to the fishing interests is also an injury to the Alliance's interests, for the Alliance exists to protect those interests, by engaging in rational development of renewable offshore energy projects. Accordingly, the Alliance has standing based on the

⁴² *Id.*

⁴³ Ex. 1 ¶ 2.

⁴⁴ *Seafreeze* Mem. Section I at 6-18.

injury the Government action has done to its members—an injury that goes to the very core of the Alliance’s organizational purpose.

The Alliance, as a fishing industry association, and its members have a recognized, protected interest under the Outer Continental Shelf Land’s Act, which directs the Government to consider “any other use of the sea or seabed, including use for a fishery. . . or navigation” in permitting offshore renewable energy projects.⁴⁵ Similarly, the Clean Water Act, National Environmental Policy Act, Marine Mammal Protection Act, and Endangered Species Act also give the Alliance protected interests that the Government must consider when approving developments in the ocean. The Vineyard Wind project not only interferes with the protected fishing rights held by the Alliance and its members, but also displaces commercial fisheries’ harvesting and transit activities. The Alliance and its members are highly dependent on the health of the ocean, and their interests in that health are legally protected.

The Alliance can vindicate its interest and its members’ interests without an individual member’s participation. The relief sought does not require each member to participate, and the individual members are not indispensable for the Court to resolve the case.⁴⁶

⁴⁵ 43 U.S.C. § 1337(p)(4)(J)(ii).

⁴⁶ See *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

3. The Bureau’s Issuance of the Easement and Lease of the Seabed to Vineyard Wind and Its Approval of the Construction and Operations Plan for the Project Violated the Outer Continental Shelf Lands Act, the Endangered Species Act, and NEPA

A. The Bureau’s Approval of the Vineyard Wind Project Violated the Mandatory Requirements of the Outer Continental Shelf Lands Act

The Alliance incorporates by reference Seafreeze’s discussion of the Bureau’s violation of the Outer Continental Shelf Lands Act in Sections II and III of their brief,⁴⁷ and adds this additional discussion.

In the Energy Policy Act of 2005,⁴⁸ Congress amended the Outer Continental Shelf Lands Act (which previously allowed ocean leasing only for oil and gas production) to include ocean leasing for renewable energy as well. But Congress prohibited this new offshore wind leasing program from interfering with fishing or navigation on the high seas: “It is hereby declared to be the policy of the United States that. . . this subchapter 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.”⁴⁹

To ensure that navigation and fishing on the high seas are not interfered with, the Energy Policy Act mandates that the Bureau “shall insure” that offshore wind activities like the Vineyard Wind Project are “carried out in a manner that provides for. . . prevention of interference with reasonable uses (as determined by the Secretary) of the

⁴⁷ *Seafreeze* Mem. at 19-42.

⁴⁸ Pub. L. No. 109-58, § 388(a), 119 Stat. 594, 744.

⁴⁹ 43 U.S.C. § 1332.

exclusive economic zone, the high seas, and the territorial seas.”⁵⁰ Among the reasonable uses that the Bureau must prevent interference with are “use for a fishery. . . or navigation.”⁵¹ By approving the Vineyard Wind lease, easement, and Construction and Operations Plan, which significantly interfere with the reasonable uses of fishing and navigation—essentially setting aside the 65,296-acre tract⁵² for Vineyard Wind’s exclusive use—the Bureau has violated this mandatory statutory requirement, rendering its approvals contrary to law.

The Government admitted that approval of the Project would result in the exclusion of commercial fishermen from the Vineyard Wind Project area. The May 10, 2021, Joint Record of Decision states as a fact that “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.”⁵³ Although the Government now tries to soften this factual finding by claiming that it made no independent investigation before announcing it, the fact remains that it included this finding in its Record of Decision—and the Record contains nothing to contradict it. The Government’s attempt to now reverse its position on this announced factual finding is not a clarification (as the Government argues) but a post hoc rationalization “on which this court cannot rely.”⁵⁴

⁵⁰ 43 U.S.C. § 1337(p)(4)(I).

⁵¹ 43 U.S.C. § 1337 (p)(4)(j).

⁵² BOEM_0077261.

⁵³ USACE_AR_011479.

⁵⁴ *Cape Fear River Watch v. United States Army Corps of Engineers*, 2022 WL 4468268 (E.D.N.C. Sept. 22, 2022).

The Bureau’s Final Environmental Impact Statement, too, confirms that the Project “would have moderate to major impacts on commercial fisheries.”⁵⁵ The Final Environmental Impact Statement goes on to frankly admit that “offshore wind structures and hard coverage for cables would have long-term impacts on commercial fishing operations and support businesses such as seafood processing,”⁵⁶ and that “[t]he impacts would increase in intensity as more offshore structures are completed.”⁵⁷ In addition, “[c]ongestion and delays could increase fuel costs (i.e., for vessels forced to wait for port traffic to pass), and could decrease productivity for commercial shipping, fishing, and recreational vessel businesses, whose income depends on the ability to spend time out of port.”⁵⁸

The Final Environmental Impact Statement summarizes the major impacts the construction of offshore wind structures and hard coverage cables will have on commercial fishing operations and the businesses they support, such as seafood processing. “The disruption from cable installation may occur concurrently or sequentially, with similar impacts on commercial fishery resources.”⁵⁹ 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

⁵⁵ USACE_AR_008784.

⁵⁶ USACE_AR_008702.

⁵⁷ *Id.*

⁵⁸ USACE_AR_008703.

⁵⁹ USACE_AR_008699.

interactions with protected resources).⁶⁰ If vessels must cut a trip short or take 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 its port.

The administrative record cites numerous ways in which the Vineyard Wind Project will dramatically interfere with commercial fishing within the 65,296 acre Project,⁶¹ contrary to the statutory prohibition on such interference:

- Construction of the Vineyard Wind Project will disturb about 3,398 acres of seafloor,⁶² destroying much of the sea life in its path.
- “It is anticipated that there will be negative economic impacts to commercial fisheries.”⁶³
- “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.”⁶⁴
- “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 or supports less valuable species).”⁶⁵
- “Short-term productivity reductions would also affect seafood processing and wholesaling businesses that depend upon the fishing industry.”⁶⁶

⁶⁰ *Id.*

⁶¹ BOEM_0077261.

⁶² *Id.*

⁶³ USACE_AR_011479.

⁶⁴ *Id.*

⁶⁵ USACE_AR_008699.

⁶⁶ *Id.*

- “Commercial fishing businesses would also be affected by the use of concrete mattresses to cover cables in hard- bottom areas during offshore wind operation.”⁶⁷
- “[f]ishing vessels may not have access to impacted areas during active construction.”⁶⁸
- “The extent of impact to commercial fisheries and loss of economic income is estimated to total \$14 million over the expected 30-year lifetime of the Project.”⁶⁹
- “It is anticipated that the discharge of fill material associated with the project will result in major impacts to mollusks, fish, and crustaceans in the project area.”⁷⁰
- “The discharge of fill as a result of scour protection placement and the turbidity associated with dredging side casting and cable placement will result in the smothering of any mollusk species present in the areas where work is taking place.”⁷¹
- “Local fish stocks will likely be negatively affected by the discharge of fill and turbidity, as non-mobile larvae and eggs cannot disperse to avoid smothering.”⁷²
- “The placement of fill material has the potential to have adverse effects to egg and larval stages of fish and crustaceans that may be present in the area, but are unable to avoid smothering due to discharges of fill or turbidity and the egg/larvae’s inability to relocate.”⁷³

Further proof of interference is found in the fact that because the Vineyard Wind Project will exclude fishermen from their traditional fishing grounds, Massachusetts and Rhode Island have required Vineyard Wind to create a fund to compensate for that loss.

⁶⁷ USACE_AR_008701.

⁶⁸ USACE_AR_008699.

⁶⁹ USACE_AR_011479.

⁷⁰ USACE_AR_011475.

⁷¹ *Id.*

⁷² USACE_AR_011476.

⁷³ USACE_AR_011475-USACE_AR_011476.

The Final Environmental Impact Statement states: “Vineyard Wind has established compensation funds for Massachusetts and Rhode Island fishermen to mitigate for the potential loss in economic revenue associated with the potential loss of fishing grounds.”⁷⁴ But of course, the Act requires the Secretary to “prevent interference” with fishing and navigation—it does not authorize the Secretary to allow interference with fishing and navigation on the high seas in exchange for a compensation fund (or anything else). Fishing and freedom of navigation on the high seas are fundamental rights recognized by American and international law that are not subject to private ownership by Vineyard Wind or any other enterprise.⁷⁵

B. The Bureau Violated the Endangered Species Act by Authorizing the Vineyard Wind Project Before Completing the Consultation Required Under Section 7 of the Endangered Species Act⁷⁶

Section 7 of The Endangered Species Act requires the Bureau to consult with the National Marine Fisheries Service before authorizing an action—here, the Vineyard Wind Project—that “may affect” an endangered or threatened species.⁷⁷ The Supreme Court describes this statute as a plain, affirmative command that admits of no exception:

One would be hard-pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies “to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence” of an endangered species or “result in the destruction or

⁷⁴ USACE_AR_011479.

⁷⁵ See 43 U.S.C. § 1337(p)(4)(J)(ii).

⁷⁶ 16 U.S.C. § 1536.

⁷⁷ *Id.*

modification of habitat of such species” This language admits of no exception.⁷⁸

The regulations promulgated to implement Section 7 require that an action agency (here, the Bureau) first must determine whether the action “may affect” an endangered or threatened species.⁷⁹ If so, the action agency must consult with—applicable here—the National Marine Fisheries Service, which has responsibility for marine species under the ESA.⁸⁰ The Section 7 consultation concludes when the National Marine Fisheries Service issues a Biological Opinion determining whether the proposed action does or does not jeopardize the species.⁸¹ During consultation, the parties cannot make “any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures.”⁸²

In addition, the regulations require that the action agency (here, the Bureau) must reinitiate the Section 7 consultation whenever “new information reveals effects of [an] action that may affect listed species or critical habitat in a manner or to an extent not previously considered,”⁸³ or “[i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not

⁷⁸ *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978) (quoting 16 U.S.C. § 1536 (1976)).

⁷⁹ 50 C.F.R. § 402.14(a)

⁸⁰ *Id.*

⁸¹ 16 U.S.C. § 1536(a)(2) & (b)(3)(A).

⁸² 16 U.S.C. § 1536(d).

⁸³ 50 C.F.R. § 402.16(a)(ii).

considered in the biological opinion.”⁸⁴ The request for reinitiation triggers a new consultation and a new or supplemental Biological Opinion.⁸⁵

In this case, upon discovery of new information regarding North Atlantic Right Whale activity within the Project site, the Bureau—as required by the ESA regulations—reinitiated the Section 7 consultation by letter on May 7, 2021.⁸⁶ That consultation concluded on October 18, 2021, when the National Marine Fisheries Service issued its new Biological Opinion.⁸⁷ During the hiatus from May 7, 2021, to October 18, 2021, the Government agencies did not know whether the proposed activity (the Vineyard Wind Project) would or would not jeopardize the existence of this highly endangered species; there was no operative Biological Opinion—the Section 7 consultation was ongoing—and NMFS had not reached a conclusion as to whether or not the Vineyard Wind Project would jeopardize the continued existence of the North Atlantic Right Whale. Yet, during this hiatus and without knowing whether or not the Project would jeopardize the North Atlantic Right Whale, the Bureau issued its Record of Decision authorizing the Project (May 10, 2021) and approved the Construction and Operations Plan and cable easement (July 15, 2021), giving Vineyard Wind the final authorization needed to start the Project.⁸⁸

⁸⁴ 50 C.F.R. § 402.16(a)(iii).

⁸⁵ 50 C.F.R. § 402.16; *see also* *Ctr. for Biological Diversity v. Nat'l Marine Fisheries Serv.*, 977 F. Supp. 2d 55, 61-62 (D.P.R. 2013).

⁸⁶ USACE_AR_013874.

⁸⁷ *Id.*

⁸⁸ *See generally* USACE_AR_0011441; *see also* USACE_AR_011773.

Although the new Biological Opinion—when finally issued—found no jeopardy to the species, the Bureau had no way of knowing when it authorized the Project whether or not the Project would jeopardize the continued existence of the highly endangered North Atlantic Right Whale. Section 7 requires that the jeopardy determination be made before the agency acts. It does not allow the Bureau to hope for the best and just authorize a project without knowing whether or not the project jeopardizes the species.

The Government may argue that the Record of Decision, COP approval, and conveyance of the easement are not irreversible commitments, but those agency decisions gave the final green light to Vineyard Wind's Project, and the company began offshore cable installation during the week of November 1, 2022.⁸⁹ By easement deed, the Government has conveyed a property interest to the company, which the company now owns.⁹⁰ By approval of the Plan, the company now has the right to build 86 massive turbines and lay hundreds of miles of electrical cable in trenches to be dug in the ocean floor.⁹¹ These are precisely the type of resource commitments that should be made only after the Government has determined that the proposed action will not jeopardize the existence of the endangered whale species—the kind of premature resource commitments that the Endangered Species Act prohibits.

In addition, even after NMFS completed the consultation, the Biological Opinion issued failed to comply with the Endangered Species Act, as discussed in detail in ACK's

⁸⁹ *Vineyard Wind Kicks off Cable Work*, RENEWS.BIZ (Nov. 1, 2022), <https://renews.biz/81491/vineyard-wind-kicks-off-cable-works/>.

⁹⁰ BOEM_0077146.

⁹¹ BOEM_0077150.

Memorandum in Support of Summary Judgment at Section 5A, which the Alliance relies on incorporates by reference.⁹²

C. The Bureau Failed to Take a Hard Look at the Environmental Impacts of the Project, as NEPA requires

The Alliance incorporates by reference the discussion of the Bureau's failure to comply with NEPA contained in the Seafreeze brief at sections II, III, VII, and VIII.⁹³

4. The Corps' Issuance of the Dredge-and-Fill Permit for the Project Violated the Clean Water Act, The Endangered Species Act, and NEPA

On May 10, 2021, the Army Corps made the final decision to issue a permit under Section 404 of the Clean Water Act, authorizing dredge-and-fill activities for the Vineyard Wind project, which the Corps described as "the construction, maintenance, and eventual decommissioning of an 800 MW wind energy facility, two ESPs, scour protection around the bases of the WTGs and ESPs, connection cables between turbines and service platforms, and two export cables with scour protection within a single 23.3-mile long corridor."⁹⁴ But, the Corps' decision to issue this permit was arbitrary, capricious, and contrary to law because:

- The Corps significantly understated and misunderstood the extent of the Vineyard Wind Project activities it was authorizing;
- The Corps violated its own Clean Water Act Section 404 regulations for issuing dredge-and-fill permits;

⁹² *Ack Residents Against Turbines v. U.S. Bureau of Ocean Energy Management*, Case No. 1:21-cv-11390-IT at 17-43 (July 14, 2022), ECF No. 89.

⁹³ *Seafreeze Mem.* Sections II, IV, and VIII at 19-27, 44-49.

⁹⁴ USACE_AR_011470.

- The Corps failed to adequately analyze the significant environmental impacts of this Project, in violation of NEPA;
- The Corps failed to complete a consultation with NMFS concerning the possible jeopardy the Vineyard Wind Project creates for the North Atlantic Right Whale, in violation of Section 7 of the Endangered Species Act.

A. The Corps Greatly Understated and Misunderstood the Extent of the Vineyard Wind Project Activities It was Authorizing

The permit the Corps actually issued on August 10, 2021⁹⁵ authorizes a far more expansive project than the one the Corps stated it was authorizing in its Record of Decision. The Corps' findings in the Record of Decision contain contradictory statements, which indicate it did not analyze all of the activities it eventually authorized. In its Record of Decision, the Corps stated that it was authorizing a 23.3-mile-long export cable corridor,⁹⁶ when, in fact, the permit authorizes a corridor of over twice that length (49 miles).⁹⁷ The Corps also incorrectly states that the Project includes 15 total acres of cable scour protection with two acres within three nautical miles of the coast,⁹⁸ when the permit actually authorizes 35 total acres of cable scour protection, with 17 acres within three nautical miles of the coast.⁹⁹ By analyzing only half of the cable corridor and only about one-fifth of the scour protection for the Project, the Corps missed the majority of

⁹⁵ BOEM_00772171-BOEM_0077274.

⁹⁶ See USACE_AR_011470.

⁹⁷ See BOEM_00772171-BOEM_0077274; see also USACE_AR_011891-USACE_AR_011892.

⁹⁸ See USACE_AR_011470, USACE_AR_011474, USACE_AR_011475, USACE_AR_011477, and USACE_AR_011486.

⁹⁹ USACE_AR_011891-92.

the cable corridor and scour protection it authorized in the permit it issued. In short, the permit the Corps issued is not supported by the administrative record—and the record shows that the Corps fell far short of analyzing the actual dimensions of the Project its permit authorized.

When reviewing an agency’s action under the arbitrary and capricious standard, a court considers “whether the agency has examined the pertinent evidence, considered the relevant factors, and ‘articulate[d] a satisfactory explanation for its actions including a ‘rational connection between the facts found and the choice made.’”¹⁰⁰ A ‘normal’ agency action is considered arbitrary and capricious when the agency “entirely fail[s] to consider an important aspect of the problem, offer[s] an explanation for its decision 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.”¹⁰¹

Here, the Army Corps made its decision based on incorrect data, and it failed to consider how the correct data and dimensions of the project would actually impact the marine ecosystem—which is the whole purpose of the Section 404 permit process. While the Corps contends that these gross misstatements of the Project dimensions were merely a typographical error, the administrative record consistently repeats the same incorrect facts concerning the project dimensions and, thus, ultimately, the impact of the project on the Nantucket Sound. The Corps’ explanation thus runs counter to the evidence within

¹⁰⁰ *N.L.R.B. v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13, 23 (1st Cir. 1999) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

¹⁰¹ *State Farm*, 463 U.S. at 43.

the Administrative Record, which shows that the Corps only evaluated the project based on the incorrect dimensions of the Project. In its December 26, 2018 Public Notice, the New England District of the Corps announced that it had received a permit application for the Vineyard Wind Project and listed an incorrect length of the cable corridor: “Work regulated by the Corps will include the construction of up to 100 offshore wind turbine generators ...[and] two offshore export cables within a single 23.3 mile route.”¹⁰² For example:

- In the 2018 Biological Assessment, the Corps also listed an incorrect cable corridor length: “two offshore export cables within a single 23.3-mile route.”¹⁰³
- The May 10, 2021, Record of Decision lists 23.3 as the length of the cables five times.

On June 25, 2021 (46 days after the release of the Record of Decision) an employee of the Army Corps of Engineers called the Vineyard Wind Corporation. The Army Corps telephone conversation record states:

During the review of the form the applicant noted that the impacts to be authorized were incorrect and did not reflect the proposed impacts submitted as part of the project application. . . the length of the cable transmission route was stated in the permit form to be 23.3 miles when the route is 39.4 miles. . . [the] S. 404 transmission cable scour protection was stated as totaling no more than 2 acres and S.10 scour protection was stated as totaling no more

¹⁰² United States Army Corps of Engineers, *Public Notice: Announcement of Public Meetings and Request for Public Comment* at 1 (Dec. 26, 2018), <https://www.nae.usace.army.mil/Portals/74/docs/regulatory/PublicNotices/NAE-2017-01206.pdf>.

¹⁰³ USACE_AR_005028.

than 15 acres in the permit form. The correct scour protection totals are 17 acres under S.404 [] and 35 acres. . . .”¹⁰⁴

Had it not been for that June 25, 2021 phone call, the Corps would not have recognized that it got the dimensions of the Project wrong during its evaluation process. While the Corps claims that these consistent misstatements are “clerical errors” and that the Corps evaluated “[a]n offshore export cable route up to 49 miles long,” “17 acres of offshore export cable scour protection within the three mile limit,” and “35 acres of offshore-export cable scour protection,”¹⁰⁵ that explanation is simply not supported by the evidence in the administrative record. If the gross misstatements about project dimensions were truly clerical, they would not be present in documents related to the Project, from the public notice in 2018 to the Record of Decision in 2021. If these misstatements were clerical errors, at least one Army Corps document during that three years would have said “an export cable route up to 49 miles long” or “35 acres of scour protection”—but none of the Army Corps’ documents in the Administrative Record note those dimensions prior to the June 25, 2021 call.

The misstatements of project dimensions—during the entire evaluation of the permit from 2018 to 2021—indicate the Army Corps failed to consider the actual dimensions of the project, which is a crucial part of the project. When an agency fails to consider important parts of the project and offers an explanation that runs counter to the

¹⁰⁴ USACE_AR_011772.

¹⁰⁵ USACE_AR_011889-USACE_AR_011892.

evidence in front of the agency—just like the Army Corps has done here—that decision is arbitrary and capricious and should be overturned.

B. The Corps Violated Its Own Clean Water Act Regulations

Congress passed the Clean Water Act in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁰⁶ The Clean Water Act prohibits the “discharge of any pollutant by any person”¹⁰⁷ into navigable waters without a permit, and violations are punishable by substantial civil and criminal fines or imprisonment.¹⁰⁸ While the authority to issue permits for the discharge of most pollutants is vested in the EPA,¹⁰⁹ Section 404 of the Clean Water Act authorizes the U.S. Army Corps of Engineers to issue permits for “the discharge of dredged or fill material into the navigable waters.”¹¹⁰ The Clean Water Act defines “dredged material” as “material that is excavated or dredged from the waters of the United States,”¹¹¹ and “fill material” as “material placed in the waters of the United States where the material has the effect of: replacing any portion of water of the United States with dry land; or changing the bottom elevation.”¹¹² Fill material includes rock, sand, clay, plastics, and construction debris but

¹⁰⁶ 33 U.S.C. § 1251(a).

¹⁰⁷ 33 U.S.C. § 1311(a).

¹⁰⁸ 33 U.S.C. § 1319(c)(1); 33 C.F.R. § 326.6.

¹⁰⁹ 33 U.S.C. § 1344(a).

¹¹⁰ *Id.*

¹¹¹ 33 C.F.R. § 323.2(c).

¹¹² 33 C.F.R. § 323.2(e).

does not include trash or garbage.¹¹³ The Corps has adopted regulations for the issuance of these Section 404 permits.¹¹⁴

Section 404 permits help to ensure that the “natural structure and function of ecosystems [are] maintained.”¹¹⁵ In amending the Clean Water Act, Congress contemplated the effects of pollutants—such as dredge discharges and fills—and recognized and demanded “broad federal authority to control pollution, for “[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.”¹¹⁶ Because the Vineyard Wind Project involves extensive disturbance of the seabed, requiring the discharge of tons of sand and debris to build the turbine foundations and lay the miles of electrical cable to carry electricity to land, these discharges of pollutants into the marine ecosystem require a Section 404 permit from the Corps.

1. The Corps Failed to Analyze Less Environmentally Damaging Alternatives to the Proposed Project, as Required by Its Clean Water Act Regulations

The Corps states in the Joint Record of Decision that “no alternative may be permitted if there is a less environmentally damaging practicable alternative.”¹¹⁷ The Corps regulations require that the proposed project in a 404(b) permit be the least

¹¹³ 33 C.F.R. § 323.2(e).

¹¹⁴ See 33 C.F.R. §§ 203-385.

¹¹⁵ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (quoting H.R.Rep. No. 92–911, p. 76 (1972)).

¹¹⁶ *Id.* (quoting S.Rep. No. 92–414, p. 77 (1972)).

¹¹⁷ USACE_AR_011471.

environmentally damaging alternative to achieve the project’s purpose.¹¹⁸ 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 proposals.”¹¹⁹ The regulations set forth a three-part analysis the Corps must conduct. First, the Corps must analyze off-site alternatives.¹²⁰ Then, if none are available, the Corps will try to modify the project so that impacts will be minimized.¹²¹ Only if the project cannot be modified to avoid impacts will the Corps determine how to mitigate that impact.¹²²

Corps regulations require the Corps to presume that practicable alternatives exist when, as here, a project is not water dependent—which is defined as “access or proximity to . . . the special aquatic site in question to fulfill its basic purpose.”¹²³ And, when a project does not require any access or proximity to an aquatic site, the Corps must “rebut the presumption that there are practicable alternatives with less adverse environmental impact.”¹²⁴

Here, the Corps correctly determined that the Project’s basic purpose, wind energy generation, is not a water-dependent activity because wind energy can be generated on

¹¹⁸ 40 C.F.R. § 230.10; Jon Schultz, *The Steepest Hurdle in Obtaining a Clean Water Act Section 404 Permit: Complying with EPA’s 404 (b)(1) Guidelines’ Least Environmentally Damaging Practicable Alternative Requirement*, 24 UCLA J. ENV. L. & POL. (2005).

¹¹⁹ 40 C.F.R. § 230.10(a)(2)

¹²⁰ 40 C.F.R. § 230.10(a)(2).

¹²¹ *Id.*

¹²² *Id.*

¹²³ 40 C.F.R. § 230.10(a)(3); *Nw. Bypass Grp. v. U.S. Army Corps of Engineers*, 552 F. Supp. 2d 97, 109 (D.N.H. 2008).

¹²⁴ *Id.* (citing *Nat’l Wildlife Fed’n, v. Whistler*, 27 F.2d 1341, 1344 (8th Cir. 1994)).

land and in the ocean.¹²⁵ The Corps' findings in the Record of Decision state: "This activity does not require access or proximity to or siting within a special aquatic site to fulfill its basic project purpose. Therefore, it is not water dependent."¹²⁶ Accordingly, "[u]nder the 404(b)(1) Guidelines, 40 C.F.R. § 230.10(a)(3), if a proposed activity is not water dependent, practicable alternatives not involving special aquatic sites are presumed to be available unless the applicant clearly demonstrates otherwise." However, the Corps failed to rebut this presumption in the Record of Decision. There is no explanation or statement explaining why wind energy cannot be generated for this project outside of the open-ocean site.

The criteria the Corps used violated its regulations that govern the requirements for an alternatives analysis. Instead of analyzing whether wind energy could be generated without discharging tons of pollutants into the waters of the United States, the Corps adopted a hyper-restrictive set of criteria that only the Vineyard Wind Project could meet, including two unique requirements that only the Vineyard Wind Project can satisfy. Any alternative, the Corps decided, must satisfy:

- "Vineyard Wind's contractual obligation with the Commonwealth of Massachusetts to deliver the generated energy to the Massachusetts power grid. . . [and]
- [T]he project must also deliver a minimum of 800 MW to the Massachusetts power grid to meet pre-established agreements."¹²⁷

¹²⁵ USACE_AR_011471.

¹²⁶ *Id.*

¹²⁷ USACE_AR_011472.

Since Vineyard Wind is the only party to the power contract it signed with the state of Massachusetts, there is, by definition, no alternative to the Vineyard Wind Project for satisfying that contract. In effect, the Corps has allowed the company and the state to contractually obligate it to issue a pollutant discharge permit for this Project, regardless of whether an alternative means of producing this renewable energy might be preferable for the ecosystem.

The Corps' narrow definition of the alternatives criteria leaves only one proposal that could possibly meet it—the Vineyard Wind 1 Project. Defining the criteria for the alternatives analysis in such a way is a subversion of the true purpose and intent of the alternatives analysis—to see whether the Project's purpose can be met without polluting the nation's water. To meet the requirements of its own regulations, the Corps was required to examine other ways renewable energy could have been produced without polluting the ocean. By failing to do so, the Corps' action was arbitrary, capricious, and contrary to Clean Water Act statutory provisions and regulations.

2. The Corps Failed to Consider the Cumulative Impacts of Other Projects

In evaluating the cumulative effects of this Project, the Army Corps seemingly ignored the cumulative adverse impacts this Project and similar future projects would have on the fishing industry and the aquatic ecosystem. When the Corps evaluates applications for dredge permits, one of the effects that it must consider is the cumulative effects of the proposed project combined with the effects of a future project on the aquatic ecosystem:

(1) Cumulative impacts are the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material. Although the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems.

(2) Cumulative effects attributable to the discharge of dredged or fill material in waters of the United States should be predicted to the extent reasonable and practical. The permitting authority 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 evaluating individual permit applications, issuing a general permit, and monitoring and enforcing existing permits.¹²⁸

The Record of Decision simply fails to discuss the cumulative effects of this Project, when combined with other offshore wind projects that have already been announced.

Nor can the Corps rely on the Environmental Impact Statement for its cumulative effects analysis, for the Final Environmental Impact Statement is also deficient and fails to provide this NEPA-required discussion. If offshore wind is a “key factor for Atlantic states to reach their greenhouse gas emission goals,”¹²⁹ as the Record of Decision states, analysis of the cumulative effects of thousands more turbines on millions of acres of seabed is surely required before issuing this pollution discharge permit.

¹²⁸ 40 C.F.R. § 230.11(g).

¹²⁹ USACE_AR_011461.

3. The Corps' Conclusion that the Project's Impacts are Minor is Not Supported by the Record

Throughout the Record of Decision, the Army Corps concludes that the impact of this project will have minor effects on commercial fisheries, wildlife, and the marine environment.¹³⁰ But this is directly at odds with the agency's own Final Environmental Impact Statement, which, as discussed more fully in Section III.A. of this brief confirms that the Project "would have moderate to major impacts on commercial fisheries[.]"¹³¹ The Final Environmental Impact Statement goes on to frankly admit that "offshore wind structures and hard coverage for cables would have long-term impacts on commercial fishing operations and support businesses such as seafood processing," and that, "[t]he impacts would increase in intensity as more offshore structures are completed[.]"¹³² In addition, "Congestion and delays could increase fuel costs (i.e., for vessels forced to wait for port traffic to pass), and could decrease productivity for commercial shipping, fishing, and recreational vessel businesses, whose income depends on the ability to spend time out of port."¹³³ In addition:

- "It is anticipated that the discharge of fill material associated with the project will result in major impacts to mollusks, fish, and crustaceans in the project area."¹³⁴
- "The discharge of fill as a result of scour protection placement and the turbidity associated with dredging side casting and cable placement will result in the

¹³⁰ See generally USACE_AR_011441.

¹³¹ USACE_AR_008799.

¹³² USACE_AR_008702; see USACE_AR_008799.

¹³³ USACE_AR_008703.

¹³⁴ USACE_AR_014475.

smothering of any mollusk species present in the areas where work is taking place.”¹³⁵

- “Local fish stocks will likely be negatively affected by the discharge of fill and turbidity, as non-mobile larvae and eggs cannot disperse to avoid smothering.”¹³⁶
- “The placement of fill material has the potential to have adverse effects to egg and larval stages of fish and crustaceans that may be present in the area but are unable to avoid smothering due to discharges of fill or turbidity and the egg/larvae’s inability to relocate.”¹³⁷

Therefore, the Corps’ conclusion that these are minor impacts is arbitrary, capricious, and unsupported by the factual record.

C. The Corps Violated the Endangered Species Act by Authorizing the Vineyard Wind Project Before Completing the Consultation Required Under Section 7 of the Endangered Species Act

On May 10, 2021, the Corps decided to authorize Vineyard Wind to discharge pollutants into waters of the United States.¹³⁸ But at the time the Corps made this decision, NMFS had received new information concerning the Project’s threat to the endangered North Atlantic Right Whale and had reinitiated consultation under Section 7 of the Endangered Species Act. For the same reasons discussed in Section 3.B. of this Memorandum concerning the Bureau’s authorization of the Project, the Corps’ decision to authorize the dredging and filling of the seabed without having first completed its

¹³⁵ *Id.*

¹³⁶ USACE_AR_011476.

¹³⁷ USACE_AR_011475-USACE_AR_0011476.

¹³⁸ USACE_AR_011441.

Section 7 consultation with NMFS (which was not completed until NMFS issued its October 18, 2021, Biological Opinion) flatly violated the ESA and was therefore invalid.

D. The Corps Failed to Take a Hard Look at the Environmental Impacts of the Project, as NEPA Requires

The Alliance incorporates by reference sections II, VII, and VIII of the Seafreeze brief, discussing how the Corps and other agencies failed to adequately consider the Vineyard Wind Project's environmental impacts.¹³⁹

1. The Bureau, in Its Approval of the Construction and Operations Plan, and the Corps, in Its Approval of the Dredge-and-Fill Permit, have Violated NEPA by Impermissibly Segmenting the Offshore Wind Program, Ignoring the Cumulative Environmental Impacts of the Thousands of Turbines on Millions of Acres of Ocean that the Agencies Expect to Approve in the Near Future

NEPA regulations require that, in addition to the specific project under consideration, an Environmental Impact Statement must analyze cumulative impacts, including

- When viewed with other proposed actions, cumulative actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.
- Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography....¹⁴⁰

The justification for NEPA's rule against segmentation is obvious: it "prevent[s] agencies from dividing one project into multiple individual actions each of which

¹³⁹ *Seafreeze* Mem. Sections II, IV, and VIII at 19-27, 44-49.

¹⁴⁰ 40 C.F.R. § 1508.25.

individually has an insignificant environmental impact, but which collectively have a substantial impact.”¹⁴¹ NEPA is

[I]n large measure, an attempt by Congress to instill in the environmental decision making process a more comprehensive approach so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major federal action under consideration.¹⁴²

The Council on Environmental Quality defines cumulative effects as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”¹⁴³

The Vineyard Wind Project is only the first of 16 enormous offshore wind energy facilities that the Government is permitting under its plan to produce 30,000 megawatts of wind energy by 2030, covering millions of acres of ocean.¹⁴⁴ Each of the thousands of turbines will stand at least 837 feet tall above the ocean surface, 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, electrical substations, and

¹⁴¹ *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988).

¹⁴² *Nat. Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975).

¹⁴³ 40 C.F.R. § 1508.7.

¹⁴⁴ Compl. for Declaratory and Injunctive Relief at 2, No. 22-00237 (D.D.C. Jan. 31, 2022), ECF No. 1.

more.¹⁴⁵

The Vineyard Wind Project is a part of the President's program to create a thriving offshore wind energy industry, described in a March 29, 2021, White House Fact Sheet:

In his first week in office, President Biden issued an Executive Order that called on our nation to build a new American infrastructure and clean energy economy that will create millions of new jobs. In particular, the President's Order committed to expanding opportunities for the offshore wind industry. The President recognizes that a thriving offshore wind industry will drive new jobs and economic opportunities up and down the Atlantic Coast, in the Gulf of Mexico, and in Pacific waters. The industry will also spawn new supply chains stretching into America's heartland, as illustrated by the 10,000 tons of domestic steel workers in Alabama and West Virginia are supplying to a Texas shipyard where Dominion Energy is building the Nation's first Jones Act compliant wind turbine installation vessel.¹⁴⁶

The President has set a target of producing 30 Gigawatts (30,000 megawatts) of Offshore Wind by 2030:

To position the domestic offshore wind industry to meet the 2030 target, DOI's Bureau of Ocean Energy Management . . . 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, generating 77,000 offshore wind jobs and more than 57,000 additional jobs in communities supported by offshore wind activity - all while creating further economic opportunity and ensuring future generations have access to clean air and abundant renewable power.¹⁴⁷

¹⁴⁵ BOEM_0001360-BOEM_0006005 (original COP); BOEM_0006293-BOEM_0010959 (revised COP).

¹⁴⁶ Fact Sheet, The Biden Administration, Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs (Mar. 29, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs/>.

¹⁴⁷ *Id.*

But here, the Bureau and the Corps failed to analyze the cumulative impacts the Government's expansive offshore wind program will have on the fishing industry. If fishermen are excluded from the 65,296-acre Vineyard Wind area,¹⁴⁸ where will they go to fish? Will that area, too, be occupied by an offshore wind project? What additional fuel and time will be required to navigate around these additional offshore wind projects after the Alliance's members navigate around the Vineyard Wind Project structures? Will it even be feasible or profitable to extend their journeys around the cumulative offshore wind projects already being planned—and will there be fish there to harvest?

The most important question underlying the responsible development of offshore wind energy—and whether it can be completed in a way that does not pose an intolerable risk to fishing, food security, and marine ecosystems—is whether adequate mitigation has been incorporated into project design. In this case, improper segmentation and an overly narrow purpose and need statement have prevented the agencies from considering mitigation alternatives for the Vineyard Wind Project that would have lessened the Project's devastating impact on the fishing industry.

The Council on Environmental Quality (CEQ) NEPA implementing regulations,¹⁴⁹ and succeeding CEQ guidance¹⁵⁰ define mitigation and describe its sequencing: avoid,

¹⁴⁸ BOEM_0077261.

¹⁴⁹ 40 C.F.R. § 1508.20.

¹⁵⁰ See Nancy Sutley, *Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact*, Memorandum for Heads of Federal Departments and Agencies Council on Environmental Quality (Jan. 14, 2011), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.

minimize, rectify, reduce, or eliminate over time, and compensate. Mitigation measures may be separate alternatives or may be included directly in the proposed action.¹⁵¹ In developing mitigation measures, agencies rely on their professional staff and outside experts comprised of “neutral parties without a financial interest in implementing the mitigation.”¹⁵²

Thus, the Bureau had a duty, from the inception of the Vineyard Wind planning and permitting process, to neutrally consider measures that would reduce the cumulative impacts of the Government’s entire Atlantic Coast offshore wind program to fishing and the environment—from early siting and design decisions that would avoid impacts to later-stage measures to mitigate and compensate. Instead, the Bureau failed to consider any measures proposed by the Alliance or the fishing industry, did not include mitigation alternatives in the Final Environmental Impact Statement, and only considered the extremely limited mitigation measures as proposed by the interested developer.

As described in the Seafreeze brief,¹⁵³ BOEM impermissibly segmented its NEPA analysis of its massive new offshore wind program on the Northeast Outer Continental Shelf when it considered the Vineyard Wind 1 Project in isolation. Even within the permitting process for this one project, BOEM’s environmental review was divided into smaller actions that served to mask the plain truth that the environmental impact of the whole project is greater than the sum of its component parts.

¹⁵¹ *Id.*

¹⁵² *Id.* at 5.

¹⁵³ *Seafreeze* Mem. at 48.

NEPA requires that an agency must take a “hard look” at the environmental effects of a major federal action “and consequences of that action.”¹⁵⁴ The impact statement must therefore look beyond the decision to offer a lease and consider the predictable consequences of that decision. The wind energy area identification, lease issuance, survey activities, SAP approval, COP approval, and decommissioning of an offshore wind energy project constitute, in effect, a single course of action that require a single impact statement. Each of these activities depends on the others for its justification. Yet, BOEM’s approach to environmental review is to divide these stages into different reviews and approvals, which are further complicated by a number of state and local permits and reviews.

The result of this segmentation is that there is never one holistic “hard look” at a single offshore wind energy project, much less multiple interrelated (and, in this case, adjacent) projects in one geographic area, even when those projects are largely indistinguishable apart from corporate ownership. By slicing and dicing project reviews into minute components of interrelated actions, environmental and economic effects are minimized—just as the operation of an individual turbine would likely not have significant environmental effects, the larger picture is entirely different.

In the Vineyard Wind Final Environmental Impact Statement, the segmentation of project review is compounded by an overly narrow purpose and need statement. NEPA must be approached to fulfill the agency’s purpose and need, not that of a project

¹⁵⁴ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

applicant.¹⁵⁵ An agency cannot circumvent its NEPA obligations “by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives,” nor can it “craft a purpose and need statement so narrowly drawn as to foreordain approval of” a project proposed by a private party.¹⁵⁶

Despite these clear limitations on defining the purpose and need of an Environmental Impact Statement, the Vineyard Wind Final Environmental Impact Statement describes its purpose as to determine whether to approve the COP and “deliver power to the New England energy grid to contribute to Massachusetts’s renewable energy requirements—particularly, the Commonwealth’s mandate that distribution companies jointly and competitively solicit proposals for offshore wind energy generation.”¹⁵⁷ Throughout the Final Environmental Impact Statement, the power purchase agreement between Vineyard Wind and the Commonwealth of Massachusetts executed as the result of such a solicitation greatly and improperly limit BOEM’s analysis and consideration of an appropriate range of alternatives.

The Bureau cannot limit its range of alternatives or analysis for this project based on contracts or decisions made prior to NEPA review; this is both an established principle of NEPA judicial history and a fact that BOEM has previously acknowledged.¹⁵⁸

¹⁵⁵ See 40 C.F.R. § 1501.

¹⁵⁶ *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2010).

¹⁵⁷ USACE_AR_008511-USACE_008536.

¹⁵⁸ *Fisheries Survival Fund v. Jewell*, 2018 WL 4705795 (D.D.C. Sept. 30, 2018) (stating that a developer’s investment in a lease is “made with full awareness that its proposals for

2. The Bureau’s Approval of the Record of Decision also Relied on Violations of the Jones Act

The Jones Act, among other regulations, requires that all merchandise transported between two points in the United States be carried by a qualified vessel built, owned, and operated within the United States and by United States citizens.¹⁵⁹ Waivers are granted only in the interest of national defense.¹⁶⁰

The Garamendi Amendment, enacted in 2021,¹⁶¹ clarified that the Jones Act applies to offshore renewable energy projects. There is significant uncertainty regarding specific aspects of its application to offshore wind projects, resulting from a series of letter rulings and subsequent reversals from U.S. Customs and Border Protection and ongoing litigation. Under current interpretations, qualified vessels and crew must be used for several aspects of project construction, including carriage of materials to wind turbine installation vessels, crew transport, and laying scour protection.

The simultaneous construction of multiple projects within the U.S. Atlantic region would require the availability of a large volume of Jones Act-qualified vessels and crew members—an amount widely known not to exist nor to be achievable within the timelines anticipated with BOEM’s reasonably foreseeable offshore wind development planning. Industry publications and government reports indicate that national

a wind energy facility may be rejected and that it may never construct or operate such a facility.”).

¹⁵⁹ 46 U.S.C. § 501.

¹⁶⁰ *Id.*

¹⁶¹ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 (2020).

shipbuilding infrastructure will be unable to produce enough wind turbine installation vessels in time to meet projected demands and that even if feeder barges are used in conjunction with a small number of Jones Act-compliant wind turbine installation vessels under commission, the global fleet will not have enough wind turbine installation vessels available to support the proposed number of projects in the Northeast U.S.¹⁶²

Despite this clear knowledge, BOEM’s “reasonably foreseeable assumptions” in the Final Environmental Impact Statement include an unobtainable proposed build-out of offshore wind projects, dismissing concerns over statutory violations by claiming its build-out scenario “assumes the challenges of vessel availability and supply chain will be overcome, and projects will advance at the schedule the states and developers have announced.”¹⁶³ The Record of Decision authorizes the transport of goods from points in the United States to and within the Vineyard Wind Project site, which also consists of points within the United States, and anticipates such activities in other offshore wind project areas in the region when no Jones Act qualified vessels exist to perform these activities. The agency cannot merely assume a reasonably foreseeable impacts scenario that is not achievable absent wholesale changes to longstanding statutory doctrine. Accordingly, BOEM’s action in issuing the Vineyard Wind lease was *ultra vires*, arbitrary, capricious, and otherwise not in accordance with law.

¹⁶² Report to Congressional Committees, *Offshore Wind Energy: Planned Projects May Lead to Construction of New Vessels in the U.S., but Industry Has Made Few Decisions Amid Uncertainties*, U.S. Government Accountability Office (Dec. 2020).

¹⁶³ USACE_AR_00869.

5. NMFS's Issuance of the Incidental Harassment Authorization Violated the Marine Mammal Protection Act

The Alliance incorporates by reference the discussion of NMFS's violation of the Marine Mammal Protection Act in the brief of *Allco Renewable Energy Limited v. Haaland*.¹⁶⁴

6. NMFS's Supplemental Biological Opinion was Too Late and Not Supported by the Record

The Alliance incorporates by reference the discussion of the inadequacies of the October 18, 2021, Biological Opinion as stated in ACK Nantucket's brief in sections 5.A.1 through 5.A.4.¹⁶⁵

CONCLUSION

For the foregoing reasons, the Alliance's motion for summary judgment should be granted.

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Respectfully submitted,

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¹⁶⁴ *Allco Renewable Energy Limited v. Haaland*, Case No. 1:21-cv-11171-IT at 6-20 (Sept. 9, 2022), ECF No. 145.

¹⁶⁵ *ACK Residents Against Turbines v. U.S. Bureau of Ocean Energy Management*, Case No. 1:21-cv-11390-IT at 17-43 (July 25, 2022), ECF No. 89.

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