Oral Argument Requested

No. 23-2051

In the United States Court of Appeals
for the First Circuit

RESPONSIBLE OFFSHORE DEVELOPMENT ALLIANCE,
a D.C. nonprofit corporation,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA HAALAND, in her official capacity as the Secretary of the Interior; BUREAU OF OCEAN ENERGY MANAGEMENT; AMANDA LEFTON, in her official capacity as the Director of the Bureau of Ocean Energy Management; NATIONAL MARINE FISHERIES SERVICE; RICHARD W. SPINRAD, in his official capacity as the Administrator of the National Oceanic and Atmospheric Administration; UNITED STATES DEPARTMENT OF THE ARMY; CHRISTINE WORMUTH, in her official capacity as Secretary of the Army; UNITED STATES ARMY CORPS OF ENGINEERS; JAMIE A. PINKHAM, in his official capacity as the Acting Assistant Secretary of the Army for Civil Works; VINEYARD WIND 1 LLC,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Massachusetts, No. 1:22-cv-11172-IT
Hon. Judge Indira Talwani

PLAINTIFF-APPELLANT'S OPENING BRIEF

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Corporate Disclosure Statement

Under Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant states that the Responsible Offshore Development Alliance does not have a parent corporation, issues no stock, and no publicly held corporation has an ownership interest of 10% or more.

/s/ Roger J. Marzulla
Roger J. Marzulla

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Other

Glossary of Abbreviations

Alliance — Responsible Offshore Development Alliance

APA — Administrative Procedure Act

BOEM — Bureau of Ocean Energy Management

COP — Construction and Operations Plan

Corps — United States Army Corps of Engineers

CWA — Clean Water Act

EIS — Environmental Impact Statement

ESA — Endangered Species Act

MMPA — Marine Mammal Protection Act

NEPA — National Environmental Policy Act

NMFS — National Marine Fisheries Service

OCSLA — Outer Continental Shelf Lands Act

ROD — Record of Decision

Reasons Why Oral Argument Should Be Heard

This is a case of first impression regarding key legal issues governing the federal offshore wind program, including who has standing to challenge Government approvals and permits for offshore wind projects under key environmental statutes.[1] Oral argument will provide counsel with an opportunity to highlight key issues and to answer questions raised by the parties' briefs. This case should be heard with the related case of *Seafreeze Shoreside v. United States Department of the Interior*, No. 23-1853, because both cases involve a single decision by the district court, where the cases were consolidated, and involve challenges to the same final agency actions under the same statutes.

[1] These include the Endangered Species Act, 16 U.S.C. § 1536; NEPA, 42 U.S.C. § 4321-4370h; Marine Mammal Protection Act, 46 U.S.C. § 883; and Clean Water Act, 33 U.S.C. § 1311.

Jurisdictional Statement

In this Administrative Procedure Act case, Plaintiff-Appellant, the Alliance, appeals from the Judgment based on the Opinion and Order issued by the United States District Court for the District of Massachusetts on October 12, 2023, granting the Government's motion for summary judgment and denying the Alliance's motion for summary judgment.[2] The District Court had jurisdiction under 28 U.S.C. § 1331 because the Alliance asserted federal statutory claims that presented a federal question.

This Court has jurisdiction under 28 U.S.C. § 1291. The Alliance filed a timely Notice of Appeal on December 7, 2023,[3] and this Court issued a briefing notice on January 25, 2024.[4]

Statement of Issues

1. A party can assert a cognizable environmental injury within the zone of interests for the National Environmental Policy Act (NEPA) and the Marine Mammal Protection Act even if its interests are both monetary and environmental,[5] and the zone of interest test plays no role in determining

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[2] *See* Add1–47; Add48–49. "Add___" refers to pages in the addendum. "Appx___" refers to pages in the appendix.
[3] Appx22–23.
[4] Briefing Notice (Jan. 25, 2024), ECF No. 0018100467.
[5] *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1287–88 (D.C. Cir. 2005) (stating that the broad Congressional purpose of NEPA

jurisdictional standing.[6] The Alliance alleged environmental and economic interests. Did the district court err in holding that the Alliance's interests were outside the statutes' zone of interest and therefore the Alliance lacked standing?

2. The Supreme Court has held that economic injuries constitute an injury-in-fact and can support standing under the Endangered Species Act (ESA) and the Outer Continental Shelf Lands Act (OCSLA).[7] Although the district court recognized the Alliance's economic interests, the court held that the Alliance lacked standing to pursue its ESA and OCSLA claims. Did the district court err in holding that the Alliance lacked standing under these Acts?

3. Under OCSLA, the Secretary was required to ensure that twelve statutory conditions were met before the agency approved the Project. The Administrative Record shows that the Bureau of Ocean Energy Management (BOEM) failed to ensure the Project met those twelve requirements. Did the

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would not be met if persons not "pure of heart" were excluded from vindicating the Act).

[6] *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) (explaining that "[a]lthough we admittedly have placed [the zone of interest] test under the 'prudential' rubric in the past . . . it does not belong there[.]").

[7] *Bennett v. Spear*, 520 U.S. 154, 156 (1997) (holding that economic harm to a business clearly constitutes an injury-in-fact.).

district court err in construing the statute's "shall ensure" language as conferring discretion on the Secretary to merely consider and "balance" the requirements before approving the Project?

4. The Corps failed to analyze the Project's cumulative impacts and analyzed the Project using incorrect sizing dimensions. Did the district court err when it determined that the Corps' analysis of the Project did not violate the Clean Water Act?

Statement of the Case

1. Factual Background

1.1 The Responsible Offshore Development Alliance Is a Trade Association That Seeks to Make Any New Offshore Wind Developments Compatible With Commercial Fishing Interests

Plaintiff-Appellant, the Responsible Offshore Development Alliance (the "Alliance"), "is a membership-based coalition of fishing industry associations and fishing companies, which have an interest in improving the compatibility of offshore developments with commercial fishing."[8] The Alliance's Atlantic members include major Atlantic fishing associations, dealers, seafood processors, over 120 vessels across fourteen states, and other affiliated businesses.[9]

[8] Appx117–120.
[9] Appx26.

Alliance Fishing Vessel and Members

 [10]

The Alliance actively works to protect the needs of commercial fishermen by improving "the compatibility of offshore developments" with commercial fishermen and commercial fisheries,[11] and with the marine habitats on which they depend.[12]

The Alliance represents its members' fishing interests by directly collaborating with relevant regulatory agencies (e.g., National Marine Fisheries Service, Bureau of Ocean Energy Management, U.S. Coast Guard, fishery

[10] The Responsible Offshore Development Alliance, *Who We Are*, RODA, https://rodafisheries.org/who-we-are/ (last accessed March 4, 2023).
[11] Appx117.
[12] The Responsible Offshore Development Alliance, *About Us*, RODA, https://rodafisheries.org/about-us/ (last accessed March 4, 2023).

management councils, and state agencies), science experts, and others to coordinate science and policy approaches to managing the development of the Outer Continental Shelf while minimizing conflicts with existing traditional and historical fishing.[13] The Alliance also works to increase collaborative research and monitoring to: (1) improve overall understanding regarding siting and operations of new offshore activities; (2) support mitigation requirements in terms of informing and minimizing impacts to users and resources, including the development of standardized mitigation frameworks; and (3) inform agency decision-making and industry engagement through existing consultative processes.[14]

1.2 The Vineyard Wind 1 Project

On July 15, 2021, the Secretary of the Interior, acting through BOEM, approved Vineyard Wind 1 LLC's 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.[15] BOEM also granted Vineyard Wind an easement to construct 23.3 miles of high-tension electrical cable to carry power from the turbines to an

[13] The Responsible Offshore Development Alliance, *About Us*, RODA, https://rodafisheries.org/about-us/ (last accessed January 30, 2023).
[14] *Id.*
[15] Appx222–224.

electrical substation to be constructed in Barnstable, Massachusetts; however, the cable corridor is actually 39.4 miles long.[16]

The Project is only the first of numerous 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. 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 for cable protection, electrical substations, and more.[17]

1.3 BOEM Selects the Vineyard Wind Lease Area Without Considering the Impacts on the Fishing Industry and the Impacts on the Marine Ecosystem

In May 2012, BOEM identified an area on the Outer Continental Shelf south of Nantucket and Martha's Vineyard for a possible lease and prepared an Environmental Assessment for the proposed lease area.[18] This area became Vineyard Wind's lease area. Following a competitive lease sale, BOEM awarded the lease to Vineyard Wind 1, LLC's predecessor.[19] The developer divided the lease into two projects and submitted a Construction and Operations Plan for Vineyard

[16] Appx154; Appx170.
[17] Appx134–135.
[18] Add53–54.
[19] Add54 (citing Appx146).

Wind 1 on December 19, 2017,[20] proposing to build at least 60 turbines on 75,614 acres.[21]

The lease area is home to many species listed under the Endangered Species Act ("ESA"), including fin, sei, sperm, and North Atlantic right whales, the Northwest Atlantic District Population Segment of loggerhead sea turtles, North Atlantic District Population Segment of green sea turtles, Kemp's ridley or leatherback sea turtles, and any District Population Segment of Atlantic sturgeon.[22] The area is also home to a strong fishing industry that relies heavily on the health of the marine ecosystem of the Outer Continental Shelf.[23]

Following the Construction and Operations Plan submission, the Government started reviewing the Project under OCSLA, NEPA, the Clean Water Act, ESA, and the Marine Mammal Protection Act. During the review process, the Alliance and its members provided thoughtful analysis and suggestions to the federal agencies to minimize Vineyard Wind's adverse impacts on the marine environment and the fishing industry. Most of these comments and proposals were unacknowledged by the Government while it rushed to approve the Project, sweeping legitimate public interests aside to meet policy goals.

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[20] Add55.
[21] Appx154; *see* Appx134.
[22] Appx199; Appx201–203.
[23] *See* Appx94–98; Appx103–112.

1.4 BOEM Determines That the Biological Opinion Does Not Adequately Assess the Project's Impacts and Asks NMFS to Reinitiate Section 7 Consultation

Before approving the Vineyard Wind Project, BOEM and the National Marine Fisheries Service (NMFS) invalidated the 2020 Biological Opinion[24] because the potential impacts of the Construction and Operations Plan had not been "fully assessed."[25] BOEM stated that new information regarding the status of the North Atlantic right whale had "become available" since the publication of the Biological Opinion.[26] BOEM asked NMFS to "determine whether the reasonable and prudent measures currently in the [Biological] Opinion will also be effective and sufficient for the additional activities for which consultation is being reinitiated."[27]

NMFS agreed that reinitiation of the Section 7 consultation was necessary because the Construction and Operations Plan had been "modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion."[28] NMFS advised BOEM that the consultation would result in a new Biological Opinion.[29] NMFS also informed BOEM that the start date for

[24] *See* Appx148; Appx166.
[25] Appx148.
[26] Appx148.
[27] Appx149.
[28] Appx166.
[29] Add59; Appx166.

the reinitiated consultation would be May 7, 2023, the date BOEM asked for consultation.[30]

1.5 BOEM and the Corps Approve the Construction and Operations Plan Without a Complete Biological Opinion and Clean Water Act Permit

BOEM, NMFS, and the Army Corps of Engineers (Corps) issued a Joint Record of Decision (ROD)—three days after invalidating the 2020 Biological Opinion as incomplete and reinitiating the Section 7 consultation process—approving the Construction and Operations Plan for the Project without a valid biological opinion as required by ESA.[31]

In the ROD, the Corps also announced its decision to approve the Project's Clean Water Act permits but admitted 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."[32]

In August 2021, the Corps issued a Supplement to the Record of Decision[33] and in January 2022, the Corps issued another Supplement to the Record of Decision.[34]

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[30] Appx180; Appx167.
[31] Appx154–164.
[32] Appx161.
[33] Appx169–173.
[34] Appx220–221.

1.6 Before the Biological Opinion Was Completed, NMFS Issues an Incidental Harassment Authorization for the Take of 20 of the 368 Remaining North Atlantic Right Whales

While NMFS conducted its reinitiated Section 7 Consultation to revise its analysis of the impacts on the North Atlantic right whale, NMFS also issued an Incidental Harassment Authorization under the Marine Mammal Protection Act. This Incidental Harassment Authorization authorized the take of 20 North Atlantic right whales and 7,279 other marine mammals in total during the one-year authorization.[35] The take of 20 North Atlantic right whales constituted 5.4% of the species' population at the time of Project approval.[36]

NMFS acknowledged that the Vineyard Wind lease area represented "an important migratory area" for the endangered North Atlantic right whale, of which there are only 368 right whales in existence, and that "[c]ore year-round foraging habitats [had] been identified [] within and around the project area."[37] NMFS further recognized in its Biological Opinion for the ESA that North Atlantic right whales are highly susceptible to "anthropogenic mortalities,"[38] have low resilience

[35] Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Construction of the Vineyard Wind Offshore Wind Project, 86 Fed. Reg. 33810, 33836 (June 25, 2021).
[36] *Id.*
[37] *Id.* at 33845.
[38] Appx130–131; Appx190.

to perturbations,[39] and have low birth rates.[40] NMFS nevertheless issued the Incidental Harassment Authorization.[41]

2. Procedural Background—Rulings Presented for Review

On October 19, 2021, the Alliance sent a 60-day Notice of Intent to Sue under OCSLA, the Clean Water Act, and the ESA to the appropriate Government officials.[42] Having received no response or curative action from any Government official, the Alliance filed its complaint in the District Court for the District of Columbia on January 31, 2022.[43] The Alliance alleged violations of the Administrative Procedure Act ("APA"),[44] OCSLA,[45] Clean Water Act,[46] ESA,[47] NEPA,[48] and the Marine Mammal Protection Act.[49]

[39] Appx131; Appx191.
[40] Appx131; Appx190–191.
[41] 86 Fed. Reg. 33810 (June 25, 2021).
[42] Add73–95.
[43] Appx24–90; *see also* Gov's Answer to Compl. (Apr. 18, 2022), ECF No. 21.
[44] 5 U.S.C. § 701-706.
[45] 43 U.S.C. § 1349.
[46] 33 U.S.C. § 1311.
[47] 16 U.S.C. § 1531.
[48] 42 U.S.C. § 4321-4370h.
[49] 16 U.S.C. § 1371.

The District Court for the District of Columbia granted Vineyard Wind, LLC's unopposed Motion to Intervene as a defendant[50] and the Government's Motion to Transfer the case to the District of Massachusetts.[51]

The Alliance,[52] the Government,[53] and Vineyard Wind[54] filed cross-motions for summary judgment.

On October 12, 2023, the district court granted the Government and Vineyard Wind's Motions for Summary Judgment.[55] The Alliance appealed this decision on December 7, 2023,[56] asking this Court to reverse the district court's decision and remand the case for further proceedings.

Summary of Argument

The district court failed to conduct the "thorough, probing, in-depth review" of the agency actions at issue here, as the APA requires.[57]

First, the district court avoided most of the APA's required review by finding that the Alliance lacked standing to assert that the agencies' actions were not in accordance with NEPA, the ESA, and the Marine Mammal Protection Act—

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[50] Order Granting Motion to Intervene (June 27, 2022), ECF No. 25.
[51] Gov's Motion to Transfer Case (Feb. 18, 2022), ECF No. 10; Order to Transfer Case (June 27, 2022), ECF No. 25.
[52] Alliance Motion for Summary Judgment (Nov. 08, 2022), ECF No. 52.
[53] Gov's Motion for Summary Judgment (Dec. 20, 2022), ECF No. 59.
[54] Vineyard Wind Motion for Summary Judgment (Dec. 27, 2022), ECF No. 73
[55] Add1–47.
[56] Appx22–23.
[57] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971).

and never reached the merits of those claims. But the district court applied the wrong legal test for standing, failing to realize that since *Lexmark*, "zone of interest" no longer determines standing.[58] The district court also failed to recognize that commercial fishermen who have environmental interests and economic interests have standing under the APA and other relevant environmental statutes.

On the merits, the district court misconstrued the requirements of OCSLA to be discretionary rather than mandatory—then failed to examine how the Secretary had exercised that purported discretion.[59] The district court also applied judicial deference to accept, without examination, the Corps' conclusory statement that it had complied with Clean Water Act regulations.[60]

The Court should therefore reverse and remand for determination in accordance with the correct legal standards.

Argument

1. Standard of Review

The Administrative Procedure Act[61] requires courts to hold unlawful and set aside federal agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[62] This Court reviews de novo a district

[58] *Lexmark*, 572 U.S. at 127–128.
[59] Add45.
[60] Add36–37.
[61] 5 U.S.C. § 706(2)(A).
[62] *Id*.

court's grant of summary judgment in APA cases.[63] This de novo standard of review requires this Court to review the challenged agency action on its own and, like the district court, to apply the "not in accordance with law" standard of the Administrative Procedure Act.[64]

This review should be "a thorough, probing, in-depth review" of the challenged decisions.[65] In deciding whether the Service acted arbitrarily and capriciously or contrary to law, this Court must determine whether the agency (1) relied on factors that Congress has not intended it to consider, (2) failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs counter to the evidence before the agency, or (4) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[66]

Courts should "not defer to the agency's conclusory or unsupported suppositions."[67] Even where deference may be applicable, an agency may not adopt an interpretation of its governing statute that either conflicts with the

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[63] *See Jimenez-Portillo v. Garland*, 56 F.4th 162, 165 (1st Cir. 2022); *see also Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997).
[64] *Castlewood Prod., L.L.C. v. Norton*, 365 F.3d 1076, 1082 (D.C. Cir. 2004).
[65] *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 415–16.
[66] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[67] *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004).

unambiguous meaning of the statute or reflects an unreasonable interpretation of statutory ambiguity.[68]

2. The District Court Erred as a Matter of Law in Dismissing the Alliance's Claims under NEPA and the Marine Mammal Protection Act for Lack of Standing, Misapplying the Zone of Interest Test

NEPA serves as our "basic national charter for the protection of the environment"[69] and requires "the federal government to identify and assess in advance the likely environmental impact of its proposed actions, including its authorization or permitting of private actions."[70] NEPA achieves its purpose by "action-forcing procedures . . . requir[ing] that agencies take a hard look at environmental consequences" of their proposed actions.[71] NEPA's "hard look" requires federal agencies to analyze and consider "any reasonably foreseeable adverse environmental effects which cannot be avoided."[72] To comply with NEPA, agencies must consider "[b]oth short- and long-term effects . . . [b]oth beneficial and adverse effects . . . [e]ffects on public health and safety . . . [and e]ffects that would violate Federal . . . law protecting the environment."[73]

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[68] *Friends of Blackwater v. Salazar*, 691 F.3d 428, 432 (D.C. Cir. 2012).
[69] 40 C.F.R. § 1500.1(a).
[70] *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 36 (D.C. Cir. 2015).
[71] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (internal quotations omitted).
[72] 42 U.S.C. § 4332(C)(ii).
[73] 40 C.F.R. § 1501.3(b)(2).

The Marine Mammal Protection Act[74] was the first national legislation to mandate an ecosystem-based approach to marine resource management. Under the Act, Congress directed that the primary objective of marine mammal management should be to maintain the health and stability of the marine ecosystem and, when consistent with that primary objective, to obtain and maintain optimum sustainable populations of marine mammals. In 2018, Congress enacted a general moratorium on the take of marine mammals without a permit.[75] The permit exception to this moratorium provides that "the Secretary shall allow" only "incidental" taking that will have only a "negligible" impact on the species.[76]

2.1 The District Court Erred in Holding That the Zone of Interest Test Is a Jurisdictional Standing Requirement

The district court erred as a matter of law in holding that "to establish standing under the APA, [the Alliance] must demonstrate they have been 'adversely affected or aggrieved by agency action within the meaning of a relevant statute.'"[77] The court held that for the Alliance to have standing, its claims must fall within the zone of interest of the relevant statute. The court cites *CSL Plasma Inc*.[78] as support for this ruling, but that case holds the opposite of what the district

[74] 16 U.S.C. § 1361-1423.
[75] 16 U.S.C. § 1371(a)(1).
[76] 16 U.S.C. § 1371(5)(A).
[77] Add30 (quoting 5 U.S.C. § 702).
[78] Add30 (citing *CSL Plasma Inc. v. U.S. Customs & Border Prot.*, 33 F.4th 584, 588 (D.C. Cir. 2022)).

court held.[79] *CSL Plasma* follows the Supreme Court's 2014 ruling in *Lexmark*,[80] which flatly rejected the inclusion of the zone of interest test as part of the jurisdictional standing analysis. The *Lexmark* court explained that "[a]lthough we admittedly have placed that test under the 'prudential' rubric in the past. . . it does not belong there[.]"[81]

To determine whether the Alliance's interests fall within a statutory zone of interest and therefore state a cause of action under the APA, the district court should have—but chose not to—applied "traditional tools of statutory interpretation"[82] to "determine the meaning of the congressionally enacted provision creating a cause of action."[83] This it failed to do, warranting reversal.

2.2 The District Court Ignored the Environmental Interests of the Alliance and Its Members, Which Provide NEPA Standing

Contrary to the district court's holding, courts routinely hold that plaintiffs who allege economic injuries along with environmental injuries have satisfied NEPA's zone of interest test.[84] A party can have standing under NEPA even if a

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[79] *CSL Plasma Inc.*, 33 F.4th at 588 ("The zone of interests inquiry, however, is not jurisdictional.").
[80] *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).
[81] *Id.* at 127; *see also Crossroads Grassroots Pol'y Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 319 (D.C. Cir. 2015).
[82] *Id.* at 127.
[83] *Id.* at 128.
[84] *See Cent. S. Dakota Co-op. Grazing Dist. v. Sec'y of U.S. Dep't of Agric.*, 266 F.3d 889, 896 (8th Cir. 2001).

party's overriding or obvious interest is viewed as monetary, which is not the case here, so long as there is some connection to the environment:[85]

> [A] party is *not precluded* from asserting cognizable injury to environmental values because his "real" or "obvious" interest may be viewed as monetary. . . . And it surely does not square with the broad Congressional purpose in NEPA of assuring that environmental values would be adequately and pervasively considered in federal decision-making for private parties who may not be "pure of heart" to be excluded from vindicating the Act.[86]

Commercial fishermen, fishing vessels, fish packers, and others dependent on the sea for their livelihood have economic interests, those interests are wholly dependent on the health of the ocean environment and the sea life it supports. Few economic sectors are as integrally intertwined with their environment as the fishing industry. When even recreational fishermen have prudential standing under NEPA,[87] it would be nonsensical to conclude that commercial fishermen lack that same prudential standing to protect "the human environment."[88] Similarly paradoxical is the argument that those who occasionally observe animals in the wild have prudential standing under NEPA, but those who spend their days (and

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[85] *See Realty Income Tr. v. Eckerd*, 564 F.2d 447, 452 (D.C. Cir. 1977); *see also Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1287–88 (D.C. Cir. 2005).
[86] *Realty Income Trust*, 564 F.2d at 452 (citations omitted) (emphasis added).
[87] *Am. Oceans Campaign v. Daley*¸183 F.Supp.2d 1, 10 (D.D.C. 2000).
[88] 42 U.S.C. § 4332(2)(C); *see also Sierra Club v. FERC*, 827 F.3d 36, 41 (D.C. Cir. 2016).

often weeks or months at a time) amid the sea and its wildlife do not.[89] These same interests place the Alliance and its members within NEPA's zone of interest.[90]

Here, the Alliance alleged significant environmental injuries that will result from constructing the Project, injuries that logically flow to fishermen whose livelihoods depend on healthy fish habitats and ocean ecosystems. The district court ignored that almost all of the plaintiffs in the related *Seafreeze* action[91] are members of the Alliance, and the Alliance specifically relied on the affidavits filed by those parties in the *Seafreeze* action, together with those filed in the Alliance's case, to detail the Alliance's non-economic injuries.[92]

Courts have concluded that commercial fishermen who "use[d] the waters of Washington for recreation, fishing, and aesthetic pursuits, engage[d] in and obtain[ed] great enjoyment and benefit from observing, studying, and photographing wildlife. . . and depend[ed] on fish as a natural resource [and] generated hundreds of millions of dollars in personal income . . . through commercial fishing,"[93] had interests that provided standing and were within NEPA's zone of interest.

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[89] *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992).
[90] *See* Add30–32.
[91] *Seafreeze Shoreside, Inc. v. United States Dept. of the Interior*, No. 23-1853 (1st Cir. 2023).
[92] Appx94–98; Appx103–112.
[93] *Washington Toxics Coal. v. U.S. Dep't of Interior, Fish & Wildlife Serv.*, 457 F. Supp. 2d 1158, 1168 (W.D. Wash. 2006) (internal quotations and brackets omitted).

One federal district court held that commercial fishermen who challenged regulations that would cause the overharvesting of red snapper had interests within NEPA's zone of interest,[94] explaining that "it is self-evident that overharvesting of red snapper in either sector could negatively impact both sectors' interests in the fishery's health."[95] The court held that "[o]verharvesting of red snapper is as likely to injure commercial as recreational fishing interests, and overharvesting is directly traceable, indeed dependent upon, NMFS's management actions or lack thereof."[96]

The Alliance and its members have alleged similar environmental interests at stake—interests that the district court did not consider in its zone of interest analysis. The Alliance's members testified to important environmental interests in their declarations:

- "The Alliance's abilities to achieve its missions and goals are impaired when the Government fails to follow statutory procedures and requirements. The Alliance's activities are impaired when the Government fails to adequately consider alternatives that would mitigate the impacts of offshore development to the commercial fishing industry and the *marine environmen*t."[97]

- "[T]he Government has simply forged ahead with the Vineyard Wind development, giving little or no consideration to the *destruction* of the *marine environment*, *fishing stocks*, and the centuries-old profession of the fishermen who supply our nation with seafood."[98]

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[94] *Guindon v. Pritzker*, 31 F. Supp. 3d 169, 186–187 (D.D.C. 2014).
[95] *Id.*
[96] *Id.*
[97] Appx97–98 (emphasis added).
[98] Appx97 (emphasis added).

- "We are incredibly concerned about the upcoming construction and operation of the Vineyard Wind project due to the many unknowns of the potential *ecological impacts on not only squid and their habitat*. . . . The construction of the project will also negatively impact our ability to fish in the lease area, which is one of our most productive fishing areas. Widespread *construction is slated to take place on and around the main* fishing and *habitat areas for this species* and there have been no in-depth studies on its effect on squid. . . . The Vineyard Wind project will also make fishing in the lease area more difficult and hazardous. Because of the lack of properly spaced and dedicated transit lanes for boats to pass, there will be heavy congestion in and around the leasing area which will create hazardous conditions for vessels fishing in the area."[99]

The administrative record confirms the adverse impacts of the proposed Project on the marine ecosystem and habitats that support the fishing industry in the Northeast:

- "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."[100]

- "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."[101]

- "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.*"[102]

[99] Appx111–112 (emphasis added).
[100] Appx157 (emphasis added).
[101] Appx157 (emphasis added).
[102] Appx158 (emphasis added).

- "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."[103]

Each identified harm to fish populations and the marine environment is directly connected to the Alliance and its members' interests. The fishing industry depends on the health of the ecosystem and the health of fish to survive and continue to operate. Fishermen's interest in the health of the fishery resources is not purely economic because, without adequate environmental protections, their businesses and livelihoods fall apart.

The district court ignored the Alliance's Memorandum of Understanding with BOEM and NMFS regarding offshore wind projects and those projects' impacts on the fishing industry, fisheries resources, and marine habitats.[104] In this Memorandum, the parties "identifie[d] areas of mutual benefit . . . to support responsible planning, siting, and development of offshore wind power that considers impacts to the fishing industry, fisheries resources, protected resources, and the marine habitats upon which fishery resources depend."[105] The Alliance is also recognized as "a membership-based coalition of fishing industry associations and fishing companies, which have an interest in improving the compatibility of

[103] Appx157–158 (emphasis added).
[104] Appx117–120.
[105] Appx95–96 (emphasis added).

offshore developments with commercial fishing. . . . seek[ing] to work . . . to address offshore development, fisheries management, and *ecosystem health*."[106] The authorities for the Memorandum are the Magnuson-Stevens Act, the ESA, Marine Mammal Protection Act, and OCSLA.

In *Monsanto Co. v. Geerston Seed Farms*,[107] the Supreme Court concluded that, because the plaintiffs had alleged economic and environmental interests, the plaintiffs' interests were within NEPA's zone of interests.[108] In another similar case, the D.C. Circuit stated that the focus is "not on those who Congress intended to benefit, but on those who in practice can be expected to police the interests that the statute protects."[109]

2.3 These Same Alliance Interests Support Standing Under the Marine Mammal Protection Act and Fall Within Its Zone of Interests

The district court also committed reversible error in dismissing the Alliance's Marine Mammal Protection Act cause of action, erroneously finding that the Alliance did "not put forth competent evidence as to an environmental injury, or even an environmental harm that would impact their fishing" and did not assert

[106] Appx117 (emphasis added).
[107] *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010).
[108] *Monsanto*, 561 U.S. at 156–157.
[109] *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998).

"any cognizable interest in right whales, or any marine mammals for that matter."[110]

Similar to NEPA, courts have construed standing and the zone of interest under the Marine Mammal Protection Act liberally:[111]

> [M]arine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem.[112]

This generous interpretation is "intended to protect marine mammals so that they continue 'to be a significant functioning element in the ecosystem of which they are a part.'"[113]

As the Ninth Circuit in *City of Sausalito v. O'Neil*[114] observed, the "implementation of the MMPA would be severely hampered if affected parties with conservationist, aesthetic, recreational, or economic interests in marine mammal protection were *not* allowed to bring suits challenging failures" of agencies.[115] In *City of Sausalito*, the city challenged the approval of plans for a former military

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[110] Add32; *but see* Add79–83.
[111] *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1203 (9th Cir. 2004).
[112] 16 U.S.C. § 1361(6).
[113] *City of Sausalito*, 386 F.3d at 1202 (quoting 16 U.S.C. § 1361(2)).
[114] *City of Sausalito*, 386 F.3d 1186.
[115] *Id.* at 1203 (emphasis added).

base, contending that the plans would cause the taking of sea lions and that the park service did not apply for an incidental take permit, as required by the Marine Mammal Protection Act The Ninth Circuit concluded that the city's interests in protecting the sea lions involved economic interests, conservation, and recreational interests and held that all three interests fell within the Marine Mammal Protection Act's zone of interests.[116]

Here, an Alliance member alleged an interest in protecting the habitat and ecosystem of the North Atlantic right whale.[117] In his declaration, the captain of Old Squaw also described his recreational interest in viewing the North Atlantic right whale:

> Watching the endangered [right whales] with their young skim-feeding is an amazing experience, and I have been fortunate to be a part of it, seeing a first-hand view of the nature and the sea on the Outer Continental Shelf. . . . The construction and operation of the Vineyard Wind project will deprive me of the aesthetic and spiritual pleasures I derive from viewing [right whales] in the area.[118]

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[116] *Id.*

[117] Appx103–105.

[118] Decl. of D. Aripotch ¶ 27, *Seafreeze Shoreside, Inc. v. United States Dept. of the Interior*, No. 21-11091 (D. Mass. Nov. 7, 2022), ECF No. 66-1; *see also Animal Welfare Inst. v. Kreps*, 561 F.2d 1002 (D.C. Cir. 1977) (plaintiffs alleging recreational interests found to have standing to bring Marine Mammal Protection Act claim).

3. The District Court Erred in Upholding the Record of Decision, Which Was Issued Without a Valid Biological Opinion Required by the ESA

Without knowing whether the Vineyard Wind Project would jeopardize the continued existence of the severely endangered North Atlantic right whale and without completing the endangered species consultation required by ESA Section 7, on May 10, 2021, three Government agencies (BOEM, Corps of Engineers, and NMFS) issued a joint Record of Decision granting all of the approvals and permits necessary to start construction on the Vineyard Wind Project.[119] That final agency action was invalid because ESA Section 7 requires completion of the consultation before an agency takes an action that may affect a listed endangered species.[120]

The North Atlantic right whale is one of the most iconic and most endangered creatures on the planet.[121] Its feeding ground includes the area off of Nantucket where the Vineyard Wind Project is being built.[122]

But instead of addressing the validity of the ROD in light of the agencies' failure to determine jeopardy to the North Atlantic right whale species, the district court dismissed the Alliance's claim on the grounds that they lacked Article III

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[119] *See* Appx150.
[120] *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1108 (9th Cir. 2012).
[121] *See* Appx184–196.
[122] Appx186.

standing.[123] This legal error should be reversed so the validity of the ROD can be decided on its merits.

3.1 Although ESA Requires That Consultation Be Completed and a Biological Opinion Be Issued Before the Agency Takes Action, the ROD Was Issued While Consultation Was Incomplete—In Violation of ESA

Congress enacted the ESA "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 endangered species and consult with other agencies *before* it acts to "insure that any action authorized" by an agency does not jeopardize the continued existence of any endangered or threatened species or its habitat.[124] ESA Section 7 requires that an agency consult with NMFS before taking any action that may affect an endangered species like the North Atlantic right whale.[125]

During the consultation, NMFS must "[f]ormulate [its biological] opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat."[126] Upon completion of the Section 7 consultation, the agency must set forth its analysis in a Biological Opinion, including the

[123] Add26–29.
[124] 16 U.S.C. § 1536(a)(2).
[125] *See* 50 C.F.R. § 402.14.
[126] 50 C.F.R. § 402.14(g)(4).

agency's determination of whether there is "jeopardy" to the species and what measures the agency must take to avoid jeopardy,[127] using the "best scientific and commercial data available."[128]

To ensure that the agencies' actions do not jeopardize the species, ESA regulations require the agency to reinitiate consultation where "new information" reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered or the identified action is modified in a way that "causes an effect to the listed species or critical habitat that was not considered in the biological opinion."[129] And "'[w]hen reinitiation of consultation is required, the original biological opinion loses its validity,'"[130] and "[r]einitiation of consultation requires [the appropriate consulting agency] to issue a new Biological Opinion before the agency action may continue."[131]

Although NMFS had issued a Biological Opinion back in September 2020, when the ROD was issued eight months later, that Biological Opinion was no longer valid because "new information regarding the status of the North Atlantic

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[127] 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(h).
[128] *Oceana, Inc. v. Pritzker*, 75 F. Supp. 3d 469, 475 (D.D.C. 2014) (quoting 16 U.S.C. § 1536(a)(2)).
[129] 50 C.F.R. § 402.16(a)(3).
[130] *Strahan v. Roughead*, 910 F. Supp. 2d 358, 375 (D. Mass. 2012) (quoting *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1108 (9th Cir. 2012)).
[131] *See Env't Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1076 (9th Cir. 2001); *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1451 (9th Cir. 1992).

right whale ha[d] become available since the consultation"[132] and "changes to the proposed action" required "a new Biological Opinion that [would] replace the September 11, 2020, Opinion."[133] As NMFS admitted, "reinitiation of consultation is necessary to consider effects of several surveys that were not considered in BOEM's 2019 Biological Assessment . . . or our September 11, 2020, Biological Opinion."[134]

The agencies did not complete their reinitiated consultation until five months after they issued the ROD—when pre-construction activities were already underway at the Vineyard Wind site. During those five months, and specifically on the date the agencies issued their ROD, there was no valid Biological Opinion for the Project. The day they reinitiated consultation (if not before), the first Biological Opinion had "disappeared into the regulatory netherworld,"[135] without a second Biological Opinion to replace it, leaving the agencies with no idea whether their proposed actions would jeopardize the North Atlantic right whale or other endangered species.

The district court's finding that the first Biological Opinion "was not deemed inadequate, invalid, or otherwise unreliable for any purpose" is wrong as a matter

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[132] Appx166.
[133] Appx166.
[134] Appx166; *see* Appx180.
[135] *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 79 (D.C. Cir. 2011).

of law. For "[w]hen reinitiation of consultation is required, the original biological opinion loses its validity, as does its accompanying incidental take statement, which then no longer shields the action agency from penalties for takings."[136]

The district court also erred in finding ESA Section 7 satisfied where "BOEM approved the COP and the Corps issued a Section 404 Permit pending the results of a reinitiated biological consultation."[137] Section 7 requires consultation before the agency takes action, and an agreement to take action first and comply later does not satisfy this ESA requirement.[138]

The second Biological Opinion did not exist when the agencies issued their ROD and the validity of the ROD must be judged on the grounds "upon which the record discloses that its action was based."[139] That rule applies not only to arbitrary and capricious review but also to review for statutory compliance.[140] In reviewing agency action, the court applies the law to the facts based on the agency record as it stood on the date of the decision—and a document made five months later is not part of that record.

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[136] *See Ctr. for Biological Diversity*, 698 F.3d at 1108 (citing U.S. Fish & Wildlife Serv. & Nat. Marine Fisheries Serv., *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities under Section 7 of the Endangered Species Act* 4–23 (1998).
[137] Add29.
[138] *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1108 (9th Cir. 2012)
[139] *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943).
[140] 5 U.S.C. § 706(2)(C).

3.2 The District Court Misconstrued the Test for ESA Standing, Which Includes Economic Injury, and Ignored the Alliance's Particularized Injury-in-Fact

The Supreme Court has held that economic injury, as well as environmental injury, supports standing for an APA claim involving Section 7 of the Endangered Species Act. Because the Alliance has both economic and environmental injuries, the district court's dismissal of their claim for lack of jurisdiction was a legal error that should be reversed.

In *Bennett v. Spear*,[141] for-profit farmers challenged a Section 7 Biological Opinion concerning endangered fish that would have reduced available irrigation water and the crops they could grow with it. They alleged no environmental injury. Reversing the Ninth Circuit's holding that ESA standing could only be based on environmental interests, the Supreme Court held that the farmers had standing: "The ESA does not preclude such review, and the claim that petitioners will suffer economic harm because of an erroneous jeopardy determination is plainly within the zone of interests. . . ."[142] The Court held that, while species conservation is the overall goal of the ESA, "we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by

[141] *Bennett v. Spear*, 520 U.S. 154 (1997).
[142] *Id.* at 156.

agency officials zealously but unintelligently pursuing their environmental objectives."[143]

Mountain States Legal Foundation v. Glickman[144] held that a timber company's economic injury gave it standing to challenge the Forest Service's cutback on allowable timber sales to protect endangered birds because

> [g]iven the company's historic dependence upon the Upper Yaak for its supply, together with the disruptive effect of the past shutdown, logging cutbacks in the Upper Yaak clearly inflict injury on the firm's economic well-being, which an order reducing the cutbacks would redress. And even forcing the Forest Service to rethink the issue would have some chance of affecting the cutbacks. *See Defenders of Wildlife,* 504 U.S. at 572 n. 7 (for procedural default, plaintiffs need not show that the default necessarily caused the injury or that its correction would necessarily redress the injury).[145]

Similarly, the D.C. Circuit found that trade associations that challenged the designation of a critical habitat and alleged economic interests had standing under the ESA because "economic harm to a business clearly constitutes an injury-in-fact."[146]

The Alliance provided ample evidence that its members will suffer economic injury caused by the Government's authorization of the Vineyard Wind Project. While the district court admitted that the Alliance's "members may lose some

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[143] *Id.* at 176–177.
[144] *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1996)
[145] *Id.* at 1232–33.
[146] *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017).

revenue as a result of the construction and operation of the Project,"[147] the court significantly understated the severe economic injury that the Alliance's members will suffer from this Project:

- The ROD states that injury to fishermen is "estimated to total $14 million over the expected 30-year lifetime of the Project."[148] The district court also ignored the evidence in the record showing that the Alliance will suffer particularized environmental injuries-in-fact from the completion of the Project.

- "As a result of the lease issuance and COP approval, Old Squaw will no longer be able to fish for squid in the Vineyard Wind lease area, thereby losing approximately 30% of its annual revenues. . . ."[149]

- "[T]he Vineyard Wind project will make fishing in the wind energy area by the Caitlin & Mairead impossible. . . ."[150]

- "The dangers posed by the Vineyard Wind project to the safety of commercial fishing operations and the environmental and ecological harm stemming from the project to squid in the area will severely limit the availability of squid for processing at Seafreeze's facility in Narragansett, Rhode Island, resulting in substantial loss of revenues to Seafreeze. This will require Seafreeze to reduce or curtail operations in order to cut costs and will likely result in termination of employees."[151]

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[147] Add28.
[148] Appx161.
[149] Appeal Now Pending Before this Court: Decl. of D. Aripotch ¶ 19, *Seafreeze Shoreside, Inc. v. United States Dept. of the Interior*, No. 21-11091 (D. Mass. Nov. 7, 2022), ECF No. 66-1.
[150] *Id*. ¶ 20.
[151] Appeal Now Pending Before this Court: Decl. of A. Ventrone, ¶ 11, *Seafreeze Shoreside, Inc. v. United States Dept. of the Interior*, No. 21-11091 (D. Mass. Nov. 7, 2022), ECF No. 66-7.

The Town Dock, another Alliance member, described how noise will reduce the squid population.[152] Representatives for the Town Dock wrote that the Project will make fishing in the lease area more difficult and hazardous and that there will be heavy congestion, creating hazardous conditions.[153] Additionally, mobile gear vessels like the Town Dock's vessels might not be able to tow gear through the lease area safely and efficiently.[154]

The declarations of Alliance members, which were filed in *Seafreeze*,[155] and incorporated by reference in the Alliance's Response and Reply to Summary Judgment,[156] further identified the Alliance's specific injuries in fact:

> [The] Federal Defendants' actions will result in harm, injury, and death to a diverse range of marine species, including whiting, squid, the North Atlantic Right Whale, and horseshoe crabs, plus destruction of their habitats and the destabilization of the delicate marine ecosystem that I enjoy as the Owner and President of Old Squaw and the Captain of the F/V/ Caitlin & Mairead.[157]

The Alliance also has protectable interests in the marine environment. The Responsible Offshore Development Alliance is a membership-based coalition of

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[152] Appx110–112.
[153] Appx112.
[154] Appx112.
[155] Appeal Now Pending Before this Court: *Seafreeze Shoreside, Inc. v. United States Dept. of the Interior*, No. 21-11091 (D. Mass. Nov. 7, 2022), ECF Nos. 66-1–66-8.
[156] Appx99–102.
[157] Appx105; *see also* Appeal Now Pending Before this Court: Decl. of D. Aripotch ¶ 29, *Seafreeze Shoreside, Inc. v. United States Dept. of the Interior*, No. 21-11091 (D. Mass. Nov. 7, 2022), ECF No. 66-1.

fishing industry associations and fishing companies that work to ensure that offshore wind development is compatible with fishing and primary food production and does not significantly impact marine habitats, biodiversity, and a healthy oceanography. The federal government and Defendants in this action, NMFS and BOEM, have recognized the Alliance's interest in ensuring that offshore development is compatible with the fishing industry and the health of the ocean through a Memorandum of Understanding with the Alliance to develop "a collaborative regional research and monitoring framework to ensure decisions are based on the best available science."[158]

The Alliance represents its members' fishing interests by directly collaborating with relevant regulatory agencies (e.g., National Marine Fisheries Service, Bureau of Ocean Energy Management, U.S. Coast Guard, fishery management councils, and state agencies), offshore developers, science experts, and others to coordinate science and policy approaches to managing the development of the Outer Continental Shelf in a way that minimizes conflicts with existing traditional and historical fishing.[159] The Alliance works to increase collaborative research and monitoring to: (1) improve overall understanding regarding siting and operations of new offshore activities; (2) support mitigation

[158] Appx108; *see also* Appx118.
[159] The Responsible Offshore Development Alliance, *About Us*, RODA, https://rodafisheries.org/about-us/ (last accessed January 30, 2023).

requirements in terms of informing and minimizing impacts to users and resources, including the development of standardized mitigation frameworks; and (3) inform agency decision-making and industry engagement through existing consultative processes.[160]

BOEM itself has recognized the Alliance's vital role in the sensible and responsible development of the outer continental shelf:

> It is important that we hear from the people who work on and know these areas, and we want to learn from the knowledge that they share. Since RODA's founding, BOEM has been committed to collaborating with you and the fishing communities that your organization represents, throughout the offshore wind leasing and development process as well as through our environmental studies program.[161]

Courts have consistently held that fishing industry associations like the Alliance have organizational standing under the Administrative Procedure Act to challenge agency actions that adversely affect commercial fishing. In *Associated Fisheries of Maine, Inc. v. Daley*,[162] a challenge to a multispecies fishery plan, the court flatly rejected the Government's argument that the fishing organization lacked standing, stating that "the argument cannot be taken seriously."[163] The court further stated:

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[160] *Id.*
[161] *Amanda Lefton*, BOEM Letter to the Responsible Offshore Development Alliance, https://rodafisheries.org/wp-content/uploads/2021/08/RODA-Response-April-2021_Final_08092021-1.pdf (last visited Jan. 31. 2023).
[162] *Associated Fisheries of Maine, Inc. v. Daley*, 954 F. Supp. 383 (D. Me. 1997).
[163] *Id.* at 386.

> Associated Fisheries meets all the requirements of standing recently laid out in *Dubois v. United States Dep't of Agriculture* . . . Associated Fisheries of Maine, Inc. is a membership organization whose objective is to protect the interests of commercial fishermen. The ability to fish commercially is directly affected by the new regulation in a concrete and particularized fashion that is actual, distinct, and palpable, not conjectural or hypothetical.[164]

In sum, the district court erred in finding that the Alliance and its members had no standing to challenge the Government's approval of this massive offshore wind project that will drastically curtail fishing in the area while also negatively impacting the marine environment and the creatures that inhabit it.

4. The District Court Misconstrued OCSLA's Mandatory Requirements as Discretionary Considerations the Secretary Could Balance

The district court interpreted the twelve mandatory requirements that the Secretary must comply with before approving the Vineyard Wind Project as discretionary considerations that the Secretary could consider and balance. The

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[164] *Id.; see also N. Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62 (D.D.C. 2007) ("a non-profit organization formed in 1952 whose members rely on the Snapper–Grouper Fishery for their livelihoods and whose primary purpose is to advance the interests of its members before the Council and other regulatory bodies" has standing to challenge snapper fishing regulation); *Guindon v. Pritzker*, 31 F. Supp. 3d 169, 187 (D.D.C. 2014) (fishermen have standing to challenge regulation of long-term red snapper stocks, and "[t]he Court need not address this matter in great depth, as the Plaintiffs' standing to bring this suit is self-evident."); *Am. Oceans Campaign v. Daley*, 183 F. Supp. 2d 1, 10 (D.D.C. 2000) (even recreational fishermen have standing to challenge agency actions that will decrease the striped bass populations).

district court's interpretation eviscerates the purpose and plain language of this provision and should be reversed.

4.1 Section 1337(p)(4) of OCSLA Prescribes Mandatory Requirements, Not a Nebulous Balancing Test

In Section 1337(p)(4) of OCSLA, Congress lists twelve requirements that the Secretary "shall ensure" compliance with before approving an offshore wind project, such as Vineyard Wind. That section, unambiguously entitled "Requirements," states:

> The Secretary shall ensure that any activity under this subsection is carried out in a manner that provides for—
> (A) safety;
> (B) protection of the environment;
> (C) prevention of waste;
> (D) conservation of the natural resources of the outer Continental Shelf;
> (E) coordination with relevant Federal agencies;
> (F) protection of national security interests of the United States;
> (G) protection of correlative rights in the outer Continental Shelf;
> (H) a fair return to the United States for any lease, easement, or right-of-way under this subsection;
> (I) prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas;
> (J) consideration of—
> i. the location of, and any schedule relating to, a lease, easement, or right-of-way for an area of the outer Continental Shelf; and
> ii. any other use of the sea or seabed, including use for a fishery, a sea lane, a potential site of a deepwater port, or navigation;
> (K) public notice and comment on any proposal submitted for a lease, easement, or right-of-way under this subsection; and

> (L) oversight, inspection, research, monitoring, and enforcement relating to a lease, easement, or right-of-way under this subsection.[165]

The word "ensure"—defined as "to make sure or certain; guarantee; secure"[166]—requires the Secretary to essentially guarantee that any offshore wind activities for any authorized project meets all twelve requirements.

The district court's conclusion that "shall ensure" "reflects Congress's intent to confer flexibility" has been flatly rejected.[167] This Court has interpreted the statutory term "shall ensure" in another context to mean that Congress is prescribing a necessary process[168] and setting forth a directive that must be guaranteed.[169]

The D.C. Circuit has also construed the term to mean that the agency must guarantee that the requirement is complied with: "So when Congress told the EPA

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[165] 43 U.S.C. § 1337(p)(4).
[166] *Ensure*, MERRIAM-WEBSTER COLLEGE DICTIONARY (5th ed. 2016).
[167] *Heating, Air Conditioning & Refrigeration Distributors Int'l v. Env't Prot. Agency*, 71 F.4th 59, 66–67 (D.C. Cir. 2023).
[168] *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996) (NEPA's shall ensure requirement signaled that Congress was prescribing a "necessary process" for environmental review.).
[169] *See United States v. Sklar*, 920 F.2d 107, 115 (1st Cir. 1990) (quoting 28 U.S.C. § 994(k)) (stating that use of "shall ensure" was a "crystal clear" sign "that Congress largely rejected rehabilitation as a direct goal of criminal sentencing under the guidelines.").

to 'ensure' that the annual HFC consumption cap is not 'exceeded' . . . the agency should guarantee that result."[170]

The Supreme Court has also held that the phrase "shall [e]nsure"[171] deprives the agency or its officials of discretion.[172] In *National Association of Homebuilders*,[173] the Court interpreted the Endangered Species Act, which states, "[e]ach Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize endangered or threatened species or their habitats"[174] as imperative, mandatory, and non-discretionary, stating:

> "The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"[]; Black's Law Dictionary 1375 (6th ed. 1990) ("As used in statutes . . . this word is generally imperative or mandatory").[175]

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[170] *Heating, Air Conditioning & Refrigeration Distributors Int'l*, 71 F.4th at 67.
[171] The ESA states "shall insure" instead of "shall ensure." These words are variations of each other and can, depending on the context, mean different things. Courts and Congress have used the two words interchangeably in opinions and statutes. In the context of the ESA, "shall insure" is read as "shall ensure," which means to make certain or guarantee. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 667 (2007). In 2023, Congress amended another environmental statute, NEPA, correcting the use of "shall insure" to "shall ensure." *See* Pub. L. No. 118–5 (June 3, 2023).
[172] *See National Ass'n of Home Builders*, 551 U.S. 644.
[173] *Id.*
[174] 16 U.S.C. § 1536(a)(2).
[175] *National Ass'n of Home Builders*, 551 U.S. at 667 (quoting *Association of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (C.A.D.C. 1994)).

The Supreme Court has explained that when Congress uses mandatory language in a statute, such as Section 1337(p)(4), the regulated community is entitled to rely on the law "as written," without fearing that courts might disregard its plain terms based on some "extratextual consideration."[176]

Had Congress intended that the Secretary balance the twelve requirements, as the district court erroneously concluded, Congress could have written such a balancing test into OCSLA. Instead, Congress directed the Secretary—giving the Secretary no discretion—to ensure that authorized activities provide for (among others) safety and the protection of the environment and prevent interference with other uses of the Outer Continental Shelf, such as commercial fishing.

The district court's misplaced reliance on *Massachusetts v. Andrus*[177] as support for its erroneous statutory construction cannot withstand scrutiny. Not only was that case decided decades before Congress enacted Section 1337(p)(4), but the challenged provision also did not include the "shall ensure" requirement. Instead, the case involved the extent of the United States' "jurisdiction into the Outer Continental Shelf" and whether that jurisdiction was "limited to the subsoil and seabed."[178] The ruling turned on how a provision should be construed: "'[T]his subchapter shall be construed in such a manner that the character of the waters

[176] *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 674 (2020).
[177] *Com. of Mass. v. Andrus*, 594 F.2d 872 (1st Cir. 1979).
[178] *Id.* at 889.

above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected.'"[179] Unlike this case, where the purpose of this lawsuit is to ensure that commercial fishing rights are protected in the context of offshore wind turbine construction, that case only tangentially concerned fishing rights.[180]

4.2 The District Court Failed to Determine if the Secretary Had Properly Exercised Discretion

This Court's decision in *Massachusetts v. Andrus*[181] is instructive here because it dealt with a provision of OCSLA that requires the Secretary to see that gas and oil leases are "conducted without unreasonable risk to fisheries"[182] and to strike a "proper balance" between environmental damage and oil and gas production.[183] Although the statute conferred discretion on the Secretary, the Court nevertheless held that the Secretary had an affirmative duty to protect fishing: "We think it clear that the Secretary had a legal duty to avoid unreasonable risks to the fisheries in waters over the Outer Continental Shelf, even to the point of refusing to lease particular areas where risks would be unreasonable."[184]

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[179] *Id.* at 888 (quoting 43 U.S.C. § 1332(b)).
[180] *Id.* at 882.
[181] *Andrus*, 594 F.2d 872.
[182] 43 U.S.C. § 1332(2).
[183] 43 U.S.C. § 1334.
[184] *Andrus*, 594 F.2d at 891.

The Court found that even the use of a balancing test did not allow the Secretary to sacrifice fishing uses:

> Thus in a case where a particular drilling operation poses too great a threat to a fishery, the Secretary must refuse to permit it. By the same token, if the threat is relatively small, and the damage posed to fishing of no major consequence, the Secretary may determine that leasing should proceed even if some harm may result. But the concept of balance rules out a policy based on sacrificing one interest to the other.[185]

Here, the district court engaged in no analysis and simply ruled that the Secretary had discretion to balance "goals" under OCSLA.[186] The court never analyzed, much less determined, what the boundaries of that discretion were, and whether the Secretary's exercise of that discretion was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[187] Even if the Secretary had performed a balancing test, as contemplated by the district court, this balancing would be arbitrary and capricious because OCSLA mandates that all twelve requirements be met.[188]

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[185] *Id.*
[186] Add40; *see also* Add45–46.
[187] 5 U.S.C. § 706(2)(A).
[188] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency [action] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . . .").

The district court's failure to determine whether the record supports the agency's decision under OCSLA falls short of APA requirements and should be reversed.

4.3 The Record Shows That the Project Will Have a Devastating Effect on Commercial Fishing

The Record of Decision states 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."[189] This destruction of commercial fisheries, standing alone, flies in the face of OCSLA's requirement that the Secretary "shall ensure" "prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas" and consideration of "any other use of the sea or seabed, including use for a fishery."[190]

The district court erroneously disregarded this uncontradicted record fact, labeling it a "clerical error."[191] Yet the record shows that the Government did not treat this statement as a clerical error but instead, after this suit was filed, merely added a statement that this information had been "submitted by interested parties"

[189] Appx161.
[190] 43 U.S.C. § 1337(p)(4).
[191] Add45; Appx220.

and "is not based upon any separate or independent USACE or other agency evaluation or study."[192]

Had the Government believed this statement about commercial fishing was included by mistake—as a clerical error—the Government would and should have corrected the record, not just identified the source of the information. The Government, however, treated this statement the same as information submitted by other interested parties—such as information provided by the developer, Vineyard Wind—which the Government relied on in approving the Project.

More telling is the fact that the record is replete with other statements in the ROD and the Environmental Impact Statement showing that the Project will destroy local fisheries—all of which the district court ignored:

- "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."[193]

- "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)."[194]

- The Project "would have moderate to major impacts on *commercial fisheries*."[195]

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[192] Appx221.
[193] Appx161 (emphasis added).
[194] Appx136.
[195] Appx143 (emphasis added).

- "[O]ffshore wind structures and hard coverage for cables would have long-term impacts on *commercial fishing* operations and support businesses such as seafood processing,"[196]

- [T]he Project would include "permanent reduction in catch or loss of access to fishing areas due to the presence of construction activities or changes in fish and shellfish populations that are the basis of fishing activities. . . [including] abandonment of fishing locations due to difficulty in maneuvering fishing vessels, fear of allisions with Proposed Action components (e.g., WTGs), increased risk of collisions with construction or lay vessels, and/or fear of damage or loss of deployed gear."[197]

The administrative record had ample evidence that the Project would create an unsafe environment for fishing vessels and would drive fisheries out of the lease area. Yet, the Government approved a Project that did not provide for safety on the Outer Continental Shelf and did not provide for the prevention of interference with other uses of the shelf in violation of OCSLA.

Under any construction of the Secretary's obligations under OCSLA, this destruction of the commercial fishery is an abuse of discretion that should have been reversed and set aside.[198]

4.4 The District Court Erred by Finding that Commercial Fishermen Lacked Standing to Bring Environmental Claims Under OCSLA

In a singular footnote, the trial court found that the Alliance did not have standing to pursue claims under OCSLA for environmental harm. As discussed in

[196] Appx139 (emphasis added).
[197] Appx141.
[198] 5 U.S.C. § 706(2)(A).

Sections 2 and 3, the Alliance has legitimate environmental interests that will be impaired or destroyed by the approval of this Project.[199] The Alliance also discussed their members' use of the waters of the lease area for commercial fishing.[200] These allegations and the other evidence in the record provide the Alliance ample standing to pursue its environmental claims under OCSLA.[201]

5. The District Court Erred as a Matter of Law in Finding that the Army Corps Did Not Violate the Clean Water Act

Congress passed the Clean Water Act in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[202] The Clean Water Act prohibits the "discharge of any pollutant by any person"[203] into navigable waters without a permit, and violations are punishable by substantial civil and criminal fines or imprisonment.[204] While the authority to issue permits for the discharge of most pollutants is vested in the EPA,[205] 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."[206] The Clean Water

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[199] *Infra* Section 2 and 3.
[200] Appx94–98; Appx103–112.
[201] *See Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 27–28 (1st Cir. 2007).
[202] 33 U.S.C. § 1251(a).
[203] 33 U.S.C. § 1311(a).
[204] 33 U.S.C. § 1319(c)(1); 33 C.F.R. § 326.6.
[205] 33 U.S.C. § 1344(a).
[206] *Id.*

Act defines "dredged material" as "material that is excavated or dredged from waters of the United States,"[207] and "fill material" as "material placed in waters of the United States where the material has the effect of: (i) replacing any portion of a water of the United States with dry land; or (ii) changing the bottom elevation."[208]

Section 404 permits help to ensure that the "natural structure and function of ecosystems [are] maintained."[209] 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.'"[210]

5.1 The Corps Failed to Consider the Cumulative Impacts of the Vineyard Wind Project and Other Surrounding Offshore Wind Projects

The Corps' cumulative impacts evaluation ignored the cumulative impacts of this Project and the other nearby projects on the fishing industry and the aquatic ecosystem. Vineyard Wind is one of 12 Projects slated to be built off the Rhode Island and Massachusetts coasts, and knowing the cumulative impacts of all these projects is vital to understanding the true impacts of the offshore wind project.

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[207] 33 C.F.R. § 323.2(c).
[208] 33 C.F.R. § 323.2(e).
[209] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (quoting H.R. Rep. No. 92–911, p. 76 (1972)).
[210] *Id.* (quoting S. Rep. No. 92–414, p. 77 (1972)).

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. [211]

Here, the Corps failed to perform the required cumulative effects analysis. Nothing in the Corps' section of the ROD discusses the cumulative effects of this Project combined with the other offshore wind projects that have already been announced, as required by CWA regulations. Nor can the Corps rely on the Final EIS's cumulative effects analysis, as that analysis 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,"[212] as the ROD states,

[211] 40 C.F.R. § 230.11(g).
[212] Appx151.

analysis of the cumulative effects of thousands more turbines on millions of acres of seabed is required before issuing this pollution discharge permit.

The district court does not identify anywhere in the record where the Corps analyzed the cumulative effects of Vineyard Wind 1 and the other planned offshore wind projects in the same area of the ocean. Instead, the district court took the Government's word for it that "reasonably foreseeable activities within the larger overall wind lease area were considered to account for potential cumulative effects."[213] The court erroneously believed that the Court must defer to the Corps' own compliance with the law: "At its core, the Alliance is contending that the Corps should have done more to satisfy its own regulations. The Alliance must meet a high bar to challenge an agency's interpretation of its own regulations."[214] But the Corps was not interpreting regulations—the Corps was stating that it had adequately performed a cumulative impacts analysis.

But under the APA, the court, and not the agency, determines whether the agency's action complies with applicable law, including the agency's own regulations.[215] This case is not about the meaning of the cumulative impacts

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[213] Add36 (citing Appx155).
[214] Add36.
[215] 5 U.S.C. § 706; *see also Nat'l Env't Dev. Assoc.'s Clean Air Project v. E.P.A.*, 752 F.3d 999, 1011 (D.C. Cir. 2014) ("An agency action may be set aside as arbitrary and capricious if the agency fails to comply with its own regulations" and "an agency is not free to ignore or violate its regulations while they remain in effect.") (internal quotations omitted).

regulation but whether the Corps performed a cumulative impacts analysis. Because the administrative record shows the Corps did not do so, the district court's finding that the Corps had complied with this regulation is unsupported by the record and should be reversed.

5.2 The Record Does Not Support the Corp's Conclusion that the Project's Impacts Are Minor

The Corps issued the Clean Water Act permit under the mistaken belief that the impacts of the Project will have minor effects on commercial fisheries, wildlife, and the marine environment.[216] But this is not true, as shown by the Final EIS, which confirms that the Project will "have moderate to major impacts on commercial fisheries[.]"[217] The Final EIS goes on to openly 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[.]"[218] 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,

[216] *See generally* Appx154–164.
[217] Appx141; Appx142–143.
[218] Appx139.

whose income depends on the ability to spend time out of port."[219] Other impacts include:

- "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."[220]
- "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."[221]
- "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."[222]
- "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."[223]

[219] Appx140.
[220] Appx157.
[221] Appx157.
[222] Appx158.
[223] Appx157–158.

Had the Corps known that the Project's impacts were major and devastating, it would surely have imposed some restrictions on the miles of boulders and concrete it authorized to be deposited on the pristine ocean floor and the many acres of deep trenching and earthmoving it approved for the laying of high-tension power lines. Common sense, as well as Corps regulations, dictate that the project should not proceed on the false assumption that its impacts on the marine environment are minor.

5.3 The Corps Conducted an Incomplete Analysis of the Project Based on Erroneous Data

The Section 404 Permit the Corps issued on August 9, 2021,[224] authorized a far more expansive Project than the one the Corps stated it was authorizing in its ROD. The ROD authorized a 23.3-mile-long export cable corridor, with 15 total acres of cable scour protection, with two acres within three miles of the coast.[225] The Corps' 2018 Federal Register Notice for Public Comments[226] and NMFS's 2018 Biological Assessment[227] state the same metrics when describing the dimensions of the Project. However, the permit the Corps issued three months after the ROD authorized a Project with a 39.4-mile-long export cable corridor with 35

[224] Appx174–177.
[225] Appx154–164.
[226] Appx121.
[227] Appx122–123.

total acres of cable scour protection and 17 acres within three nautical miles of the coast.[228]

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 action[s] including a 'rational connection between the facts found and the choice made.'"[229] 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."[230]

The 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. The Corps did not only just make this mistake in the Record of Decision; it made the mistake throughout the environmental review and permitting process. For example, in its December 26, 2018 Public Notice, the New England District of the

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[228] Appx171–173.
[229] *N.L.R.B. v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13, 23 (1st Cir. 1999) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).
[230] *State Farm Mut. Auto Ins.,* 463 U.S. at 43.

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."[231] The use of these incorrect dimensions consistently infected the agency's analysis:

- 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."[232]
- The May 10, 2021, Record of Decision lists 23.3 as the length of the cables five times.[233]

The Corps only realized that it had the incorrect dimensions of the Project after the Record of Decision was issued when an employee of Vineyard Wind LLC brought the problem to its attention.[234] Had it not been for that conversation with Vineyard Wind LLC, the Corps would not have recognized that it got the dimensions of the Project wrong. The Corps tried to pass off the incorrect dimensions as "clerical errors" and merely supplemented the ROD, but that explanation is dubious, and, in any event, the Corps' action is tested on the record

[231] Appx121.
[232] Appx123.
[233] Appx154–164.
[234] Appx168.

existing at the time of the decision—not some later rationalization.[235] Genuine clerical errors would not be repeated throughout the approval process—over the course of three years. If these misstatements were clerical errors, at least one Corps document during those three years would have stated the correct cable length and 35 acres of scour protection—but none of the Corps' documents in the Administrative Record state those dimensions the Corps "corrected."

The district court's wholesale acceptance of the Government's improbable claim that this misstatement of dimensions, which occurs throughout the administrative record, begs the question of whether the Corps officials knew the true dimensions of the project they were authorizing—or believed the far lesser dimensions repeated throughout the reports and documents on which they relied.

The only available evidence shows that the Corps officials relied on the "clerical errors" published throughout the permit process and only learned of their mistake after approving the permit. Because the size and breadth of the project are fundamental to its impacts on the marine environment, the district court should have reversed and remanded this permit so the agency could decide based on the true dimensions of the project it is asked to approve.

[235] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

Conclusion

The district court performed a truncated review of the Government's rushed approval of the Vineyard Wind Project, accepting at face value the agencies' assurances that they had complied with the myriad of major environmental statutes and regulations in the approval process. But even a cursory examination of the facts reveals that specific requirements of the ESA and OCSLA were ignored and that the Alliance had amply alleged facts to support standing.

This Court should reverse the district court's rulings and entry of final judgment in favor of the Defendants-Appellees and remand the case to the district court for further proceedings.

Dated: March 5, 2024

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,493 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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Certificate of Service

I hereby certify that on March 5, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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ADDENDUM

TABLE OF CONTENTS

ADDENDUM

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SEAFREEZE SHORESIDE, INC., et al.,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	Case No. 1:22-cv-11091-IT
	*	
THE UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,	*	
	*	
Defendants,	*	
	*	
and	*	
	*	
VINEYARD WIND 1, LLC,	*	
	*	
Intervenor-Defendant.	*	
* *		
RESPONSIBLE OFFSHORE DEVELOPMENT ALLIANCE,	*	
	*	
Plaintiff,	*	
	*	Case No. 1:22-cv-11172-IT
v.	*	
	*	
UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,	*	
	*	
Defendants,	*	
	*	
and	*	
	*	
VINEYARD WIND 1, LLC,	*	
	*	
Intervenor-Defendant.	*	

MEMORANDUM & ORDER

October 12, 2023

TALWANI, D.J.

Plaintiffs Seafreeze Shoreside, Inc. ("Seafreeze Shoreside"), Long Island Commercial Fishing Association, Inc. ("LICFA"), XIII Northeast Fishery Sector, Inc. ("Sector XIII"),

Heritage Fisheries, Inc. ("Heritage Fisheries"), Nat. W., Inc. ("Nat. W.") and Old Squaw Fisheries, Inc. ("Old Squaw") (collectively, the "Seafreeze Plaintiffs") and Plaintiff Responsible Offshore Development Alliance ("Alliance") brought the above-captioned lawsuits challenging actions taken by several federal agencies and associated officials in the approval of an offshore-wind energy project to be constructed and operated by Intervenor-Defendant Vineyard Wind 1 LLC ("Vineyard Wind") in the Outer Continental Shelf off the coast of Martha's Vineyard and Nantucket, Massachusetts (the "Vineyard Wind Project" or the "Project").[1]

Before the court in a consolidated proceeding are cross-motions for summary judgment in Seafreeze, 1:22-cv-11091, see Plaintiffs' Motion for Summary Judgment, Doc. No. 66, Defendants' Motion for Summary Judgment, Doc. No. 72, Vineyard Wind's Motion for Summary Judgment, Doc. No. 86; and in Responsible, 1:22-cv-11172, see Plaintiff's Motion for Summary Judgment, Doc. No. 52, Defendants' Motion for Summary Judgment, Doc. No. 59, Vineyard Wind's Motion for Summary Judgment, Doc. No. 73. For the reasons that follow, Plaintiffs' Motions for Summary Judgment are DENIED and Defendants' and Vineyard Wind's Motions for Summary Judgment are GRANTED.

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[1] Seafreeze Shoreside, Inc., et al. v. The United States Dept. of the Interior, et al., 1:22-cv-11091, and Responsible Offshore Development Alliance v. United States Dept. of the Interior, et al., 1:22-cv-11172, are referred to herein by their respective case numbers.

Two other challenges to the Project were filed in this District and are now on appeal. See Melone v. Coit, et al., 1:21-cv-11171-IT, appeal docketed, No. 23-1736 (1st Cir. Sept. 8, 2023); Nantucket Residents Against Turbines et al. v. U.S. Bureau of Ocean Energy Mgmt., 1:21-cv-11390-IT, appeal docketed, No. 23-1501 (1st Cir. June 13, 2023), (together "the Related Actions").

I. Background

A. Procedural Background

The Procedural Background is set forth in detail in the court's Memorandum and Order, 1:22-cv-11091, Doc. No. 137; 1:22-cv-11172, Doc. No. 104, denying Plaintiffs' Motions to Strike Documents from and Supplement the Administrative Record, 1:22-cv-11091, Doc. No. 56; 1:22-cv-11172, Doc. No. 43, and is incorporated by reference herein.

B. Background Concerning the Project

The Background Concerning the Project is also set forth in detail in the court's Memorandum and Order, 1:22-cv-11091, Doc. No. 137; 1:22-cv-11172, Doc. No. 104, and is incorporated by reference herein. The Background Concerning the Project is derived from the Administrative Record common to the pending challenges and the Related Actions.[2]

The following further background concerning the Project is also drawn from the Administrative Record, is specific to the pending challenges, and was not at issue in the Related Actions.

In considering Vineyard Wind's application for a permit under Section 404 of the Clean Water Act ("Section 404 Permit") pertaining to the discharge of dredged and fill materials that would occur along a 23.3 mile long corridor as part of Vineyard Wind's installation of the wind energy facility, electronic service platforms, connections between the wind turbine generators,

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[2] Certified Indices of the Administrative Record and addenda were docketed electronically, see 1:22-cv-11091, Federal Defendants' Notices, Doc. Nos. 26, 30, 34, 36; 1:22-cv-11172, Federal Defendants' Notices, Doc. Nos. 17, 23; portions of the Administrative Record reflected in the parties briefing are docketed electronically as part of the parties' Joint Appendices filed in connection with the cross-motions for summary judgment, 1:22-cv-11091, Doc. Nos. 104, 105; 1:22-cv-11172, Doc. Nos. 97, 98.

service platforms, and export cables, the Army Corps of Engineers ("Corps") considered the practicability of the following alternatives to the proposed Vineyard Wind Project: (a) one no-action alternative; (b) a largely land-based alternative; (c) alternatives that would bring the cable on shore in a different location; (d) two off-site alternatives in other zones of the ocean; and (e) seven different on-site alternatives identified by Bureau of Ocean Energy Management ("BOEM") in the Environmental Impact Statement ("Final EIS"). Joint Record of Decision ("Joint ROD"), BOEM_0076799 at -6830-31.

The Corps stated that in order to consider an alternative "practicable," the alternative "must be available, achieve the overall project purpose (as defined by USACE) and be feasible when considering cost, logistics, and existing technology." Id.

In issuing the Section 404 Permit to Vineyard Wind, the Corps imposed certain "Special Conditions" on Vineyard Wind as the permittee, including compliance with all "mandatory terms and conditions to implement the reasonable and prudent measures that are associated with 'incidental take' that is also specified in the [Biological Opinion ('BiOp')]." The Permit further specified that the Permit is conditional on Vineyard Wind's "compliance with all of the mandatory terms and conditions associated with incidental take of the attached [BiOp], and any future [BiOp] that replaces it, which terms and conditions are incorporated by reference into this [P]ermit." Dep't of Army Permit, USACE_AR_012635 at -36.

C. Plaintiffs' Pending Claims

In reviewing the pending motions, the court considers the following claims asserted by Plaintiffs.

1. Claims under the Administrative Procedure Act ("APA") for Violations of the Endangered Species Act

Plaintiffs allege that Defendant National Marine Fisheries Service ("NMFS") violated Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536, and attendant regulations by failing during the 2020 biological consultation process (i) to consider the cumulative effects of the proposed Project to endangered species or their habitat (1:22-cv-11091, 9th Claim for Relief), or (ii) to inform BOEM of alternatives to the proposed Project that would avoid harming endangered species (1:22-cv-11091, 10th Claim for Relief), and that Defendants violated the ESA and its implementing regulations by approving the Vineyard Wind Construction Operations Plan ("COP") and issuing the Section 404 Permit without a valid BiOp (1:22-cv-11172, Count 3).[3]

2. Claims under the APA for Violations of the Clean Water Act

Next, Plaintiffs allege that the Corps violated the Clean Water Act ("CWA"), 33 U.S.C. § 1251, et seq., and attendant regulations in issuing the Section 404 Permit pertaining to the dredge and fill activities associated with the Project by (i) failing to review practicable

[3] The Seafreeze Plaintiffs' ESA claims set forth in their 6th, 7th, 8th, 11th, 12th, 13th, 14th, 15th, and 16th Claims for Relief, 1:22-cv-11091, Complaint, Doc. No. 1, and portions of the Alliance's Count 3 asserting Defendants violated the ESA by (i) approving minimal mitigation measures to protect the safety of endangered species, and (ii) failing to rely on the best scientific and commercial data available, 1:22-cv-11172, Complaint, Doc. No. 1, are waived where neither the Seafreeze Plaintiffs nor the Alliance briefed these claims. And although Seafreeze Shoreside and the Alliance submitted 60-day notice of intent to sue letters as required under the ESA to commence a citizen-suit, 16 U.S.C. § 1540(g)(2)(A)(i), those letters did not assert any violations pertaining to the 2021 BiOp. Accordingly, Plaintiffs' ESA challenges to the BiOp are limited to the 2020 BiOp.

alternatives to the Project outside of the Lease Area[4] (1:22-cv-11091, 17th Claim for Relief; 1:22-cv-11172, Counts 2.2, 2.3), and (ii) failing to consider the cumulative effects of multiple similar projects in issuing the Section 404 Permit (1:22-cv-11172, Count 2.4).[5]

3. Claims under the APA for Violations of the Marine Mammal Protection Act

Next, Plaintiffs allege that NMFS violated the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1371, and attendant regulations in issuing the Incidental Harassment Authorization ("IHA") (i) by failing to provide evidence that the Project will only affect "small numbers," have a "negligible impact" on marine mammal species, or be completed within one year of issuance of the IHA (1:22-cv-11091, 22nd Claim for Relief), and (ii) by improperly relying on defects in the Corps' CWA review, rendering the issuance of the IHA arbitrary and capricious (1:22-cv-11172, Count 5).[6]

4. Claims under the APA for Violations of the National Environmental Protection Act

Next, Plaintiffs allege that Defendants violated various provisions of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, and attendant regulations throughout the Project review process by:

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[4] The Lease Area covers the 166,886 acres of the Outer Continental Shelf leased by BOEM to Vineyard Wind on April 1, 2015. See 1:22-cv-11172, Mem. & Order 5, Doc. No. 104.

[5] The Seafreeze Plaintiffs' CWA claims set forth in their 18th, 19th, and 20th Claims for Relief, 1:22-cv-11091, Complaint, Doc. No. 1, and the Alliance's CWA claims set forth in Counts 2.1, 2.5, and 2.6, 1:22-cv-11172, Complaint, Doc. No. 1, are also waived where neither the Seafreeze Plaintiffs nor the Alliance briefed these claims.

[6] The Seafreeze Plaintiffs' MMPA claim set forth in their 21st Claim for Relief, 1:22-cv-11091, Complaint, Doc. No. 1, is also waived where neither the Seafreeze Plaintiffs nor the Alliance briefed this claim.

(i) defining the purpose of the Action in connection with the Vineyard Wind COP too narrowly (1:22-cv-11091, 23rd Claim for Relief; 1:22-cv-11172, Count 4.4);

(ii) failing to properly consider a range of alternatives to the COP (1:22-cv-11091, 24th Claim for Relief; 1:22-cv-11172, Count 4.1);

(iii) failing to comply with requirements for analyzing cumulative impacts of the Project (1:22-cv-11091, 25th Claim for Relief; 1:22-cv-11172, Count 4.2);

(iv) failing to take reasonable steps considering the lack of information relevant to reasonably foreseeable significant adverse impacts (1:22-cv-11091, 26th Claim for Relief);

(v) limiting the scope of the Final EIS to the Vineyard Wind Project Area (1:22-cv-11091, 27th Claim for Relief);

(vi) failing to make diligent efforts to involve the public in the NEPA process (1:22-cv-11091, 28th Claim for Relief);

(vii) inadequately addressing and disclosing comments submitted by the public (1:22-cv-11091, 29th, 30th Claims for Relief; 1:22-cv-11172, Count 4.5);

(viii) failing to prepare an EIS prior to issuing the Lease (1:22-cv-11091, 31st Claim for Relief; 1:22-cv-11172, Count 4.6);

(ix) improperly segmenting the NEPA analysis (1:22-cv-11091, 32nd Claim for Relief; 1:22-cv-11172, Count 4.6);

(x) relying on outdated NEPA regulations (1:22-cv-11091, 33rd Claim for Relief; 1:22-cv-11172, Count 4.7);

(xi) withdrawing the EIS and reinitiating it without supplementing to account for design changes (1:22-cv-11172, Count 4.3);

(xii) failing to consider the impacts of climate change (1:22-cv-11172, Count 4.8).

5. Claims under the APA for Violations of the Outer Continental Shelf Lands Act

Finally, Plaintiffs have asserted that Defendants have violated the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1337, in connection with the issuance of the Vineyard Wind Lease and review of the Vineyard Wind COP by (i) adopting and applying the "Smart from the Start" Initiative to the leasing process in violation of 43 U.S.C. § 1337(p)(4)'s requirement that BOEM consider a set list of criteria (1:22-cv-11091, 1st, 2nd, and 3rd Claims for Relief); (ii) resuming review of the COP after Vineyard Wind withdrew and resubmitted it in

January 2021 (1:22-cv-11091, 4th Claim for Relief); and (iii) adopting and approving the COP without considering and providing for the factors set forth in 43 U.S.C. § 1337(p)(4) (1:22-cv-11091, 5th Claim for Relief; 1:22-cv-11172, Counts 1.1, 1.2, 1.7).[7]

II. Standard of Review

Under Federal Rules of Civil Procedure 56(a), summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A fact is material when, under the governing substantive law, it could affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Baker v. St. Paul Travelers, Inc., 670 F.3d 119, 125 (1st Cir. 2012). A dispute is genuine if a reasonable jury could return a verdict for the non-moving party. Anderson, 477 U.S. at 248.

The moving party bears the initial burden of establishing the absence of a genuine dispute of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party establishes the absence of a genuine dispute of material fact, the burden shifts to the non-moving party to set forth facts demonstrating that a genuine dispute of material fact remains. Anderson, 477 U.S. at 250.

The non-moving party cannot oppose a properly supported summary judgment motion by "rest[ing] upon the mere allegations or denials of [the] pleading[s]." Id. at 248. Disputes over facts "that are irrelevant or unnecessary" will not preclude summary judgment. Id. When

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[7] The Alliance's OCSLA claims set forth in Counts 1.3, 1.4, 1.5, 1.6, 1.8, 1:22-cv-11172, Complaint, Doc. No. 1, are also waived where neither the Seafreeze Plaintiffs nor the Alliance briefed these claims.

The Alliance has conceded its claim under the Jones Act. 1:22-cv-11172, Hearing Tr. 7:4-10, Doc. No. 101.

reviewing a motion for summary judgment, the court must take all properly supported evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment." Anderson, 477 U.S. at 255.

The fact that the parties have filed cross motions does not alter these general standards; rather the court reviews each party's motion independently, viewing the facts and drawing inferences as required by the applicable standard, and determines, for each side, the appropriate ruling. See Wightman v. Springfield Terminal Ry. Co., 100 F.3d 228, 230 (1st Cir. 1996) (noting that cross-motions for summary judgment do not "alter the basic Rule 56 standard" but rather require the court "to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed").

A summary judgment motion has a "special twist in the administrative law context." Boston Redevelopment Auth. v. Nat. Park Serv., 838 F.3d 42, 47 (1st Cir. 2016) (quotations omitted). In an APA action, a motion for summary judgment serves as "a vehicle to tee up a case for judicial review and, thus, an inquiring court must review an agency action not to determine whether a dispute of fact remains but, rather, to determine whether the agency action was arbitrary and capricious." Id. (citing cases); see also 5 U.S.C. § 706(2)(A) ("The reviewing court shall…hold unlawful and set aside agency action…found to be…arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]").

Because the APA affords great deference to agency decision-making and agency actions are presumed valid, "judicial review [under the APA], even at the summary judgment stage, is

narrow." Assoc'd Fisheries of Maine, Inc. v. Daley, 127 F.3d 104, 109 (1st Cir. 1997) (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971)). Courts should "uphold an agency determination if it is 'supported by any rational view of the record.'" Marasco & Nesselbush, LLP v. Collins, 6 F.4th 150, 172 (1st Cir. 2021) (quoting Atieh v. Riordan, 797 F.3d 135, 138 (1st Cir. 2015)). Even where an inquiring court disagrees with the agency's conclusions, the court cannot "'substitute its judgment for that of the agency.'" Boston Redevelopment Auth., 838 F.3d at 47 (quoting Assoc'd Fisheries, 127 F.3d at 109). Rather, an agency's action should only be vacated where the agency "has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered 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." Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 658 (2007) (quotations omitted).

III. Standing

Defendants challenge Plaintiffs' standing to bring claims under NEPA while Vineyard Wind challenges Plaintiffs' standing to bring claims under NEPA, ESA, and MMPA.[8] The court considers first the evidence in the record relating to Plaintiffs' standing, and then whether Plaintiffs have standing to bring their claims under each of the challenged statutes, addressing constitutional issues first and then statutory issues.

[8] Vineyard Wind also challenged the Seafreeze Plaintiffs' standing to bring a claim under the CWA but withdrew that argument at the summary judgment hearing. 1.22-cv-11091, Hearing Tr. 13:5-16, Doc. No. 112.

A. Evidence Relating to Plaintiffs' Standing[9]

1. Old Squaw, Heritage Fisheries, and Nat. W.

Seafreeze Plaintiffs Old Squaw, Heritage Fisheries, and Nat. W. (the "Commercial Fishing Entities") are each commercial fishing companies that engage in trawl fishing[10] for squid.

a. Evidence Offered as to Economic Injury

Declarant David Aripotch, the owner and president of Old Squaw and captain of its boat, the F/V Caitlin & Mairead, states that the F/V Caitlin & Mairead trawl fishes in the Atlantic Ocean off the coast of Massachusetts to the coast of North Carolina. 1:22-cv-11091, Aripotch Decl. ¶¶ 2, 5, 11, Doc. No. 66-1. Aripotch states that the F/V Caitlin & Mairead typically takes

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[9] Vineyard Wind opposes numerous statements in Plaintiffs' Statement of Undisputed Material Facts, 1:22-cv-11091, Doc. No. 66. See Vineyard Wind Resp. to Seafreeze Pls.' Statement of Undisp. Material Facts, Doc. No. 88. First, Vineyard Wind opposes many statements supported only by affidavits. See 1:22-cv-11091, Intervenor's Opening Mem. 28-31, Doc. No. 87 (disputing the admissibility of statements such as those concerning Seafreeze Shoreside's interests, goals, and purported injuries). Where Fed. R. Civ. P. 56(c)(4) permits affidavits or declarations "made on personal knowledge [that] set out facts that would be admissible in evidence, and [that] show that the affiant or declarant is competent to testify on the matters stated," the court considers the evidentiary weight of these submissions under this standard for purposes of standing, as discussed infra. Second, Vineyard Wind objects to Plaintiffs' numerous citations outside of the Administrative Record where Plaintiffs have not offered those materials through a motion to supplement the Record. Id. at 31-33. Here, the court does not consider statements relying on materials outside of the Administrative Record where Plaintiffs have not addressed these in any motion to supplement the Record or otherwise offered a basis for the court to consider extra-record material. Finally, Vineyard Wind asserts numerous statements of fact should be struck where Plaintiffs mischaracterize the Administrative Record. The court looks directly to the Administrative Record, as discussed in its Memorandum and Order, 1:22-cv-11172, Doc. No. 137, rather than the parties' characterizations of the Administrative Record.

[10] Trawl fishing involves pulling a net towed by steel wires and spread open by steel doors to harvest squid and other fish at the ocean bottom. 1:22-cv-11091, Decl. of David Aripotch ("Aripotch Decl.") ¶ 10, Doc. No. 66-1; 1:22-cv-11091, Decl. of Thomas E. Williams, Sr. ("Williams Sr. Decl.") ¶ 15, Doc. No. 66-2.

25-40 trips per year to the Lease Area for squid. Id. at ¶¶ 8-9. Aripotch states further that, in a typical year, Old Squaw generates $175,000-$350,000 in annual revenues from fishing expeditions for squid in the Lease Area and that this accounts for roughly 30% of Old Squaw's revenue in a given year. Id. at ¶ 12. Aripotch states that Old Squaw will lose this revenue if construction and operation of the Project go forward as contemplated by the COP. Id. at ¶ 19.

Aripotch states that the spacing of the Vineyard Wind turbines "will not allow for safe transit lanes in the Vineyard Wind area for the F/V Caitlin & Mairead" because one nautical mile of distance "is not enough room to risk getting through[.]" Id. at ¶ 14. Aripotch also states that the wind turbines, when operational, will interfere with marine radar. Id. at ¶ 15. Aripotch contends that commercial fishing will become untenable for his boat in the Lease Area because trawl fishing gear will become entangled. Id.[11] Finally, Aripotch states that the F/V Caitlin & Mairead will be unable to fish in the Wind Energy Area during the Project's construction because of the safety risks associated with certain construction activities, such as the installation of cables or installation of armoring with boulders, and that those safety risks will remain after the construction is complete and the Project is operational. Id. at ¶¶ 16-17.

Aripotch states that the risks posed to the F/V Caitlin & Mairead will also disrupt and displace squid in the Area and impact the marine ecosystem in ways that will further impact Old Squaw's ability to fish in the Lease Area. Id. at ¶ 20.[12] Aripotch states that, because of the Lease

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[11] Aripotch relies on the Final EIS Vol. 1, BOEM_0068434 at -717, -18, -22, --224, -225, which states that entanglement is a possibility that could impact fishing businesses.

[12] Additionally, Aripotch states that it is his understanding that the Vineyard Wind Project will result in environmental and ecological harms to numerous marine species. Id. at ¶¶ 29-30. Aripotch's declaration does not show, however, that he is competent to testify to this assertion.

issuance and COP approval, Old Squaw will no longer be able to fish for squid in the Lease Area and will lose approximately 30% of its revenue as a result. Id. at ¶ 19.

Declarant Thomas E. Williams, Sr., the owner and President of Heritage Fisheries and Nat. W., states that, in a typical year, Heritage Fisheries, which owns and operates the F/V Heritage, generates $290,000 in annual revenues from trawl fishing for squid in the Lease Area, accounting for approximately 30% of Heritage Fisheries total annual revenues in any given year. 1:22-cv-11091, Williams Sr. Decl. ¶¶ 2, 4-5, 17, Doc. No. 66-2. Williams states further that Nat. W., which owns and operates the F/V Tradition, generates roughly $490,000 in annual revenues from trawl fishing for squid in the Lease Area, accounting for approximately 65% of Nat. W.'s total annual revenues in any given year. Id. at ¶¶ 5, 18. Like Aripotch, Williams states that his companies will be unable to engage in trawl fishing in the Lease Area because (i) the spacing of the turbines will not allow for safe passage, (ii) the turbines will interfere with vessel radar, making passage more dangerous for his companies' boats, and (iii) protections around cables and foundations will cause gear to become tangled. Id. at ¶¶ 20, 23. Williams states that the Vineyard Wind Project will cause both Heritage Fisheries and Nat. W. to lose out on the annual revenues attributable to fishing in the Lease Area. Id. at ¶ 22. [13]

[13] Williams also contends that the construction activities and operation of the turbines will affect the water quality in the Lease Area and beyond, which will displace not only squid, but other marine life, affecting the entire ecosystem and further impacting Heritage Fisheries and Nat. W.'s abilities to fish in the Lease Area. Id. at ¶ 24. Williams states this "impact" constitutes pollution of the waters and degradation of all living things in the waters. Id. Williams' declaration does not show, however, that he is competent to testify to these assertions.

Vineyard Wind disputes Plaintiffs' representations regarding the frequency and duration of fishing trips by Plaintiffs Old Squaw, Heritage Fisheries, and Nat. W. See 1:22-cv-11091, Intervenor's Opening Mem. 3 n.1, Doc. No. 87. Vineyard Wind offers the expert opinion of R. Douglass Scott, PhD., P. Eng., a Principal with W.F. Baird & Associates Ltd., reflecting, based on Automatic Identification System ("AIS") tracking data, that the total time between January 2016 and 2022 spent in the Lease Area by Old Squaw's vessel (the F/V Caitlin & Mairead) was 21.2 hours, by Heritage Fisheries' vessel (the F/V Heritage) was 0.4 hours, and by Nat. W.'s vessel (the F/V Tradition) was 6.2 hours, for a total time of 27.7 hours over six years. See 1:22-cv-11091, Vineyard Wind Resp. to Seafreeze Pls.' Statement of Undisp. Material Facts ¶¶ 100-102, Doc. No. 88; 1:22-cv-11091, Decl. of R. Douglas Scott in Supp. of Intervenor's Cross-Mot. for Summ. J. and in Opp'n to Pls. Mot. for Summ. J., Doc. No. 86-1.[14]

Defendants also dispute that the Project will result in the cessation of commercial fishing in the Lease Area. 1:22-cv-11091, Fed. Defs.' Resp. to Seafreeze Pls.' Statement of Undisp. Material Facts ¶¶ 9-11, Doc. No. 76 (citing BOEM Info. Mem. dated May 21, 2021, BOEM_0076922 at -942-44 (reflecting that "the navigational risk assessment prepared for the Project shows that it is technically feasible to navigate and maneuver fishing vessels and mobile gear through the WDA.") and Final EIS, Vol. 1 BOEM_0068434 at -68718 (discussing impacts in the WDA that may impact fishing activities) and BOEM_0068743-44 (acknowledging concerns from commercial fishing interests about the ability to safely navigate the WDA but

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[14] Plaintiffs dispute that AIS data is an accurate reflection of their fishing activities in the Lease Area where none of the Plaintiffs' vessels are required to carry or use AIS, and, instead, voluntarily use AIS, but typically not when fishing. See 1:22-cv-11091, Third Decl. of David Aripotch ¶¶ 4-6, Doc. No. 90-3; 1:22-cv-11091, Second Decl. of Thomas E. Williams, Sr. ¶¶ 8-9, Doc. No. 90-4.

noting, "fishing vessels, including those involved in line, trawl, and drag fishing, would be able to work in the area; however vessel operators would need to take the [wind turbine generators] and [electrical service platforms] into account as they set their courses[.]"). Vineyard Wind states that the Lease Area was selected to minimize conflicts with commercial fishing and because it does not have high relative revenue as compared to nearby waters. See 1:22-cv-11091, Vineyard Wind Resp. to Seafreeze Pls.' Statement of Undisp. Material Facts ¶¶ 9-11, Doc. No. 88 (citing Final EIS, Vol. 1 for proposition that, during the leasing process, and in response to public comments, BOEM identified "high value fishing areas…and removed [them] prior to leasing." Final EIS Vol. 1, BOEM_0068434 at -725).

In sum, there is a dispute of material facts as to the extent of any economic harm that the Commercial Fishing Entities may suffer. For purposes of Defendants' and Intervenor's Motions for Summary Judgment, however, and considering the evidence in the light most favorable to the Commercial Fishing Entities, the court finds that the Commercial Fishing Entities have demonstrated that they trawl fish in the Lease Area and may lose an unquantified sum of the revenue attributable to their trawl-fishing activities in the Lease Area.

b. Evidence Offered as to Non-Economic Injury

Aripotch states that, in addition to economic interests in the Lease Area, he also has environmental and aesthetic interests in the Lease Area. He states that the Project will impact the aesthetic and spiritual pleasures he derives from fishing in the Vineyard Wind Lease Area. 1:22-cv-11091, Aripotch Decl. ¶ 21, Doc. No. 66-1. In particular, while engaged in commercial fishing in the Vineyard Wind Lease Area, Aripotch tries to bring his camera to capture the wildlife. Id. at ¶ 25. He observes right whales and other marine life. Id. He plans to continue

fishing in the Lease Area, and observing marine mammals, "through the foreseeable future if the Vineyard Wind lease and COP are vacated." Id. at ¶ 28.[15]

Williams states that the impact the Vineyard Wind Project will have on the Vineyard Wind Lease Area will harm not only his business but also the aesthetic and emotional pleasures he derives from fishing. 1:22-cv-11091, Williams Sr. Decl. ¶ 25, 28, Doc. No. 66-2.[16] Williams' sons, who serve as captains of the F/V Heritage and the F/V Tradition, each likewise states that he takes pleasure in observing marine life, including right whales, while fishing in the Lease Area. 1:22-cv-11091, Decl. of Thomas H. Williams ¶ 25, Doc. No. 66-3; see 1:22-cv-11091, Decl. of Aaron Williams ¶ 27, Doc. No. 66-4.

Defendants dispute that statements of individual owners' aesthetic and emotional interests can be imputed to the Plaintiff corporations. See 1:22-cv-11091, Fed. Defs.' Opening Mem. 8, Doc. No. 73. Defendants also assert that the record directly conflicts these individuals' assertions where (i) NMFS has concluded there will be no adverse impacts to right whales other than temporary harassment of a small number of right whales due to exposure to pile driving noises, and (ii) that the Corps considered the Project's effects on food and fiber production as part of its public interest review and determined that the Project would have no effect on the food

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[15] Aripotch also states that he fears the Project will destroy the area that his family, and many others, depend on for their food supply. Id. at ¶ 24. Aripotch's affidavit does not show that he is competent to testify as to the alleged destruction of the area.

[16] Williams also states that it is his understanding that the impacts of the Project "will result in a sizeable overall decrease in the food supply" that will negatively affect food availability for all Americans, including his family. 1:22-cv-11091, Williams Sr. Decl. ¶ 28, Doc. No. 66-2. Again, Williams' affidavit does not show that he is competent to testify to these assertions.

supply. 1:22-cv-11091, Fed. Defs.' Resp. to Seafreeze Pls.' Statement of Undisp. Material Facts ¶¶ 167, 120, Doc. No. 76.

The court concludes the Commercial Fishing Entities have not demonstrated any non-economic injury where the competent evidence proffered relates to the interests of their owners and not to the Commercial Fishing Entities themselves.

2. Seafreeze Shoreside

Plaintiff Seafreeze Shoreside is a seafood dealer located in Narragansett, Rhode Island. 1:22-cv-11091, Decl. of Arthur Ventrone ("Ventrone Decl.") ¶ 4, Doc. No. 66-7; see also 1:22-cv-11091, Decl. of Meghan Lapp ("Lapp Decl.") ¶ 3, Doc. No. 66-8.

a. Evidence Offered as to Economic Injury

Declarant Arthur Ventrone, Seafreeze Shoreside's Treasurer, states that Seafreeze Shoreside purchases, sells, and processes fish product, primarily squid. 1:22-cv-11091, Ventrone Decl. ¶ 2, 4, Doc. No. 66-7. Ventrone states that Seafreeze Shoreside generates substantial revenue from squid seafood product brought in by commercial fishermen from the Lease Area and that, while revenues vary annually, catches from the Lease Area are "a consistently high percentage of [Seafreeze Shoreside's] total annual revenues year after year." Id. at ¶ 10. Ventrone states that, in 2016, 19% of Seafreeze Shoreside's total revenue, or $1.7 million, was attributable to catches in the "Vineyard Wind area." Id. Ventrone states that it is his understanding that commercial fishing in the Lease Area will "become untenable" as a result of the Vineyard Wind Project, and that, as a result, Seafreeze Shoreside will process less squid, and will experience a "substantial loss of revenues." Id. at ¶¶ 8-11. Ventrone also states that it is his understanding that squid will be displaced from the Lease Area as a result of the Project's impact

to squid habitat, and that, even if commercial fishermen could continue fishing in the Area, the catch would be "severely reduced or nonexistent." Id. at ¶ 9.[17]

Declarant Meghan Lapp, Seafreeze Shoreside's Fisheries Liaison and Assistant General Manager, states that the pile driving and operational noise from the Project will negatively impact the habitats longfin squid and other species, and thus impact Seafreeze Shoreside. 1:22-cv-11091, Lapp Decl. ¶¶ 2, 45-50, Doc. No. 66-8.

Defendants dispute that the construction and operation of the Vineyard Wind Project will result in the cessation of commercial fishing in the Vineyard Wind Lease Area. 1:22-cv-11091, Fed. Defs.' Resp. to Seafreeze Pls.' Statement of Undisp. Material Facts ¶ 6, Doc. No. 76 (citing BOEM Info. Mem. dated May 21, 2021, BOEM_0076922 at -942-44, Final EIS, Vol. 1 BOEM_0068434 at -718 and -743-44). Defendants also dispute that the Project will have adverse impacts on the squid habitat where Plaintiffs' only support for this proposition are the statements of employee declarants, who Defendants contend offer opinions and understanding in lieu of expertise, and Seafreeze Shoreside's own comments in the Administrative Record. See id. at ¶ 166.

Vineyard Wind disputes that Seafreeze Shoreside derives substantial revenue from the Lease Area, stating that the Lease Area was selected to minimize conflicts with commercial fishing and because it does not have high relative revenue as compared to nearby waters. See 1:22-cv-11091, Vineyard Wind Resp. to Seafreeze Pls.' Statement of Undisp. Material Facts ¶ 6,

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[17] Although Ventrone has not demonstrated that he is competent to testify as to any reduction in commercial fishing in the Lease Area, the Aripotch and Williams Sr. affidavits detailed above regarding their anticipated reduction in trawling for squid, are sufficient to allow the court to consider Ventrone's further statement that Seafreeze Shoreside will process less squid.

Doc. No. 88 (citing Final EIS, Vol. 1 for proposition that, during the leasing process, and in response to public comments, BOEM identified "high value fishing areas…and removed [them] prior to leasing." Final EIS Vol. 1, BOEM_0068434 at -725).

As above, there is a dispute of material facts as to the extent of any economic harm that Seafreeze Shoreside may suffer. For purposes of Defendants' and Intervenor's Motions for Summary Judgment, however, and considering the evidence in the light most favorable to Seafreeze Shoreside, the court finds that Seafreeze Shoreside has demonstrated that its suppliers trawl fish in the Lease Area and that Seafreeze Shoreside may lose an unquantified sum of the revenue attributable to the loss of its suppliers' trawl-fishing activities in the Lease Area.

b. Evidence offered as to Non-Economic Injury

Lapp states that "Seafreeze [Shoreside] has a keen interest in protecting the purity and cleanliness" of the Outer Continental Shelf, not only for economic reasons, but also because "environmental degradation" from the Vineyard Wind Project would take away "from Seafreeze [Shoreside] employees' aesthetic, psychological, emotional, and spiritual pleasures of working as part of a fishing community reliant on those waters." 1:22-cv-11091, Lapp Decl. ¶ 52, Doc. No. 66-8.

Vineyard Wind disputes that Plaintiffs have asserted any of its own legal rights and interests. See 1:22-cv-11091, Intervenor's Opening Mem. 4-5, Doc. No. 87.

As with the Commercial Fishing Entities, Seafreeze Shoreside has not shown that Seafreeze Shoreside, as opposed to its employees, have suffered any non-economic injuries where it has offered no evidence to that effect.

3. LICFA, Sector XIII, and the Alliance

Seafreeze Plaintiffs LICFA and Sector XIII, and Responsible Plaintiff Alliance (collectively, the "Associations"), are associations representing commercial fishing interests.

a. Evidence Offered as to Associations' Membership and Purposes

LICFA represents over 150 fishing businesses, boats, and fishermen from multiple ports on Long Island, New York. 1:22-cv-11091, Decl. of Bonnie Brady ("Brady Decl.") ¶ 3, Doc. No. 66-6. LICFA and its members "support extensive cooperative scientific research to better understand the marine environment and fisheries management." Id. at ¶ 4.

Sector XIII is a private organization of commercial fishermen that monitors compliance with fishing permits and supports the commercial fishing industry along the Atlantic Coast. 1:22-cv-11091, Decl. of John Haran ("Haran Decl.") ¶ 3, Doc. No. 66-5.

Plaintiff Alliance is a not-for-profit trade association headquartered in Washington, D.C., comprised of fishing associations and fishing companies, whose members own and operate more than 120 vessels and conduct business in more than 30 fisheries throughout the country. 1:22-cv-11172, Joint SOF ¶ 1, Doc. No. 99; 1:22-cv-11172, Decl. of Anne Hawkins ("Hawkins Decl.") ¶ 2, Doc. No. 53-1. One of the Alliance's members is Town Dock, which is one of the largest producers of squid in the United States. 1:22-cv-11172, Decl. of Katie Almeida ("Almeida Decl.") ¶¶ 1-2, Doc. No. 77-2. The Alliance is committed to improving the compatibility of new offshore development with its members' fishing-related businesses. 1:22-cv-11172, Hawkins Decl. ¶ 2, Doc. No. 53-1. Hawkins states that Defendants' approval of the Vineyard Wind Project has "frustrated the very purpose for which the Alliance was formed[.]" Id. at ¶ 8.

b. Evidence offered as to Economic Injury

Each association offers as injury the economic injury of its members, primarily as detailed above. See 1:22-cv-11091, Brady Decl. ¶¶ 6, 19-22, Doc. No. 66-6 (the presence and good health of numerous species of marine life in the Lease Area is vital to LICFA members); 1:22-cv-11091, Second Decl. of David Aripotch ("2d Aripotch Decl.") ¶ 4, Doc. No. 90-1 (Aripotch and Old Squaw are members of LICFA and LICFA represents Aripotch's "economic . . . interests as a commercial fisherman"); see also 1:22-cv-11091, Second Decl. of Bonnie Brady ("2d Brady Decl.") ¶ 4, Doc. No. 90-2 ("LICFA, as an association of commercial fishermen, represents the economic . . . interests of David Aripotch in his capacity as a member of LICFA."); 1:22-cv-11091, Haran Decl. ¶¶ 3, 6, Doc. No. 66-5 (approximately 38 of Sector XIII's members operate their commercial fishing businesses in the Lease Area and the presence and good health of numerous species of fish and other marine life in the Lease Area are vital to the members of Sector XIII, who depend on the Lease Area for a substantial portion of their revenues); id. at ¶¶ 7, 20 (Plaintiffs Heritage Fisheries and Nat. W. are members of Sector XIII and Heritage Fisheries, Nat. W., and similarly situated Sector XIII members will experience "substantial economic adverse impacts" as a result of the Vineyard Wind Project); id. at ¶ 11 (stating that the Vineyard Wind Project would force Sector XIII members who operate trawl vessels to fish and travel outside of the "project area," thereby increasing vessel traffic and hazardous conditions outside of the Lease Area); id. at ¶ 18 (stating that the Vineyard Wind Project will preclude members from fishing in the Lease Area, due to (i) the risk of entanglement of trawl fishing gear, (ii) reduced navigational capabilities because of radar interference, and (iii) increased risk of collision when navigating through Project transit lanes); 1:22-cv-11172, Second Decl. of Anne Hawkins ("2d Hawkins Decl.") ¶¶ 4-7, Doc. No. 77-1 (Old Squaw, Sector XIII,

LICFA, and Seafreeze Shoreside are members of the Alliance and will be harmed in the ways identified by the Seafreeze Plaintiffs' declarants); see also 1:22-cv-11172, Almeida Decl. ¶¶ 1-2, 4-5, Doc. No. 77-2 (Alliance member Town Dock is dependent on longfin squid, the Lease Area is "on top of and adjacent to one of [Town Dock's] most productive spring and summer longfin squid grounds," Town Dock's vessels may be unable to tow their trawling gear through the Lease Area safely and efficiently, and the noise from the Project will negatively impact the longfin squid population, and ultimately, Town Dock's business) (citing letter offered as part of Town Dock's comments on an adjacent wind project which references a Woods Hole Oceanographic Institute study).

As discussed above, Defendants dispute that the Vineyard Wind Project will result in the cessation of fishing activities in the Lease Area. Vineyard Wind disputes that members of the Associations asserting "substantial" losses in revenue will experience such impacts where AIS data reflects that LICFA member Old Squaw and Sector XIII members Heritage Fisheries andNat. W. fished in the Lease Area for a collective 27.7 hours over six years.

Vineyard Wind also disputes that Alliance member Town Dock may have difficulty navigating through the Lease Area with gear where it previously submitted comments reflecting that Town Dock's boats will continue to work in the wind energy areas with one nautical mile of spacing between the turbines. See 1:22-cv-11172, Intervenor's Reply 4 n.2, Doc. No. 93.

As above, there is a dispute of material facts as to the extent of any economic harm that the Associations' members may suffer. For purposes of Defendants' and Intervenor's Motions for Summary Judgment and considering the evidence in the light most favorable to the Associations, the court finds that the Associations have demonstrated that their members may

lose an unquantified sum of the revenue attributable to the loss of their or their suppliers' trawl-fishing activities in the Lease Area.

c. *Evidence Offered as to Non-Economic Injury*

Each association also offers as injury the non-economic injury of its members, primarily as detailed above. See 1:22-cv-11091, 2d Aripotch Decl. ¶ 4, Doc. No. 90-1 (LICFA represents Aripotch's "environmental interests as a commercial fisherman"); see also 1:22-cv-11091, 2d Brady Decl. ¶ 4, Doc. No. 90-2 ("LICFA, as an association of commercial fishermen, represents the . . . environmental interests of David Aripotch in his capacity as a member of LICFA."). Whether that non-economic injury may be asserted by the Associations is discussed further below.

B. Constitutional Standing

Vineyard Wind challenges Plaintiffs' standing to bring their NEPA, ESA, and MMPA claims as a constitutional issue, and Defendants and Vineyard Wind also challenge the Associations' standing. The court considers the challenges to standing under NEPA and MMPA as a zone-of-interest question, which is addressed below. Here, the court considers first legal principles concerning constitutional standing generally, then questions of associational standing, and then Plaintiffs' standing under ESA.

1. Applicable Law

The doctrine of standing is rooted in Article III of the Constitution, which confines federal courts to the adjudication of actual "cases" and "controversies." See U.S. Const. Art. III, § 2, cl. 1; Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992). Standing consists of three elements: "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial

decision." Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016), as revised (May 24, 2016) (citing Defs. of Wildlife, 504 U.S. at 560-61). Plaintiffs' injury must be "'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable court ruling.'" Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (quoting Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149 (2010)).

To establish the first element of standing, an injury-in-fact, a plaintiff must demonstrate "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Defs. of Wildlife, 504 U.S. at 560 (quotations omitted). "The particularization element of the injury-in-fact inquiry reflects the commonsense notion that the party asserting standing must not only allege injurious conduct attributable to the defendant but also must allege that he, himself, is among the persons injured by that conduct." Hochendoner v. Genzyme Corp., 823 F.3d 724, 731-32 (1st Cir. 2016).

Moreover, standing is "ordinarily substantially more difficult to establish," where the plaintiff is not the object of the action. Defs. of Wildlife, 504 U.S. at 562 (quotations omitted); compare Maine Lobstermen Assoc. v. Nat. Marine Fish. Serv., 70 F.4th 582, 592-93 (D.C. Cir. June 16, 2023) (concluding that the plaintiff lobstermen have standing to challenge a biological opinion considering NMFS' fishery licensing activities where they were the "object of the action" and the biological opinion had "virtually determinative effect"). "The standing inquiry is claim-specific: a plaintiff must have standing to bring each and every claim that she asserts." Katz v. Pershing, LLC, 672 F.3d 64, 71 (1st Cir. 2012) (citing Pagán v. Calderón, 448 F.3d 16, 26 (1st Cir. 2006)).

Because standing is not a "mere pleading requirement[] but rather an indispensable part of the plaintiff's case," standing must be supported "with the manner and degree of evidence

required at the successive stages of the litigation." Defs. of Wildlife, 504 U.S. at 561; see also People to End Homelessness v. Develco Singles Apartments Assoc., 339 F.3d 1, 8 (1st Cir. 2003). While at the pleadings stage, "general factual allegations of injury" may suffice, and at summary judgment, such allegations must be supported by affidavits which will be taken to be true, where standing remains a controverted issue at trial, the specific facts establishing standing "must be 'supported adequately by the evidence adduced at trial.'" Id. (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 114, 115 n.31 (1979)).

2. Associational Standing

An association cannot establish standing to sue on behalf of its members unless (i) "at least one of [its] members possesses standing to sue in his or her own right," United States v. AVX Corp., 962 F.2d 108, 116 (1st Cir. 1992), (ii) "the interests at stake are germane to the organization's purpose," and (iii) "neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 169 (2000).

Here, despite an initial challenge,[18] there is no real dispute that the Associations may assert the economic injuries of its commercial fishing members.

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[18] Defendants and Vineyard Wind initially asserted that the Alliance lacked standing to bring claims on behalf of its members where it had not identified any members with Article III standing. Defendants and Vineyard Wind withdrew this argument after the Alliance provided additional declarations identifying members who operate fishing vessels in the Vineyard Wind project area. See 1:22-cv-11172, Fed. Defs.' Reply, Doc. No. 92; 1:22-cv-11172, Intervenor's Reply 1, Doc. No. 93.

Defendants and Vineyard Wind also asserted that the Alliance lacked standing to bring claims on behalf of itself as a nonprofit trade organization. Where the Alliance has standing to raise the economic claims of its members and does not assert claims distinct from those asserted on behalf

Plaintiffs argue that Seafreeze Plaintiff LICFA can also bring claims of noneconomic injury on behalf of LICFA member David Aripotch. 1:22-cv-11091, Pls.' Opp'n 12-14, Doc. No. 90. Defendants and Vineyard Wind challenge LICFA's standing to assert the environmental injuries of its members where it has not demonstrated environmental issues are germane to its purpose. 1:22-cv-11091, Fed. Defs.' Opening Mem. 8, Doc. No. 73; Fed. Defs.' Reply 2, Doc. No. 93; Intervenor's Opening Mem. 6-7, Doc. No. 87.

Here, LICFA has not demonstrated that the interests at stake–Aripotch's interests in observing right whales and marine life–are germane to LICFA's purpose of supporting fisheries management. See Friends of the Earth, 528 U.S. at 169. Accordingly, LIFCA does not have associational standing to assert any of Aripotch's injuries based on the aesthetic and spiritual pleasures he derives from fishing.

3. ESA (Seafreeze, 9th, 10th Claims for Relief; Responsible Count 3)

Plaintiffs assert that Defendants violated the ESA, where (i) NMFS failed to consider the cumulative effects of the Project on endangered species or their habitat, 1:22-cv-11091, Complaint, 9th Claim for Relief, Doc. No. 1; (ii) NMFS failed to inform BOEM of alternatives to the approved Project that would avoid harming endangered species, id., 10th Claim for Relief; and (iii) Defendants violated the ESA by approving the COP and Corps' pollutant discharge permit without a valid biological opinion in place, 1:22-cv-11172, Complaint, Count 3, Doc. No. 1.

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of its members, the court need not address whether the Alliance has standing based on its status as a nonprofit trade organization. See Horne v. Flores, 557 U.S. 433, 446-47 (2009).

The citizen-suit provision of the ESA grants "any person" the authority to commence a civil suit to enforce a violation of any provision of the ESA. 16 U.S.C. § 1540 (g)(1). But this "authorization of remarkable breadth," does not obviate Plaintiffs' obligations under Article III of the Constitution to establish standing. Bennett v. Spear, 520 U.S. 154, 162-164 (1997).

Taking Plaintiffs' claims in turn, the Seafreeze Plaintiffs allege that NMFS violated its obligations under Section 7 of the ESA and attendant regulations in issuing the 2020 BiOp without (i) considering the cumulative effects of the Project on endangered species, and (ii) without informing BOEM of alternatives that would avoid harming endangered species. Vineyard Wind asserts that Plaintiffs lack standing to bring claims against the superseded Biological Opinion where they have not demonstrated any injury flowing from it, let alone established causation or redressability. 1:22-cv-11091, Intervenor's Opening Mem. 8, Doc. No. 87. As discussed above, considering the evidence in the light most favorable to the Plaintiffs, Plaintiffs or their members may lose some revenue if the Commercial Fishing Entities (or Seafreeze Shoreside's suppliers) reduce their trawling for squid as a result of the construction and operation of the Project but they have shown no noneconomic harm. Plaintiffs have not demonstrated their particularized injury is in any way connected to the Project's impact on any endangered species. They also have not shown that they are the object of any action taken under the ESA consultation process, nor that they are the object of any other challenged agency action under the ESA connected to the Project. Nor do they have a demonstrated interest in the direct agency action related to the ESA.[19]

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[19] Defendants argue that if the Seafreeze Plaintiffs have standing to assert their 9th and 10th Claims for Relief challenging NMFS' actions as part of the 2020 BiOp process, such challenge would still be moot. See 1:22-cv-11091, Fed. Defs.' Reply 38-39, Doc. No. 93. The court agrees

Similarly, although the Alliance alleges that both BOEM and the Corps permitted actions without satisfying the requirements of the ESA, see 1:22-cv-11172, Plaintiff's Opposition 24-25, Doc. No. 77, the Alliance has only offered evidence to support that their members may lose some revenue as a result of the construction and operation of the Project.

The relationship between the unquantified economic harm Plaintiffs will suffer as a result of the Project's possible physical impacts on Plaintiffs' preferred trawl fishing area, and the agency actions Plaintiffs are challenging—which are general procedural aspects of the 2020 biological consultation process undertaken pursuant the ESA—is too attenuated to support either that Plaintiffs have demonstrated an appropriately particularized injury-in-fact or causation under Article III's standing requirements.

"Establishing causation in the context of a procedural injury requires a showing of two causal links: one connecting the omitted [procedural step] to some substantive government decision that may have been wrongly decided because of the lack of [that procedural requirement] and one connecting that substantive decision to the plaintiff's particularized injury."

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where Plaintiffs challenge procedural defects in the 2020 BiOp, and seek declaratory and injunctive relief, but do not raise those challenges to the operative 2021 BiOp. Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (courts cannot "'declare principles or rules of law which cannot affect the matter in issue in the case before it'" (quoting Mills v. Green 159 U.S. 651, 653 (1895)); Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1114 (10th Cir. 2010) (concluding that environmental challenge was moot where complaint did not challenge superseding biological opinion). Defendants likewise challenges the Alliance's remaining ESA claim as moot where the Alliance likewise seeks declaratory relief in conjunction with its challenge that BOEM and the Corps improperly proceeded with approval of the COP and issuance of the Section 404 Permit without a valid biological opinion given the agency issued a superseding biological opinion shortly thereafter, which Plaintiffs do not challenge. The court agrees with Defendants as to the Alliance's remaining ESA claim as well. Accordingly, if the mootness inquiry should occur first, the court lacks jurisdiction to decide Plaintiffs' pending ESA claims where they are moot.

See Ctr. for Bio. Div. v. EPA, 861 F.3d 174, 184 (D.C. Cir. 2017) (quotations omitted). An agency's procedural omission is necessary but not sufficient to establish standing. Cf. Ctr. for Bio. Div., 861 F.3d at 183-86 (holding association had established standing where it demonstrated that the EPA's failure to conduct an "effects determination" or ESA Section 7 consultation created a demonstrable risk to the endangered species in which the association's member established a demonstrable interest). Instead, a plaintiff must also show the procedural step was connected to the substantive result.

Here, Plaintiffs have not shown their alleged procedural deficiencies were connected to (i) their alleged injuries or (ii) any substantive result, where they challenge only decisions undertaken during the 2020 biological consultation process and not the 2021 BiOp from which all agency actions flowed.[20]

Accordingly, where Plaintiffs lack standing to assert the remaining ESA claims, Plaintiffs' Motions are denied and Defendants' and Vineyard Wind's Motions are granted.

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[20] The Alliance's claims suffer from additional defects that would prevent consideration on the merits. First, the Alliance's claim requires the court to accept the unsupported fact that the 2020 BiOp was "inadequate," and thus, could not be relied upon for any purpose, resulting in BOEM and the Corps adopting actions without having conducted consultation as required under ESA Section 7. See 1:22-cv-11172, Pl.'s Opp'n 24-25, Doc. No. 77. But the Record demonstrates instead that (1) the 2020 BiOp was not deemed inadequate, invalid, or otherwise unreliable for any purpose, (2) reinitation of consultation was limited to discrete issues, (3) BOEM approved the COP on July 15, 2021, under numerous express conditions, including any terms and conditions and reasonable and prudent measures stemming from the reinitiated consultation, see COP Approval Letter, BOEM_077150 at -7152; see also 1:22-cv-11172, Memorandum and Order 15-19, Doc. No. 104, and (4) the Corps also imposed conditions on its approval, including adherence to the then-in-effect biological opinion and any subsequently issued biological opinion. See 2021 BiOp, BOEM_0077276 at -7282; Joint ROD, BOEM_ 0076799 at -6844. Accordingly, the Alliance has not pointed to some procedural requirement that was left unsatisfied where BOEM approved the COP and the Corps issued a Section 404 Permit pending the results of a reinitiated biological consultation.

C. Zone of Interest

1. Relevant Law

For Plaintiffs to establish standing under the APA, they must demonstrate they have been "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702; see also CSL Plasma Inc. v. U.S. Customs and Border Prot., 33 F.4th 584, 588 (D.C. Cir. 2022). The "zone of interests" test is "a limitation on the cause of action for judicial review conferred by the [APA.]" Lexmark Int'l., Inc. v. Static Control Components, Inc., 572 U.S. 118, 129 (2014). As such, a court "ask[s] whether [plaintiff] has a cause of action under the statute." Id. at 128. "'The 'zone of interest' test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision.'" Nulankeyutmonen Nkihtaqmikon v. Impson, 503 F.3d 18, 29 (1st Cir. 2007) (quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987)). "[T]he test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Clarke, 479 U.S. at 399.

2. National Environmental Policy Act (Seafreeze, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd Claims for Relief, Responsible, Count 4)

Defendants and Vineyard Wind assert that the NEPA claims cannot survive where Plaintiffs' only asserted interests are economic. See 1:22-cv-11091, Fed. Defs.' Reply 1-3, Doc. No. 93; 1:22-cv-11172, Fed. Defs.' Reply 2-3, Doc. No. 92; 1:22-cv-11091, Intervenor's Reply, Doc. No. 94; 1:22-cv-11172, Intervenor's Reply 2-4, Doc. No. 92. NEPA was enacted "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321; see also Nev. Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993). Numerous courts have thus concluded that a

plaintiff who asserts purely economic injuries does not come within NEPA's zone of interests. Nev. Land Action Ass'n, 8 F.3d at 716; see also Gunpowder Riverkeeper v. FERC, 807 F.3d 267, 274 (D.C. Cir. 2015); Am. Waterways Operators v. U.S. Coast Guard, 613 F. Supp. 3d 475, 486-87 (D. Mass. 2020) (collecting cases).

Such is the case here for the Commercial Fishing Entities and Seafreeze Shoreside, who each only asserts economic injuries. Similarly, where each of the Plaintiff Associations predicate injuries on the economic impact of the Project to their members, the Plaintiff Associations likewise lack statutory standing for their NEPA claims.

Plaintiffs argue that they have stated environmental injuries that will have economic impact, including that the Project will make Old Squaw Fisheries unable to fish in the Lease Area, and that this is sufficient to come within NEPA's zone of interests. 1:22-cv-11091, Pls.' Opp'n 3-4, Doc. No. 90. They contend that Defendants rely on case law involving purely economic injuries, see 1:22-cv-11091, Pls.' Opp'n 3-4, Doc. No. 90 (discussing Am. Waterways Operators, 613 F. Supp. 3d at 486-87 and Gunpowder Riverkeeper, 807 F.3d at 274), and that such cases are inapplicable here, where Plaintiffs have asserted environmental harms that will cause economic injury, id. (citing Monsanto, 561 U.S. at 155). However, the plaintiff farmers in Monsanto based their standing on a claim that an environmental harm (a potential genetic mutation from the defendant's products) could harm their alfalfa crop and ultimately impact to their livelihoods. The Court left undisturbed the district court's unchallenged conclusion that plaintiffs fell within NEPA's zone of interests because the risk the genetically modified gene at issue would "infect conventional and organic alfalfa is a significant environmental effect within the meaning of NEPA." Monsanto, 561 U.S. at 155.

Here, by contrast, Plaintiffs have not put forth competent evidence as to an environmental injury, or even an environmental harm that would impact their fishing. Instead, where the gist of their claim is that the physical impediment the Project poses will limit their trawling, Plaintiffs' argument fails.

Accordingly, the court denies the Seafreeze and Responsible Plaintiffs' Motions and grants Defendants and Intervenor's Motions as to Plaintiffs' NEPA claims.

3. *Marine Mammal Protection Act (Seafreeze, 22nd Claim for Relief; Responsible Count 5)*

Vineyard Wind challenges Plaintiffs' ability to bring claims challenging the Incidental Harassment Authorization permit issued by NMFS under the MMPA where Plaintiffs have not asserted any environmental injuries. The MMPA was adopted by Congress to promote marine mammal conservation. See 16 U.S.C. § 1361; City of Sausalito v. O'Neill, 386 F.3d 1186, 1202-03 (9th Cir. 2004).

Here, Plaintiffs assert violations of the APA and MMPA pertaining to the issuance of the IHA to Vineyard Wind for taking by harassment of right whales. But Plaintiffs have not asserted any cognizable interest in right whales, or any marine mammals for that matter. While the test for prudential standing is not "especially demanding," Lexmark, 572 U.S. at 130 (quotations omitted), Plaintiffs have not demonstrated any interests that fall within the most generous reading of the zone of interests for the MMPA. Accordingly, Plaintiffs' claims fall outside of the zone of interests of the MMPA and cannot proceed. Thus, as to Plaintiffs' MMPA claims, the court denies the Seafreeze and Responsible Plaintiffs' Motions for Summary Judgment and grants Defendants and Intervenor's Motions.

IV. Plaintiffs' Clean Water Act Claims (Seafreeze, 17th Claim for Relief; Responsible, Count 2)

Plaintiffs assert that the Corps' issuance of Section 404 Permit under the CWA was arbitrary and capricious where it violated CWA regulations.[21] Both complaints allege that the Corps' failed to analyze alternatives to the Project. 1:22-cv-11172, Compl. Counts 2.2, 2.3, Doc. No. 1; 1:22-cv-11091, Compl. 17th Claim for Relief, Doc. No. 1. The Alliance additionally claims that the Corps failed to consider the cumulative impact of the Project and future similar Projects. 1:22-cv-11172, Compl. Counts 2.4, Doc. No. 1; 1:22-cv-11172, Pl.'s Opening Mem. 27-33, Doc. No. 53.[22]

A. Practicable Alternatives – (Responsible, Counts 2.2, 2.3, Seafreeze, 17th Claim for Relief[23])

The Alliance claims that in issuing the Section 404 Permit, Defendants violated their own regulations concerning practicable alternatives by failing to analyze less damaging alternatives to the Vineyard Wind Project. 1:22-cv-11172, Pl.'s Opening Mem. 28-29, Doc. No. 53.

Section § 230.10(a) prohibits (except in circumstances not at issue here) the discharge of dredged or fill materials "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

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[21] Section 404 Permits allow for the discharge of dredged or fill materials into navigable waters at specified disposal sites. 33 U.S.C. § 1344.

[22] The Parties debate whether Plaintiffs waived their argument that the Section 404 Permit was flawed where the notice and Permit application reflected a corridor length of 23.3 miles, not the actual 39.4 mile length of the corridor. 1:22-cv-11172, Fed. Defs.' Opening Mem. 33-34, Doc. No. 60; 1:22-cv-11172, Pl.'s Opening Mem. 24-25, Doc. No. 53. However, where that alleged error was raised by the Alliance only in its summary judgment briefing, and not in its Complaint, the claim is not properly before the court.

[23] The Seafreeze Plaintiffs do not independently brief this issue, instead incorporating the Alliance's briefing by reference.

have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). Defendants assert that the Corps considered various other alternatives, "including: (a) the no-action alternative; (b) a largely land-based alternative; (c) alternatives that would bring the cable on shore in a different location; (d) two off-site alternatives in other zones of the ocean; and (e) seven different on-site alternatives." 1:22-cv-11172, Fed. Defs.' Opening Mem. 39, Doc. No. 60 (citing USACE AR 011451-52, 011471-73). The Alliance acknowledges that the Corps did consider other alternatives and it does not argue that any of these alternatives should have been selected. 1:22-cv-11172, Pl.'s Opp'n 23, Doc. No. 77.

Instead, the Alliance argues that the Corps' analysis violated its regulations. Id. at 24. The Alliance's arguments do not withstand scrutiny. First, the Alliance contends that there is a three-step analysis that the Corps must conduct: it must assess off-site alternatives; then, if none are available, it must try to modify the project to minimize impacts; finally, if the project cannot be modified to avoid impacts, it must determine mitigation measures. 1:22-cv-11172, Pl.'s Opening Mem. 29, Doc. No. 53 (citing 40 C.F.R. §§ 230.10(a)(2)). But the cited regulation says no such thing.

Then the Alliance contends that 40 C.F.R. § 230.10(a)(3) requires "the Corps to presume that practicable alternatives exist[.]" 1:22-cv-11172, Pl.'s Opening Mem. 29, Doc. No. 53. The Alliance reasons that the Project "is not water dependent" because it does not require "access or proximity to . . . the special aquatic site in question to fulfill its basic purpose," and argues that "when a project does not require any access or proximity to an aquatic site," the Corps must "rebut the presumption that there are less practicable alternatives with less adverse environmental impact." Id. (citing 40 C.F.R. §§ 230.10(a)(3)). But as Defendants point out, the Alliance's argument relies on a misreading of the regulations, including failing to recognize that

§ 230.10(a)(3)'s presumption applies only to "special aquatic sites,"[24] and that where the Vineyard Wind Project will not be placed in a "special aquatic site," the presumption is inapplicable, and the Alliance's claim must fail. 1:22-cv-11172, Fed. Defs.' Opening Mem. 37-38, Doc. No. 60.

Consequently, Plaintiffs have failed to demonstrate how the regulation purportedly requiring consideration of alternatives and a presumption that practicable alternatives exist was violated here. Nor have they made other arguments, independent of the cited regulation, that would have obligated Defendants to consider other alternatives beyond what was done.

As a result, Plaintiffs' claims that Defendants failed to consider practicable alternatives fails.

B. Cumulative Impacts (Responsible, Count 2.4)

The Alliance claims that the Corps failed to consider the cumulative impacts of the Vineyard Wind Project and other future projects under 40 C.F.R. § 230.11(g),[25] where discussion of cumulative impacts from this Project and similar future projects is absent from the Joint ROD. 1:22-cv-11172, Pl.'s Opening Mem. 31-32, Doc. No. 53. The Alliance argues further that the Corps cannot rely on the EIS for its cumulative effects analysis, on the ground that the Final EIS is also deficient and fails to provide this discussion. Id. at 32.

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[24] As summarized by Defendants, "[s]pecial aquatic sites are sanctuaries, refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pools." 1:22-cv-11172, Fed. Defs.' Opening Mem. 38, Doc. No. 60 (citing 40 C.F.R. §§ 230.40 to 230.45; 40 C.F.R. § 230.3(m)).

[25] Under 40 C.F.R. § 230.11(g)(2), "cumulative effects attributable to the discharge of dredged or fill material in the 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."

Defendants respond first that, under 40 C.F.R. § 230.11(g), the Corps' required cumulative impact analysis is limited to the 23.3 miles of cable corridor[26] covered by the CWA permit. Where the regulations at issue apply only to the length of corridor permitted under the CWA regulations (i.e. the 23.3 mile corridor), Defendants are correct.

Defendants argue next, that the Alliance has not explained how future projects would cause impacts along the 23.3 mile corridor that Defendants failed to consider, and that the Corps complied with § 230.11(g) in considering cumulative impacts to the 23.3 mile corridor. Defendants detail that the Corps both relied on cumulative impacts analysis performed as part of the NEPA review and independently considered cumulative impacts that other wind projects in the area would cause. 1:22-cv-11172, Fed. Defs.' Opening Mem. 42-44, Doc. No. 60 (citing USACE AR 011471 ("reasonably foreseeable activities within the larger overall wind lease area were considered to account for potential cumulative effects.")); Fed. Defs.' Reply 11, Doc. No. 92. Where the Alliance has not pointed to (i) authority suggesting that the Corps cannot rely on analysis performed during NEPA review or (ii) specific cumulative impacts not considered as part of the NEPA or CWA review, Defendants' arguments are well-taken.

At its core, the Alliance is contending that the Corps should have done more to satisfy its own regulations. The Alliance must meet a high bar to challenge an agency's interpretation of its own regulations. See Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 658

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[26] There are also two disputes concerning this figure: first, Plaintiffs appear to challenge impacts beyond the 23.3 miles considered under the CWA. Where those challenges are not based on any agency action or lack of action (i.e. Plaintiffs are not challenging the Rivers and Harbors Permit, nor are they arguing the CWA considered an overly narrow area) they fail. Second, Plaintiffs raise, for the first time, that in two public notices, the Corps improperly omitted the total corridor length. This argument is entirely without merit as the Corps detailed the area to be considered under the CWA, and other documents connected to the Project review detailed total figures.

(2007) (vacatur is proper only where the agency "has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered 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."). The Alliance has failed to make this showing.

Accordingly, Plaintiffs' Motions for Summary Judgment as to the CWA claims are denied and Defendants' and Vineyard Wind's Motions are granted where certain claims were waived, and as to those remaining claims, Plaintiffs have not shown show any actions on the part of Defendants were arbitrary, capricious, or otherwise unlawful.

V. Plaintiffs' Outer Continental Shelf Lands Act Claims[27]

A. Smart from the Start (Seafreeze, 1st, 2nd, and 3rd Claims for Relief)

1. Background

On November 23, 2010, the Department of Interior issued a press release which announced the "Smart from the Start" Initiative, designed to "speed offshore wind energy development." 1:22-cv-11091, Joint SOF ¶ 18, Doc. No. 106 (citing U.S. Dep't of Interior Press Release). In the press release, BOEM announced that it was "proposing a revision to its regulations that will simplify the leasing process of offshore wind in situations where there is only one qualified and interested developer." Id. at 19. On May 16, 2011, BOEM adopted a final rule pertaining to non-competitive leases on the Outer Continental Shelf that may utilize pre-

[27] In their summary judgment briefing, the Seafreeze Plaintiffs assert for the first time that BOEM violated OCSLA in approving the Vineyard Wind Site Assessment Plan. Where this claim is absent from the Complaints, it is not properly before the court, and Plaintiffs' Motions for Summary Judgment fail as to that previously unasserted claim.

existing facilities. 76 Fed. Reg. 28,178 (May 16, 2011). On February 6, 2012, in addition to publishing a Call for Information and Nominations for wind energy projects on the Outer Continental Shelf, BOEM published a notice concerning ongoing efforts to develop wind energy consistent with the "Smart from the Start" Initiative. 77 Fed. Reg. 5830 (Feb. 6, 2012).

2. Plaintiffs' Challenge

The Seafreeze Plaintiffs allege the "Smart from the Start" Initiative was a change in regulatory policy which violates the APA and OCSLA for various reasons, including that (1) the Initiative was not promulgated through notice-and-comment rulemaking, and (2) the subsequent application of the Initiative was impermissible, because of the lack of notice-and-comment at various stages of the Vineyard Wind review process.[28]

Defendants respond that the "Smart from the Start" Initiative–which Plaintiffs define as a "policy" adopted in 2010 and 2011 press releases–is not a reviewable agency action. They argue further that, in any event, even if the 2011 press release and initiative could be challenged as an agency action, such challenge would be time barred. 1:22-cv-11091, Fed. Defs.' Opening Mem. 8-9, Doc. No. 73; 1:22-cv-11091, Fed. Defs.' Reply 21, Doc. No. 93. Vineyard Wind additionally asserts that (i) Plaintiffs' Complaint ¶ 55, 1:22-cv-11091, Doc. No. 1, challenges only 76 Fed. Reg. 28,178, a regulation pertaining to non-competitive leasing (which the process for OCS-A 0501 was not), and (ii) nothing in the Record demonstrates that the "Smart from the Start" Initiative was applied to the relevant Environmental Assessment or the EIS prepared in

[28] The Seafreeze Plaintiffs also brought a claim pertaining to the "Smart from the Start" Initiative under the APA and NEPA. See 1:22-cv-11091, Compl. 24th Claim for Relief, ¶¶ 286-293, Doc. No. 1. Where Plaintiffs lack standing to bring claims under NEPA, the court does not reach this claim.

connection with the Vineyard Wind Project. 1:22-cv-11091, Intervenor's Reply 7-8, Doc. No. 94.[29] The court need not reach whether the "Smart from the Start" Initiative was a final agency action where Plaintiffs' challenges are time barred.

Under 28 U.S.C. § 2401(a), "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Here, the "Smart from the Start" Initiative was announced in 2010; a final rule pertaining to non-competitive leaves was issued in 2011; and BOEM published a notice concerning ongoing efforts to develop wind energy consistent with the "Smart from the Start" Initiative in 2012. The two actions here were filed more than nine years later, in December 2021 and January 2022.

Plaintiffs contend the statute of limitations does not apply to *ultra vires* actions. 1:22-cv-11091, Pls.' Opening Mem. 19-20, Doc. No. 67 (citing La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986)). To the extent Plaintiffs are arguing that there is no statute of limitations applicable to such actions, they are incorrect. Louisiana Public Service Commission does not instruct otherwise.

Next, Plaintiffs contend their challenge is not time barred where it "'arises in response to application of the [agency action] to the challenger[.]'" 1:22-cv-11091, Pls.' Opp'n 33-34, Doc. No. 90 (quoting Rodriguez v. United States, 852 F.3d 67, 82 (1st Cir. 2017)). The statute of limitations to challenge illegal agency actions may be tolled until it is applied to a challenger.

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[29] Vineyard Wind also challenges the Seafreeze Plaintiffs' standing to bring claims concerning the "Smart from the Start" Initiative. 1:22-cv-11091, Intervenor's Reply 7-8, Doc. No. 94. Where the Seafreeze Plaintiffs have asserted economic injuries caused by the application of the "Smart from the Start" Initiative to BOEM's subsequent leasing and approval decisions under OCSLA, the court considers the statute of limitations defense first.

See Aguayo v. Jewell, 827 F.3d 1213, 1226 (9th Cir. 2016). However, Plaintiffs have not demonstrated that the "Smart from the Start" Initiative was applied to any aspect of the Vineyard Wind Project, let alone that it was applied to Plaintiffs. Although Plaintiffs contend BOEM's issuance of the Vineyard Wind Lease, publication of the Final EIS, issuance of the ROD, and approval of the COP were each "later" applications of the "Smart from the Start" Initiative, some of which they contend make their challenge timely, Plaintiffs offer no evidence to demonstrate the "Smart from the Start" Initiative was applied in any of those phases of the Project review process. Where they have not offered evidence that the "Smart from the Start" Initiative was applied to the Vineyard Wind Project, their tolling argument fails.

Accordingly, the Seafreeze Plaintiffs' challenge to the "Smart from the Start" Initiative is time-barred.[30] As to the Seafreeze Plaintiffs' First, Second,[31] and Third Claims for Relief, the Seafreeze Plaintiffs' Motion for Summary Judgment is denied and Defendants' and Vineyard Wind's Motions for Summary Judgment are granted.

B. Violations of 43 U.S.C. § 1337(p)(4)

Both the Seafreeze Plaintiffs and the Alliance assert that BOEM violated OCSLA in numerous phases of the Vineyard Wind Project by failing to ensure it met the majority of the twelve goals enumerated under § 1337(p)(4). 1:22-cv-11091, Pls.' Opening Mem. 25-26, Doc.

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[30] Although Plaintiffs assert that their claims challenging the application of the "Smart from the Start" Initiative implicates the major questions doctrine, where their APA/OCSLA claims pertaining to the "Smart from the Start" Initiative are time-barred, and their NEPA claims have been dismissed for want of standing, the court is without jurisdiction to consider Plaintiffs' further arguments as to these claims.

[31] The Seafreeze Plaintiffs' Second Claim for Relief as it pertains to their claim that BOEM did not consider the requisite factors under 43 U.S.C. § 1337(p)(4) in issuing the Lease is addressed below.

No. 67; 1:22-cv-11172, Pl.'s Opening Mem. 13, Doc. No. 53 (incorporating the Seafreeze Plaintiffs' arguments pertaining to OCSLA by reference). Defendants contend that Plaintiffs' claims are deficient in numerous respects and that, in any event, Defendants' actions are entitled to deference. The court considers each of the challenged actions in turn below.

1. Vineyard Wind Lease (Seafreeze 2nd Claim for Relief)

Plaintiffs contend that BOEM's issuance of the Lease violated OCSLA's substantive requirements under § 1337 and EPA's procedural requirements under 40 C.F.R. § 1501.3(a) where BOEM prepared an Environmental Assessment but failed to prepare an Environmental Impact Statement for the Lease issuance; and BOEM did not otherwise consider the factors enumerated in § 1337 when issuing the Vineyard Wind Lease. 1:22-cv-11091, Pls.' Opening Mem. 19-26, Doc. No. 67.

Defendants assert that challenges to the issuance of the Vineyard Wind Lease and the Environmental Assessment BOEM prepared in connection with the Lease issuance are time barred. The court agrees. Under 28 U.S.C. § 2401(a), except in the case of contract disputes not at issue here, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The Lease was effective April 1, 2015. The first of these actions was not commenced until December 15, 2021. As discussed supra, Plaintiffs' sole argument that the action is not time barred–that actions which are "*ultra vires*" can be challenged at any time – has no legal support. Accordingly, the Seafreeze Plaintiffs' Motion for Summary Judgment is denied and Defendants' and Vineyard Wind's Motions for Summary Judgment are granted as to the Seafreeze Plaintiffs' challenges to the issuance of the Vineyard Wind Lease as violating the OCSLA.

2. Approval of the COP (Seafreeze, 5th Claim for Relief; Responsible, Count 1.1, 1.2, and 1.7)

Plaintiffs argue that, as a matter of statutory construction, 43 U.S.C. § 1337(p)(4) imposes certain non-negotiable requirements that Defendants failed to provide for in consideration of the Vineyard Wind COP. 1:22-cv-11091, Pls.' Opening Mem. 25-27, Doc. No. 67; 1:22-cv-11172, Pl.'s Opening Mem. 13-15, Doc. No. 53 (adopting the Seafreeze Plaintiffs' arguments); Pl.'s Opp'n 17-19, Doc. No. 77 . Defendants respond that § 1337 commits discretion to the Secretary of the Interior to ensure these criteria are appropriately balanced, and that, as a result, the Secretary's determinations are entitled to deference, and, in any event, that Defendants complied with OCSLA in approving the COP. 1:22-cv-11091, Fed. Defs.' Opening Mem. 35-36, Doc. No. 73.

Under OCSLA, the Secretary of the Interior may, in consultation with other agencies, grant leases, easements, or other rights of way on the Outer Continental Shelf for the purpose of renewable energy production. 43 U.S.C. § 1337(p)(1)(c). Section 1337(p)(4), entitled "Requirements," provides:

> The Secretary [of the Interior] shall ensure that any activity under this subsection is carried out in a manner that provides for–
>
> (A) safety;
>
> (B) protection of the environment;
>
> (C) prevention of waste;
>
> (D) conservation of the natural resources of the outer Continental Shelf;
>
> (E) coordination with relevant Federal agencies;
>
> (F) protection of national security interests of the United States;
>
> (G) protection of correlative rights in the outer Continental Shelf;
>
> (H) a fair return to the United States for any lease, easement, or right-of-way under this subsection;

(I) prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas;

(J) consideration of—

i. the location of, and any schedule relating to, a lease, easement, or right-of-way for an area of the outer Continental Shelf; and

ii. any other use of the sea or seabed, including use for a fishery, a sealane, a potential site of a deepwater port, or navigation;

(K) public notice and comment on any proposal submitted for a lease, easement, or right-of-way under this subsection; and

(L) oversight, inspection, research, monitoring, and enforcement relating to a lease, easement, or right-of-way under this subsection.

43 U.S.C. § 1337(p)(4).

Plaintiffs argue that where this Section is titled "Requirements" and states that the Secretary "shall ensure" that activity is carried out in a manner that provides for the twelve enumerated grounds, Defendants are required to ensure that each of those criteria are met. Plaintiffs argue that in approving the COP Defendants did not provide for (A) safety, and (I) interference with reasonable uses of the OCS, specifically, fisheries' use.[32] See 1:22-cv-11091, Pls.' Opp'n 20, Doc. No. 90. Plaintiffs rely on Almendarez-Torres v. United States, 523 U.S. 224 (1998) and National Association of Home Builders v. Defs. of Wildlife, 551 U.S. 644 (2007), however, neither Almendarez-Torres nor National Association of Home Builders directs the result Plaintiffs seek.

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[32] Plaintiffs also asserted challenges as to (B) protection of the environment; (D) conservation of natural resources; and (F) protection of national security. 1:22-cv-11091, Compl. 5th Claim for Relief, Doc. No. 1; 1:22-cv-11172, Compl. Count 1, Doc. No. 1. However, Plaintiffs have not established standing as to these challenges. Specifically, as discussed supra, Plaintiffs offer no evidence to support their standing to bring claims on behalf of marine species, natural resources, or national security issues.

First, it is true that "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." Almendarez-Torres, 523 U.S. at 234 (internal citations omitted). But consideration of the section heading does not resolve the dispute here which centers on how the agency determines whether each of the enumerated "Requirements" is satisfied, not whether they are requirements at all.

Second, although Plaintiffs are correct that "shall" should be construed as mandatory, Plaintiffs are incorrect that the word mandates their preferred outcome here. While National Association of Home Builders certainly dictates that "shall" means the statutory directive is not discretionary, it also recognizes that, in considering whether the enumerated factors have been satisfied in the statute at issue, the agency must necessarily exercise some discretion. 511 U.S. at 671 ("While the EPA may exercise some judgment in determining whether a State has demonstrated that it has the authority to carry out § 402(b)'s enumerated statutory criteria, the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list."). The Secretary still retains some discretion in considering whether the enumerated statutory criteria have been satisfied, even where the statute does not state so expressly.

Such is the case here. Plaintiffs advocate that each enumerated criterion must be satisfied to its absolute maximum, without the discretion functionally necessary for the Secretary to determine what each criterion requires, both generally and as to a given proposal, and how to ensure each criterion is met, and not to the detriment of the other criteria.

Commonwealth of Massachusetts v. Andrus, 594 F.2d 872 (1st Cir. 1979), cuts directly against Plaintiffs' argument (despite their contention otherwise). In Andrus, the First Circuit considered the following language:

> [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.

43 U.S.C. § 1332(2). The plaintiffs in Andrus argued that this language "imposes a duty on the Secretary to see that mining and drilling are conducted absolutely without harm to fisheries." 594 F.2d at 888. However, prior interpretations of the provision concluded that it was "directed at the legal right to fish rather than at prohibiting physical impediments." Id. at 889. Against this backdrop, the First Circuit concluded that Section 1332(2) placed on the Secretary a duty to see that offshore drilling activities were conducted "without unreasonable risk to the fisheries." Id.

Moreover, the First Circuit recognized in Andrus that Congress knew that oil and gas development would have an impact on fisheries, but that "the concept of balance rules out a policy based on sacrificing one interest to the other." Id. at 889. Balance is similarly required here, where Congress has recognized the importance of leasing on the Outer Continental Shelf in support of energy projects, and, specifically enumerated twelve factors to be provided for, including the "prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas[.]" 43 U.S.C. § 1337(p)(4)(I).

Plaintiffs contend that Andrus rejected the wholesale destruction of a fishery, which they claim is the case here, 1:22-cv-11091, Pls.' Opp'n 22, Doc. No. 90 (citing Joint ROD, BOEM_0076837 reflecting that the area will "likely…be abandoned by commercial fisheries"), but, as the court held in its Memorandum and Order, 1:22-cv-11091, Doc. No. 137, on Plaintiffs' motions to strike, the language on which Plaintiffs rely for the proposition that the Area will be abandoned is a mere clerical error in the Administrative Record that has since been corrected by

the Corps. Where Plaintiffs do not offer other evidence of the complete destruction of fisheries in the OCS, their argument fails.

Beyond their statutory challenge, Plaintiffs contend that the Secretary, in fact, did not provide for safety or prevention of interference with reasonable uses as required by 43 U.S.C. § 1337(p)(4) in approving the COP. However, where Plaintiffs point only to the impact to fishing operations as reflected in since-corrected misstatements to the Record that the court has since concluded were clerical errors, Plaintiffs' challenges to the COP approval as arbitrary and capricious and in violation of OCSLA are entirely without merit.

Accordingly, as to Plaintiffs' challenge to the approval of the COP as violating OCSLA, Plaintiffs' Motions for Summary Judgment are denied and Defendants' and Vineyard Wind's Motions for Summary Judgment are granted.

3. *Temporary Withdrawal and Resumption of COP Review (Seafreeze Plaintiffs' 4th Claim for Relief)*

Plaintiffs alleges that BOEM lacked authority to restart review of the COP after suspending it at Vineyard Wind's request, and that BOEM's decision to restart review was *ultra vires*. 1:22-cv-11091, Pls.' Opening Mem. 33-34, Doc. No. 67. Plaintiffs further contend that, once BOEM resumed review of the COP, BOEM did not independently confirm Vineyard Wind's technical review of the newly selected turbines, and BOEM failed to provide a notice-and-comment period for the resumed review process, as required under NEPA and OCSLA. Id. Defendants respond that the decisions to suspend and resume review were lawful. 1:22-cv-11091, Fed. Defs.' Opening Mem. 17-18, Doc. No. 73. Defendants further note that the requisite notice-and-comment periods were previously satisfied under both NEPA and OCSLA, and Vineyard Wind's technical review of the newly proposed turbines reflected that the turbine fit within the parameters and design envelope previously considered in the Supplemental Draft EIS

so no substantive re-review was required by the agencies. 1:22-cv-11091, Fed. Defs.' Opening Mem. 17-18, Doc. No. 73 (citing BOEM_0067698-701, 0067703-04; BOEM_0067665).

The court finds Plaintiffs' arguments unpersuasive where Plaintiffs offer no authority (i) to suggest that resumption of review was subject to notice and comment, or (ii) that BOEM was without authority to suspend review and resume it. Nor have Plaintiffs shown that, even if there were some technical violation, how that violation was anything beyond harmless error where the changes made by Vineyard Wind were within the parameters already contemplated and reviewed as part of the NEPA process. See 1:22-cv-11091, Joint SOF ¶ 50, Doc. No. 106. Accordingly, Plaintiffs' Motion for Summary Judgment is denied, and Defendants' and Vineyard Wind's Motions are granted, as to the Seafreeze Plaintiffs' 4th Claim for Relief.

VI. Conclusion

For the foregoing reasons, Plaintiffs have not shown that Defendants acted arbitrarily, capriciously, or otherwise unlawfully. Accordingly, Defendants and Vineyard Wind's Motions for Summary Judgment, 1:22-cv-11091, Doc. Nos. 72, 86; 1:22-cv-11172, Doc. Nos. 59, 73, are GRANTED and Plaintiffs' Motions for Summary Judgment, 1:22-cv-11091, Doc. No. 66; 1:22-cv-11172, Doc. No. 52, are DENIED.

IT IS SO ORDERED

October 12, 2023

/s/ Indira Talwani
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SEAFREEZE SHORESIDE, INC., et al., Plaintiffs, v. THE UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants, and VINEYARD WIND 1, LLC, Intervenor-Defendant.	*	Case No. 1:22-cv-11091-IT
RESPONSIBLE OFFSHORE DEVELOPMENT ALLIANCE, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants, and VINEYARD WIND 1, LLC, Intervenor-Defendant.	*	Case No. 1:22-cv-11172-IT

JUDGMENT

October 12, 2023

TALWANI, D.J.

Pursuant to the court's Memorandum and Order, 1:22-cv-11091, Doc. No. 138; 1:22-cv-11172, Doc. No. 105, on the parties' cross-Motions for Summary Judgment 1:22-cv-11091, Doc. Nos. 66, 72, 86; 1:22-cv-11172, Doc. Nos. 52, 59, 73, JUDGMENT IS HEREBY ENTERED in favor of Defendants and Intervenor-Defendant and against Plaintiffs. All parties shall bear their own costs and fees. The above consolidated action CLOSED.

IT IS SO ORDERED

October 12, 2023

/s/ Indira Talwani
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SEAFREEZE SHORESIDE, INC, et al.,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	Case No. 1:22-cv-11091-IT
	*	
THE UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,	*	
	*	
Defendants	*	
	*	
and	*	
	*	
VINEYARD WIND 1, LLC	*	
	*	
Intervenor-Defendant.	*	
* *		
RESPONSIBLE OFFSHORE DEVELOPMENT ALLIANCE,	*	
	*	
Plaintiff,	*	
	*	Case No. 1:22-cv-11172-IT
v.	*	
	*	
UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,	*	
	*	
Defendants	*	
	*	
and	*	
	*	
VINEYARD WIND 1, LLC	*	
	*	
Intervenor-Defendant.	*	

MEMORANDUM & ORDER

September 25, 2023

TALWANI, D.J.

Members of the commercial fishing industry brought the two above-captioned lawsuits challenging actions taken by several federal agencies and associated officials in the approval of

an offshore-wind energy project to be constructed and operated by Intervenor-Defendant Vineyard Wind 1 LLC ("Vineyard Wind") in the Outer Continental Shelf off the coast of Martha's Vineyard and Nantucket, Massachusetts (the "Vineyard Wind Project" or the "Project").[1] The parties' cross-motions for summary judgment are pending and will be addressed in a separate order. For the reasons that follow, Plaintiffs' motions to strike documents from and supplement the Administrative Record are DENIED.

I. Procedural Background

The above-captioned actions were originally filed in the District Court for the District of Columbia.[2] Plaintiffs Seafreeze Shoreside, Inc., Long Island Commercial Fishing Association, Inc., XIII Northeast Fishery Sector, Inc., Heritage Fisheries, Inc., Nat. W., Inc., and Old Squaw Fisheries, Inc. (collectively, the "Seafreeze Plaintiffs") in Seafreeze Shoreside, Inc., et al. v. The United States Department of the Interior, et al. ("Seafreeze") [1:22-cv-11091 Doc. No. 1], and Plaintiff Responsible Offshore Development Alliance (the "Alliance") in Responsible Offshore Development Alliance v. United States Department of the Interior, et al. ("Responsible") [1:22-cv-11172 Doc. No. 1] bring claims against the Bureau of Ocean Energy Management ("BOEM"), the National Marine Fisheries Service ("NMFS"), the United States Army Corps of Engineers ("Corps"), and other agencies and individuals.

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[1] Two other challenges to the Project were filed this District. See Melone v. Coit, et al., 1:21-cv-11171-IT, appeal docketed No. 23-01736 (1st Cir. Sept. 8, 2023); Nantucket Residents Against Turbines et al. v. United States Bureau of Ocean Energy Mgmt., 1:21-cv-11390-IT, appeal docketed, No. 23-01501 (1st Cir. June 13, 2023), (together "the Related Actions").

[2] Both cases received new docket numbers upon transfer to this District, and all docket references are to the docket numbers assigned here.

In each action, the District Court for the District of Columbia granted Vineyard Wind's motion to intervene as unopposed, granted the government's motion to transfer the case to the District of Massachusetts, and denied another pending motion without prejudice. See Seafreeze 1:22-cv-11091, Vineyard Wind's Mot. to Intervene [Doc. No. 6], Defs.' Mot. to Transfer [Doc. No. 16], Jan. 19, 2022 Minute Order, Pls.' Mot. to Strike [Doc. No. 31]; Mem. and Order [Doc. No. 35]; Responsible 1:22-cv-11172, Vineyard Wind's Mot. to Intervene [Doc. No. 5], Pl.'s Mot. to Consolidate [Doc. No. 8], Defs.' Mot. to Transfer [Doc. No. 10]; Mem. & Order [Doc. No. 25].

After the cases were transferred to this court, Plaintiffs filed the pending Motions to Strike Documents from and Supplement the Administrative Record, Seafreeze, Mot. to Strike [1:22-cv-11091 Doc No. 56]; Responsible, Mot. to Strike [1:22-cv-11172 Doc. No. 43], and motions for summary judgment (which will be addressed in a separate order).

In light of the substantial overlap between the claims and parties in the above-captioned matters, the court consolidated the two matters following summary judgment briefing. Seafreeze, Hearing Tr. 61 [1:22-cv-11091 Doc. No. 112].

II. Background Concerning the Project

The following background is drawn from the Administrative Record, as certified by BOEM and NMFS, and is common to all four challenges to the Project in this District.[3]

[3] Certified Indices of the Administrative Record and addenda were docketed electronically, see Responsible, Federal Defendants' Notices [1:22-cv-11172 Doc. Nos. 17, 23]; Seafreeze, Federal Defendants' Notices [1:22-cv-11091 Doc. Nos. 26, 30, 34, 36]; Portions of the Administrative Record are docketed electronically as part of the parties' Joint Appendices filed in connection with the cross-motions for summary judgment, Responsible [1:22-cv-11172 Doc. Nos. 97, 98]; Seafreeze [1:22-cv-11091 Doc. Nos. 104, 105].

A. BOEM's Development of The Wind Energy Area

In 2009, BOEM began evaluating the possibility of developing wind energy in the Outer Continental Shelf offshore from Massachusetts pursuant to BOEM's authority under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331, et seq. Final Environmental Impact Statement ("Final EIS") Vol. II, BOEM_0068786 at -9170. In December 2010, BOEM published an initial Request for Interest ("RFI") regarding wind energy development in the Outer Continental Shelf offshore from Massachusetts. The RFI also invited public submissions on environmental issues. Id.; see also Joint Record of Decision ("Joint ROD"), BOEM_0076799 at -6802 (citing 75 Fed. Reg. 82,055 (Dec. 29, 2010)). In response to comments, BOEM reduced the planning area by 50%. Final EIS Vol. II, BOEM_0068786 at -9170.

In February 2012, BOEM published a Call for Information and Nominations in the Federal Register to gauge interest in commercial leases for wind energy projects. Id. (citing 77 Fed. Reg. 5821 (Feb. 6, 2012)). BOEM also published a notice of intent to prepare an environmental assessment in connection with potential wind energy leases and site assessment activities offshore from Massachusetts. Id.

In May 2012, BOEM identified a further reduced area for consideration for potential wind energy development ("the Wind Energy Area") in the Outer Continental Shelf south of Nantucket and Martha's Vineyard, Massachusetts, based on public comments concerning high sea duck concentrations and an area of high-value fisheries. Final EIS Vol. II, BOEM_0068786

at -9170. BOEM then prepared an Environmental Assessment, regarding the proposed Wind Energy Area, to guide its leasing. See 2014 Revised Env't Assessment, BOEM_0000090 at -118.

In June 2014, BOEM issued its Revised Environmental Assessment concerning the proposed wind energy area. Id. At the time, BOEM concluded that leasing and site assessment actions would not significantly impact the environment. Id. at -100.

On June 18, 2014, BOEM published a proposed sale notice and invited public comment on a proposal to sell four wind energy leases in the Wind Energy Area. Final EIS Vol. II, BOEM_0068786 at -9171. Following public comment, BOEM published a final sale notice reflecting its intent to sell commercial wind energy leases in the Wind Energy Area, including Lease "OCS-A 0501." See Final EIS Vol. II, BOEM_0068786 at -9171, -9235.

B. BOEM's Award of the Lease

In January 2015, BOEM conducted a competitive lease sale for Lease OCS-A 0501 (the "Lease"), ultimately awarding the Lease to Offshore MW, LLC, later renamed Vineyard Wind 1, LLC. Final EIS Vol. II, BOEM_0068786 at -9171. The lease area covers 166,886 acres in the Outer Continental Shelf (the "Lease Area"). Id.; April 1, 2015 Lease, BOEM_0000764 at -0776. The Lease became effective April 1, 2015. Id. at BOEM_0000764.

The Lease granted Vineyard Wind the right to seek approval for a Site Assessment Plan ("SAP") and a Construction Operations Plan ("COP"). Id. On November 22, 2017, Vineyard Wind submitted a Site Assessment Plan ("SAP") to BOEM for the Lease Area. May 10, 2018 Approval of SAP, BOEM_0013366. On May 10, 2018, BOEM approved Vineyard Wind's SAP,

subject to numerous conditions, including for the protection of cultural resources, marine mammals and sea turtles, and implementation of mitigation measures. Id.

C. Biological Review(s) of the Project's Impacts by BOEM and NMFS

1. Environmental Impact Statement(s) prepared by BOEM

On December 19, 2017, Vineyard Wind submitted to BOEM for consideration under OCSLA a proposed COP for the Project to be constructed in 65,296 acres of the Vineyard Wind Lease Area, referred to as the Wind Development Area or "WDA." Dec. 19, 2017 COP Submission Letter, BOEM_0006004-06; December 19, 2017 COP BOEM_0001361-6003. On March 30, 2018, BOEM published a notice of its intent to prepare an EIS for the COP. 83 Fed. Reg. 13,777 (Mar. 30, 2018), BOEM_0012028. The notice described the Project and invited the public to participate in public comment and public scoping meetings BOEM later conducted. Id.; BOEM_012406-13078 (April 2018 meeting transcripts)). On December 7, 2018, BOEM published a notice of availability of the Draft EIS in the Federal Register. 83 Fed. Reg. 63,184 (Dec. 7, 2018), BOEM_0034694. As summarized in the notice, the Draft EIS analyzed the proposed COP and several alternatives, including different locations for cable landfall, reduction in project size, several options for turbine layout, and a no-action alternative. Id. The notice invited public comment and/or participation at public hearings BOEM later conducted. Id.; see also BOEM_035872-36269 (Draft EIS public meeting transcripts).

Vineyard Wind submitted numerous updates to the proposed COP over the course of BOEM's review. See Final EIS Vol. I, BOEM_0068434 at -8440 (listing prior iterations of the COP). The updates addressed comments from BOEM, modified the Project design envelope, and accounted for the possibility of higher capacity wind turbine generators, which would ultimately

reduce the number of wind turbines to be installed and reduce the total Project area. See, e.g., Jan. 22, 2021 Letter from Vineyard Wind to BOEM, BOEM_0067698-7701.

On June 12, 2020, BOEM published a notice in the Federal Register that the supplement to the Draft EIS ("Supplemental Draft EIS") was available on BOEM's website and invited public comment in connection with the notice and participation at public meetings BOEM later held virtually. 85 Fed. Reg. 35,952 (June 12, 2020), BOEM_0057578; June-July 2020 Public Meeting Transcripts, BOEM_058001-59241. BOEM prepared the Supplemental Draft EIS "in consideration of the comments received during the [National Environmental Policy Act] process and in connection with cooperating agencies." Supplemental Draft EIS, BOEM_0056950 at -6954. In particular, BOEM expanded its analysis of the reasonably foreseeable effects from cumulative activities for offshore development, included previously unavailable fishing data, considered a new transit lane alternative through the WDA, and addressed changes to the proposed COP since publication of the Draft EIS. Joint ROD, BOEM_0076799 at -6803-04; 85 Fed. 35,952 (June 12, 2020), BOEM_0057578; Supplemental Draft EIS, BOEM_0056950 at -6954. The transit lane alternative that was included was in response to a proposal from the Alliance for a northwest/southeast transit corridor to facilitate transit for fishing vessels from southern New England to fishing areas. Supplemental Draft EIS, BOEM_0056950 at -6958.

On December 1, 2020, Vineyard Wind notified BOEM that it was withdrawing the proposed COP from review in order to conduct a technical and logistical review of the turbines selected for inclusion in the final Project design. Dec. 1, 2020 Vineyard Wind Letter to BOEM, BOEM_0067649-50; see also Final EIS Vol. I, BOEM_0068434 at -8440 n.3. Vineyard Wind's notice of withdrawal indicated that Vineyard Wind intended to rescind the withdrawal upon completion of its due diligence review. Dec. 1, 2020 Vineyard Wind Letter to BOEM,

BOEM_0067649-50. On December 16, 2020, following Vineyard Wind's notification that it was withdrawing the COP pending further technical and logistical review, BOEM published a notice in the Federal Register stating that "since the COP has been withdrawn from review and decision-making, there is no longer a proposal for major federal action awaiting technical and environmental review, nor is there a decision pending before BOEM…[the] notice advises the public that the preparation of an EIS is no longer necessary, and the process is hereby terminated." Fed. Reg. 81,486 (Dec. 16, 2020), BOEM_0067694.

On January 22, 2021, Vineyard Wind notified BOEM that Vineyard Wind had completed its review and "had concluded that the proposed turbines did not fall outside of the project design envelope being reviewed in the COP" and requested that BOEM resume review of the COP, most recently updated on September 20, 2020. Joint ROD, BOEM_0076799 at -6804.

On March 3, 2021, BOEM published a notice in the Federal Register stating it was resuming preparation of a final environmental impact statement related to the COP. Joint ROD, BOEM_0076799 at -6804. On March 12, 2021, BOEM posted the Final EIS, which consists of 1,600 pages in four volumes assessing the environmental, social, economic, historic, and cultural impacts of the Vineyard Wind Project, from construction to decommissioning, on BOEM's website and issued a notice of availability in the Federal Register. 86 Fed. Reg. 14,153 (Mar. 12, 2021), BOEM_0071036; see also Final EIS, BOEM_0068434-70061.

2. Biological Opinion

On December 6, 2018, BOEM sent a request to NMFS to conduct a biological consultation pursuant to Section 7 of the Endangered Species Act. BOEM ESA Consultation Request, BOEM_0034533-4688. BOEM made the request in its capacity as the lead Federal agency in the Section 7 consultation process for the Vineyard Wind Project on behalf of itself,

the Army Corps of Engineers ("Corps"), and NMFS Office of Protected Resources ("NMFS/OPR"). 2021 Biological Opinion, BOEM_0077276 at -7280. On May 1, 2019, NMFS's Greater Atlantic Regional Office ("NMFS/GAR") agreed to initiate formal consultation to consider the effects of the proposed actions on ESA-listed whales, including the North Atlantic right whale, sea turtles, fish, and the critical habitat for various species that may be present in the proposed action area. NMFS Initiation Letter, NMFS 16008. On September 11, 2020, NMFS/GAR issued a biological opinion (the "2020 BiOp") pursuant to its obligations under Section 7(a)(2) of the ESA on behalf of itself, BOEM, NMFS/OPR, and the Corps. Sept. 11, 2020 NMFS BiOp Transmittal Letter to BOEM, NMFS 16027-28; 2020 BiOp, NMFS 16029-354. The 2020 BiOp concluded that the "proposed action may adversely affect but is not likely to jeopardize the continued existence" of the North Atlantic right whales, among other species. Sept. 11, 2020 NMFS BiOp Transmittal Letter, NMFS 16029; 2020 BiOp, NMFS 16029 at -6317.

On May 7, 2021, BOEM requested that NMFS/GAR reinitiate its biological consultation. 2021 BiOp, BOEM_0077276 at -7281; May 7, 2021 Letter from BOEM to NMFS/GAR, BOEM_0076721. On May 27, 2021, NMFS/GAR advised BOEM that it agreed that consultation must be reinitiated and that it anticipated such consultation would result in a new BiOp that would replace the 2020 BiOp. 2021 BiOp, BOEM_0077276 at -7281. The biological consultation was reinitiated to consider (i) the effects of monitoring surveys identified in the Joint ROD by BOEM, at NMFS's recommendation, as conditions of COP approval, which were not considered in the 2020 BiOp, and (ii) new information concerning the status of the right whale. 2021 BiOp Transmittal Mem., NMFS 017683 at -7683-84; BOEM Mem. to Record, BOEM_077788-89.

On October 18, 2021, NMFS/GAR issued the reinitiated BiOp, and on November 1, 2021, NMFS reissued the reinitiated BiOp ("2021 BiOp") with corrections after typos and other non-substantive errors were identified and corrected. See Oct. 18, 2021 NMFS Transmittal Letter to BOEM, NMFS 16668; Nov. 1, 2021 Transmittal Letter, NMFS 17172; 2021 BiOp, BOEM_0077276-7779. As discussed below, these are two of the documents that Plaintiffs seek to strike from the Administrative Record. The 2021 BiOp states that it supersedes the 2020 BiOp. Nov. 1, 2021 Transmittal Letter, NMFS 17172 at -74; Oct. 18, 2021 NMFS Transmittal Letter to BOEM, NMFS 16668 ("this Opinion replaces the Opinion we issued to you on September 20, 202[0]"). In formulating its biological opinions, NMFS/GAR considered documents prepared by BOEM, including each iteration of the EIS, Vineyard Wind's proposed COP and updates, BOEM's COP Approval, and the Incidental Harassment Authorization issued by NMFS/OPR, discussed further below. 2021 BiOp, BOEM_0077276 at -7285-86, -88, -63-64. The 2021 BiOp analyzed the direct and indirect effects of the approved COP, the modifications proposed by BOEM, and those proposed by NMFS/OPR in the IHA. Id. NMFS/GAR also updated the 2021 BiOp to reflect the best scientific information available concerning right whales and explain whether any of the new information affected the analysis. Oct. 15, 2021 Transmittal Mem., NMFS 17683 at -86-87.

Like the 2020 BiOp, the 2021 BiOp concludes the proposed action is not likely to jeopardize the continued existence of the right whales. 2021 BiOp, BOEM_0077276 at -7657. Also like the 2020 BiOp, the 2021 BiOp included an incidental take statement ("ITS") and imposed reasonable and prudent measures and their implementing terms and conditions to minimize and document the take of ESA-listed species. 2021 BiOp, BOEM_0077276 at -7657-78; 2020 BiOp, NMFS 16029-354. The 2021 BiOp reflects that NMFS anticipates the incidental

take of up to 20 right whales by Level B harassment, harassment that has the potential to "disturb a marine mammal…in the wild by causing disruption of behavioral patterns," due to exposure to pile driving noise based on the "maximum impact scenario" for the Project. 2021 BiOp BOEM_0077660-62, -7299. The maximum impact scenario is defined as 90 monopiles being placed in the Wind Development Area, with 12 jackets, at a rate of one pile being driven per day, assuming only 6 decibels of attenuation, or reduction of sound through mitigation measures. 2021 BiOp, BOEM_0077276 at -7660-61. The 2021 BiOp notes that Vineyard Wind may install fewer turbines and models the corresponding decrease in likely harassment to right whales and other animals. Id. The 2021 BiOp concludes that "neither Vineyard Wind nor NMFS expect[s] serious injury or mortality to result from this activity, and therefore, NMFS has determined that an IHA is appropriate." Id. at -7284; see also id. at -7658 (reflecting in all modeled scenarios that no injury is anticipated with respect to right whales). BOEM and NMFS/OPR each adopted the 2021 BiOp. 2021 BiOp, BOEM_0077276 at -7788; NMFS 3557. The 2021 BiOp concluded, based on all scenarios modeled with 12 decibels of sound attenuation, that no right whales would be subject to Level A harassment, which is defined under the Marine Mammal Protection Act ("MMPA") as "harassment" that has the potential to injure a marine mammal. 2021 BiOp, BOEM_0077276 at -7299-300.[4] The 2021 BiOp includes an analysis of the effect of Project vessels, estimating that the Project will increase overall vessel traffic by 4.8% during the construction phase and by 1.6% during the operational phase of the Project. Id. at -7508. The 2021 BiOp concludes, based on traffic, combined with mitigation measures and other

[4] Vineyard Wind did not seek authorization for Level A harassment because it anticipated that that such harassment "will be avoided through enhanced mitigation and monitoring measures proposed specifically for North Atlantic right whales." 2021 BiOp, BOEM_0077276 at -7451.

requirements for project vessels, that it is "extremely unlikely that a project vessel will collide with a whale." Id. at -7527.

On December 1, 2021, NMFS filed a Memorandum for the Record regarding the issuance of the 2021 BiOp, reflecting that the NMFS Permits and Conservation Division (PR1) was adopting the 2021 BiOp. NMFS Mem. to Record, NMFS 3557. On January 20, 2022, BOEM determined, pursuant to 50 C.F.R. § 402.15(a), that "because the activities authorized under BOEM's COP approval—including the monitoring surveys—are subject to the terms and conditions and reasonable and prudent measures found in the 2021 BiOp, no further action is required in order for Vineyard Wind to proceed with construction and operation of the Project." BOEM Information Mem. to Record, BOEM_077788-89.

D. Other Agency Review[5]

1. Incidental Harassment Authorization

Meanwhile, on September 7, 2018, Vineyard Wind submitted a request under the MMPA to NMFS/OPR for an Incidental Harassment Authorization, seeking authorization of the likely incidental taking by harassment that may occur from impact pile driving in connection with the Project. Draft IHA Application, NMFS 14218-14550; Transmittal Email, NMFS 14451. In October 2018, and then January 2019, Vineyard Wind submitted revised versions of its IHA application to NMFS/OPR. Transmittal Emails, NMFS 14457, NMFS 14581; January 2019 Draft IHA Application, NMFS 14737-4984. The Vineyard Wind IHA Application was deemed

[5] The Vineyard Wind Project was also subject to review by other agencies whose actions were not challenged by Plaintiffs here or in the Related Actions. See Final EIS Vol. II, BOEM_0068786 at -9170-78 (discussing review under several other statutes, including the Coastal Zone Management Act, the National Historic Preservation Act, and the Magnuson-Stevens Fishery Conservation and Management Act).

complete on February 15, 2019. 84 Fed. Reg. 18,346 (April 30, 2019), NMFS 3392. Notice inviting public comment on the proposed IHA was published in the Federal Register 74 days later, on April 30, 2019. Id. The public comment period closed on May 30, 2019. Id.

Approximately two years later, on May 21, 2021, NMFS issued the IHA to Vineyard Wind. May 21, 2021 Letter Issuing IHA, NMFS 3514; IHA, NMFS 3489-3509. On June 25, 2021, NMFS/OPR issued notice of its approval of an IHA under the MMPA, 16 U.S.C. §§ 1361, et seq., NMFS 3415; see also 86 Fed. Reg. 33,810 (June 25, 2021) ("Notice of Issuance of IHA"), NMFS 3515-3556. The notice responded to the public comments NMFS/OPR received, explained the basis for the agency's decision, and described the mitigation, monitoring, and reporting requirements that were imposed by the IHA. Notice of Issuance of IHA, NMFS 3515-3556.

The IHA is valid from May 1, 2023, through April 30, 2024. IHA, NMFS 3489. The IHA authorizes a maximum take by Level B harassment of 20 incidents to right whales. Notice of Issuance of IHA, NMFS 3515 at -3551. The Notice of Issuance defines Level B Harassment as "the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering." Notice of Issuance of IHA, NMFS 3515 at -3532; see also 50 C.F.R. § 216.3.

2. Clean Air Act Permits

On August 17, 2018, Vineyard Wind applied to the U.S. Environmental Protection Agency ("EPA") for a permit under the Clean Air Act concerning construction of a wind farm. 2021 BiOp, BOEM_0077276 at -7282-83. On April 19, 2019, Vineyard Wind submitted a subsequent application for an operating permit in accordance with 310 C.M.R. 7.00. Id. On June

28, 2019, the EPA issued a draft permit for public comment. Id. On May 19, 2021, the EPA issued a permit to Vineyard Wind. Id.

3. Rivers and Harbors & Clean Water Act Permits

On December 26, 2018, the Corps issued a public notice in the Federal Register regarding proposed permits under the Rivers and Harbors Act and Section 404 of the Clean Water Act, to permit Vineyard Wind to construct, maintain, and eventually decommission an 800 megawatt wind energy facility, two electronic service platforms, scour protection around the bases of the wind turbine generators and electronic service platforms, connection between the turbines and the service platforms, and two export cables with scour protection within a 23.3 mile long corridor. Joint ROD, BOEM_ 0076799 at -6803, -6807. The public comment period ran from December 26, 2018, to January 18, 2019. Joint ROD, BOEM_0076799 at -6828. The Corps did not receive any comments from the public during or after the public comment period. Id. The Corps issued a permit, with special conditions, to Vineyard Wind on August 9, 2021. 2021 BiOp, BOEM_0077276 at -7282.

E. The Approved Vineyard Wind Project

On May 10, 2021, BOEM, NMFS, and Corps issued a Joint ROD adopting the Final EIS. Joint ROD, BOEM_0076799-898. The Joint ROD consolidated the records of decision by each respective agency, specifically, BOEM's action to approve the COP under OCSLA, the Corps' issuance of permits under the Clean Water Act and Rivers and Harbors Act,[6] and NMFS/OPR's

[6] On August 4, 2021, the Corps issued a Record of Decision Supplement to "correct several clerical errors contained in the [Army Corps] section of the [Joint]ROD." Aug. 2021 Supplement ¶ 1, identically filed in Seafreeze [1:22-cv-11091 Doc. No. 58-3] and Responsible [1:22-cv-11172 Doc. No. 44-3], for simplicity all references are to August 2021 Supplement are to the Seafreeze docket. On January 14, 2022, the Corps issued an additional Record of Decision

Supplement "to correct a clerical error in the [Joint]ROD and clarify a statement contained in the [Army Corps] section of the [Joint]ROD." Jan. 2022 Supplement ¶ 1, identically filed in Seafreeze [1:22-cv-11091 Doc. No. 58-4] and Responsible [1:22-cv-11172 Doc. No. 44-4]; for simplicity all references are to January 2022 Supplement are to the Seafreeze docket. Both the August 2021 and January 2022 Supplements state that they have "no bearing on the BOEM or NMFS decisions documented in the [Joint]ROD." Aug. 2021 Supplement [Doc No. 58-3]; Jan. 2022 Supplement [Doc. No. 58-4]. As discussed below, these are the other two documents that Plaintiffs seek to strike.

The August 2021 Supplement states that the Joint ROD had misidentified the length of the export cable corridor as 23.3 miles in five instances instead of 39.4 miles. Aug. 2021 Supplement ¶¶ 8, 10 [Doc No. 58-3]. It also states that the Joint ROD misidentified the total acreage of transmission as two acres instead of 17 in six instances. Id. The August 2021 Supplement reports further that, despite the erroneous figures, the Corps conducted their review based on more significant jurisdictional impacts, specifically, a cable corridor of up to 49 miles long. Id. at ¶ 7. It also explains that the errors were identified by Vineyard Wind during the permit application process. Id at ¶ 5.

The January 2022 Supplement states as to the clerical error that the Army Corps' public interest determination was cut off mid-sentence and omitted part of the following sentence:

> The issuance of this permit is consistent with National Policy, statutes, regulations, and administrative directives; and on balance, issuance of a USACE permit to construct the Vineyard Wind Project is not contrary to the public interest. As explained above, all practicable means to avoid and/or minimize environmental harm from the selected, permitted alternative have been adopted and required by the terms and conditions of this permit.

Jan. 2022 Supplement ¶ 2 [Doc. No. 58-4] (omitted portion underlined).

The January 2022 Supplement states as to the clarification that, in the General Public Interest Review section of the Joint ROD, a sentence concerning the impact of the Vineyard Wind Project to commercial fishing in the Project Area failed to attribute concerns about abandonment to concerned parties only. Id. at ¶ 3. The January 2022 Supplement states that the Joint ROD did not accurately reflect that "[t]his statement regarding the likelihood of abandonment of the area by commercial fisheries is based solely upon comments of interested parties submitted to BOEM during the public comment period," "is not based upon any separate or independent USACE or other agency evaluation or study," and that it "does not represent the position of the USACE regarding the status of commercial fisheries . . . ." Id. The January 2022 Supplement amends the Joint ROD to state:

> While Vineyard Wind is not authorized to prevent free access to the entire wind development area, according to comments submitted by interested parties to BOEM as summarized in Appendix K to the [Final Environmental Impact Statement], due to the placement of the turbines, it is likely that the entire 75,614-

issuance of an IHA under the MMPA. Joint ROD, BOEM_0076799-898. The Joint ROD reflects that BOEM's approval of the COP would be subject to mitigation and monitoring measures outlined in the Final EIS and any additional technical, navigational, and safety conditions imposed by BOEM. Joint ROD, BOEM_0076799 at -6820-21, -6827.

On July 15, 2021, BOEM issued final approval of Vineyard Wind's COP under OCSLA. July 15, 2021 VWI COP Project Easement and Approval Letter ("COP Approval Letter"), BOEM_0077150-265. The Project, as approved, will involve 84 or fewer wind turbines to be installed in 100 of the locations proposed by Vineyard Wind in the Wind Development Area, in an east-to-west orientation, with a minimum spacing of 1 nautical mile each. Joint ROD, BOEM_0076799 at -6821. The Project is located approximately 14 nautical miles south of Nantucket Island and Martha's Vineyard at its nearest point. Final EIS Vol. II, BOEM_0068786 at -8863. As part of construction of the Project, project-related vessels will travel primarily from New Bedford, Massachusetts, approximately fifty miles from the WDA, although some vessel trips will originate in Canadian ports. 2021 BiOp, BOEM_0077276 at -7294.

BOEM's final approval is subject to numerous terms and conditions, including compliance with all "statutes, regulations, and permits and authorizations issued by Federal and state agencies for the [P]roject." COP Approval Letter, BOEM 077150 at -152. The COP Approval Letter also noted that all activities authorized thereunder by BOEM "will be subject to

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> acre area will be abandoned by commercial fisheries due to difficulties with navigation.

Id. (added language underlined). The January 2022 Supplement was issued roughly one month after Plaintiffs filed their Complaint [1:22-cv-11091 Doc. No. 1], which specifically identified the error.

any terms and conditions and reasonable and prudent measures resulting from a BOEM-reinitiated consultation for the Project's BiOp." COP Approval Letter, BOEM 077150 at -7152. The IHA set forth a number of minimization and monitoring measures, which were incorporated into the conditions of the COP Approval and set forth in the 2021 BiOp. IHA, NMFS 3489-3509. Numerous other measures were laid out in the Joint ROD pertaining to right whales and other ESA-listed animals. See Joint ROD, Appendix A, BOEM_0076852-897. The mitigation measures include:

1. **Seasonal restriction on pile driving.** Pile driving is not permitted from January 1 through April 30 to avoid the time of year with the highest densities of right whales in the Project Area. Pile driving is not permitted in December, except in the event of unanticipated delays, and will require enhanced protection measures and approval by BOEM. 2021 BiOp, BOEM_0077276 at -7451-52; IHA, NMFS 3489 at -3490.

2. **A "soft start" pile driving procedure**. Vineyard Wind will begin pile driving activities with three rounds of three impact hammer strikes at a reduced energy, each followed by a one-minute waiting period. Vineyard Wind will use this "soft start" approach for each pile to be driven at the beginning of a day's pile driving activities, and at any point where pile driving has ceased for thirty minutes or longer. 2021 BiOp, BOEM_0077276 at -7458. This "soft start" procedure is designed to "provide a warning to any marine mammals" and the opportunity to disperse from the area prior to higher intensity pile driving, to reduce the change of Level A or Level B harassment of right whales. 2021 BiOp, BOEM_0077276 at -7458.

   Although NMFS expects soft-start procedures to reduce the effects of pile driving on right whales, NMFS was unable to modify the estimated taken numbers to account for such benefit because NMFS could not predict the extent to which soft start would reduce exposure. 2021 BiOp, BOEM_0077276 at -7458.

3. **The use of protected species observers.** Vineyard Wind must employ qualified, trained protected species observers ("PSOs") to conduct monitoring for marine mammals during pile driving activity. These individuals must be approved by NMFS and are subject to certain conditions, including that they must be independent observers, rather than construction personnel. IHA, NMFS 3489 at -3499-3500. At least two PSOs must be stationed on the pile driving vessel at all times sixty minutes prior to, during, and thirty minutes after pile driving. IHA, NMFS 3489 at -3490.

4. **Passive Acoustic Monitoring & Other Reporting**. Passive Acoustic Monitoring ("PAM") will be used to "record ambient noise and marine mammal vocalizations in the [L]ease [A]rea before, during, and after [construction] to monitor project impacts relating to vessel noise, pile driving noise, [wind turbine] operational noise, and to document whale detections in the WDA." 2021 BiOp, BOEM_0077276 at -7298. PAM-generated noise data must be interpreted by an expert trained to discern the species of whale making sounds detected. Id.

5. **The establishment of pile driving clearance zones.** Vineyard Wind PSOs must establish clearance zones for right whales between sixty minutes prior to pile driving activities and thirty minutes after completion of pile driving activities. The clearance zones range depending on the time of year from 2-10 km for visual and 5-10 km for PAM. Zones are the smallest from June to December 31, when the BiOp concludes there is a lower probability of right whales being present in the pile driving area. 2021 BiOp, BOEM_0077276 at -7319.

   Vineyard Wind vessels must also use all other available sources of information on right whale presence, including the Right Whale Sightings Advisory System, WhaleAlert app, and monitoring of Coast Guard channels to plan vessel routes. IHA, NMFS 3489 at -3496.

6. **Vessel Speed Restrictions.** Vessels must comply with the NOAA Ship Strike Rules' speed restrictions, that restrict speed to 10 knots in certain restricted zones. IHA, NMFS 3489 at -3497; see also 2021 BiOp, BOEM_0077276 at -7520. All vessels travelling over 10 knots must have a dedicated visual observer on duty at all times, such as a PSO or crew member. IHA, NMFS 3489 at -3496. Where a crew transfer vessel is not subject to the 10-knot speed limit, it must employ an additional PSO or other enhanced detection method to monitor for right whales, in addition to PAM. Id. at -3497.

7. **Heightened Measures in Dynamic Management Areas and Slow Zones.** Dynamic Management Areas ("DMA"), as defined by the 2008 NOAA Ship Strike Rules (73 Fed. Reg. 60,173), are temporary protection zones designed to reduce lethal right whale strikes and are triggered when three or more whales are sighted within 2-3 miles of each other outside of the seasonal protection zones, See 2021 BiOp, BOEM_0077276 at -7675. NMFS adopted an additional protective measure, referred to as Right Whale Slow Zones, based on acoustical detection of a vocalizing right whale. When a right whale is detected acoustically, notifications of a "Slow Zone," covering a protective circle with a radius of 20 nautical miles from any point of detection, are triggered. Id.; see also NOAA Fisheries, Help Endangered Whales: Slow Down in Slow Zones (Dec. 23, 2021) available at https://www.fisheries.noaa.gov/feature-story/help-endangered-whales-slow-down-slow-zones. In instances where a DMA or Slow Zone has been triggered, NMFS requires that Vineyard Wind use an increased number of PSOs, and establish an extended exclusion zone with PAM, in addition to other

restrictions established by the rules pertaining to DMAs and Slow Zones. 2021 BiOp, BOEM_0077276 at -7675.

As the 2021 BiOp acknowledges, numerous mitigation measures are designed not only to protect right whales from harassment, but also to protect other species. For instance, Vineyard Wind is required to implement PSOs for several species of sea turtles, and the soft-start pile driving procedures are designed to disperse any undetected sea turtles, right whales, and other marine species from the Area. See 2021 BiOp, BOEM_0077276 at -7480-82, -7458.

III. Plaintiffs' Challenges to the Administrative Record

Plaintiffs assert that the 2021 Biological Opinions and the August 2021 and January 2022 Supplements to the Joint ROD offered by the Army Corps should be stricken and also that the Record should include supplemental exhibits offered by Plaintiffs. See Seafreeze, Mot. to Strike [1:22-cv-11091 Doc. No. 56]; Responsible, Mot. to Strike [1:22-cv-11172 Doc. No. 43].[7] The court denies both requests for the reasons set forth below.

A. Motion to Strike Documents from the Administrative Record

Plaintiffs argue that the final agency action at issue occurred on May 10, 2021, when the Joint ROD was issued, and that these later-issued documents should not have been included in the Administrative Record. Mot. to Strike Mem. 4 [Doc. No. 57]. Defendants: (1) disagree that the Joint ROD was the final agency action; (2) assert that, as to the Army Corps' Supplements and the updates and correction to the Biological Opinion, agencies have the power to correct ministerial errors; (3) assert that even if the errors were more than clerical, the errors were harmless; and, (4) assert that as to the substantive changes to the Biological Opinion, the update

[7] The motions and oppositions filed in each case are identical. For simplicity, the court cites to the Seafreeze docket only for this discussion.

was permissible, contemplated by the Joint ROD, and required to ensure BOEM remained in continued compliance with the ESA. Fed. Defs.' Opp'n to Mot. to Strike 11-12, 17-18 [Doc. No. 58].Fed. Defs.' Opp'n to Mot. to Strike 11-12, 17-18 [Doc. No. 58].

Whether the Joint ROD was final agency action is of little relevance to whether Defendants were entitled to supplement the Record in this instance. Government agencies have the power to correct ministerial errors, so long as such power is not used "as a guise for changing previous decisions." See Am. Trucking Ass'ns v. Frisco Transp. Co., 358 U.S. 133, 146 (1958). Here, nothing before the court suggests that the Supplements amount to more than mere corrections or clarifications. Neither Supplement contains information that was *not* before the Army Corps at the time the Joint ROD was issued. Where the Supplements address issues of misprint or misattribution, the information added was reflected elsewhere in the Record, and the clarifications do not reflect some fundamental change in either the decision-making process or the information considered.

As to the 2021 Biological Opinion, where BOEM was under a statutory obligation under the ESA to reinitiate consultation in certain instances, and that statutory obligation and the re-initiation of such consultation were both reflected in the Joint ROD, the court finds no basis to exclude the document from the Administrative Record. While Plaintiffs may challenge the conclusions of the 2021 Biological Opinion or the process surrounding it, neither challenge is a basis to strike the document from the Administrative Record.

Moreover, Plaintiffs do not identify what corrections were made to the Biological Opinions, let alone why those corrections were improper and warrant exclusion from the Administrative Record. Accordingly, Plaintiffs' Motion to Strike portions of the Record is DENIED.

B. Plaintiffs' Request to Supplement the Record

Plaintiffs also seek to supplement the Record before the court with eight exhibits.[8] Plaintiffs contend these exhibits should be considered because (i) they demonstrate "fatal flaws associated with the [Project]," (ii) would assist the court in understanding the "highly complex technical record," (iii) "would provide useful background information . . . regarding the true reasons behind the . . . issuance of the Vineyard Wind lease and approval of the [Joint] ROD," and (iv) "would assist the [c]ourt in determining the extent of . . . 'bad faith or improper behavior'" engaged in by Defendants when supplementing the Administrative Record. Mot. to Strike Mem. 2 [Doc. No. 57]. Defendants and Vineyard Wind oppose the offered exhibits as outside of the Administrative Record and not subject to any exceptions to the rule against supplementation. Fed. Defs.' Opp'n to Mot. to Strike 4-9 [Doc. No. 58]; Vineyard Wind Opp'n to Mot. to Strike 12-19 [Doc. No. 59].

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[8] The exhibits are: (1) a collection of emails with officials from the State of Rhode Island regarding a state open meeting law violation [Doc. No. 57-2], (2) Minutes of a January 3, 2019 meeting of the Rhode Island Coastal Resources Management Council's Fishermen's Advisory Board [Doc. No. 57-3] (3) a July 2006 study titled "Effects of offshore wind farm noise on marine mammals and fish" [Doc. No. 57-5], (4) Comments from Seafreeze Ltd. dated August 27, 2020 in response to a U.S. Coast Guard Request for Comment Notice concerning a Port Access Route Study in the Northern New York Bight [Doc. No. 57-6], (5) Document titled "High Frequency Radar Wind Turbine Interference Community Working Group Report" dated June, 2019 [Doc. No. 57-7], (6) Comments from Seafreeze Ltd. dated June 22, 2018, regarding "BOEM Proposed Path Forward for Future Offshore Renewable Energy Leasing on the Atlantic OCS- BOEM-2018-0018" [Doc. No. 57-8], (7) Document titled "New England Wind Lease Area Transit Corridor Workshop Summary," dated October 31, 2018 [Doc. No. 57-9], (8) Document titled "Vineyard Wind Meeting Summary," dated December 20, 2018 [Doc. No. 57-10].

A ninth exhibit offered by Plaintiffs, Exhibit D [Doc. No. 57-4], is already in the Administrative Record. See BOEM 0037799–0037807.

Under the APA, a reviewing court is required to "review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. The Supreme Court has held that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973). Supplementation on judicial review "is therefore the exception, not the rule, and is discretionary with the reviewing court." Town of Winthrop v. FAA, 535 F.3d 1, 14 (1st Cir. 2008). The First Circuit has established only two limited exceptions to the rule against supplementation. First, where supplemental evidence may facilitate comprehension of the record or the agency decision, such as where the decision involves "highly technical, environmental matters" or where the court is faced with a "failure to explain administrative action as to frustrate effective judicial review." City of Taunton, Mass. v. U.S. EPA, 895 F.3d 120, 127 (1st Cir. 2018) (first quoting Valley Citizens for a Safe Env't v. Aldridge, 886 F.2d 458, 460 (1st Cir. 1989) (Breyer, J.); then quoting Olsen v. United States, 414 F.3d 144, 155-56 (1st Cir. 2005)). Second, "a 'strong showing of bad faith or improper behavior' may also provide occasion to 'order[ ] the supplementation of the administrative record.'" Id. (quoting Town of Norfolk v. U.S. Army Corps of Eng'rs, 968 F.2d 1438, 1458-59 (1st Cir. 1992)). Although the First Circuit has acknowledged that other exceptions may exist, it has declined to recognize any. See City of Taunton, 895 F.3d at 128 (declining to permit supplementation of the record to allow Plaintiff to respond to arguments raised by an amicus brief).

Plaintiffs have not met the high burden of demonstrating that any of the offered Exhibits should be considered. First, while Plaintiffs contend the evidence would demonstrate flaws in the Project or assist the court in understanding the Record, they do not explain what specific information these Exhibits offer that is not available to the court in the Record before it. Second,

although Plaintiffs contend these Exhibits will assist the court in determining the extent of bad faith or improper behavior engaged in by Defendants in supplementing the record, the First Circuit requires a ***strong showing*** of bad faith or improper behavior to permit supplementation, See id. at 127, and Plaintiffs have not made any such showing.

Accordingly, Plaintiffs' request to supplement the Record is also denied.

IV. Conclusion

For the foregoing reasons, Plaintiffs' Motions to Strike Documents from and Supplement the Administrative Record, Seafreeze, Mot. to Strike [1:22-cv-11091 Doc No. 56]; Responsible, Mot. to Strike [1:22-cv-11172 Doc. No. 43], are DENIED.

IT IS SO ORDERED

September 25, 2023

/s/ Indira Talwani
United States District Judge

Marzulla Law

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:

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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]

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.

[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.*

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.

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

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[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.
[10] Responsible Offshore Development Alliance, *About Us* (last visited Oct. 4, 2021), https://rodafisheries.org/who-we-are/.
[11] *Id.*
[12] *Id.*

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 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]

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[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.").
[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).

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.

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

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[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/.
[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.*

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 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]

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[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 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.*

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 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, and wind speed.[48] The Government failed to ensure that recommended turbine spacing maintains a high level of safety, year-round, for vessels operating

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[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.*
[48] *Id.*

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 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)

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[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.
[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.

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]

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

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[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.
[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.

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 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

[63] Final Environmental Impact Statement at 3-219.
[64] *Id.*
[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).

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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 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

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[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_FINAL.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.

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.

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 or preservation of coastal communities'

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

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.

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

[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).
[77] 40 C.F.R. § 230.1(c).

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, "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.

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[78] *Id.* § 231.2(e).
[79] *Id.* § 230.1(c).
[80] *Id.* § 230.10(a).
[81] *Id.* § 230.10(a)(1)(i).
[82] *Id.* § 230.10(a)(2).

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.

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

[83] *Id.* § 230.10(a)(3).
[84] *Id.* § 230.11(g).

> (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:

> 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

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[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).
[87] White House: Briefing Room, *Fact Sheet: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs* (Mar. 29, 0221), 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.

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 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 energy . . . .[92]

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.

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[89] *See* Approval Letter.
[90] *See id.*
[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:

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[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 species . . . .[97]

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.

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]

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[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.*
[101] *Id.*

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]

3.2 On May 7, 2021, the Bureau requested to reinitiate 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

[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.*

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 reinitiated 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 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

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[107] 85 Fed. Reg. 86878 (Dec. 31, 2020).
[108] *Id.*
[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.*

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.

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

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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.

Roger J. Marzulla

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 701

§ 701. Application; definitions

Effective: January 4, 2011
Currentness

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; [1] and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 103-272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub.L. 111-350, § 5(a)(3), Jan. 4, 2011, 124 Stat. 3841.)

Footnotes

1 See References in Text note set out under this section.

5 U.S.C.A. § 701, 5 USCA § 701
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 702

§ 702. Right of review

Currentness

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

5 U.S.C.A. § 702, 5 USCA § 702
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 703

§ 703. Form and venue of proceeding

Currentness

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

5 U.S.C.A. § 703, 5 USCA § 703
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 704

§ 704. Actions reviewable

Currentness

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

5 U.S.C.A. § 704, 5 USCA § 704
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 705

§ 705. Relief pending review

Currentness

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

5 U.S.C.A. § 705, 5 USCA § 705
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 706

§ 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

5 U.S.C.A. § 706, 5 USCA § 706

Add102

Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 16. Conservation
Chapter 31. Marine Mammal Protection (Refs & Annos)
Subchapter I. Generally

16 U.S.C.A. § 1361

§ 1361. Congressional findings and declaration of policy

Currentness

The Congress finds that--

(1) certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities;

(2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. Further measures should be immediately taken to replenish any species or population stock which has already diminished below that population. In particular, efforts should be made to protect essential habitats, including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions;

(3) there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully;

(4) negotiations should be undertaken immediately to encourage the development of international arrangements for research on, and conservation of, all marine mammals;

(5) marine mammals and marine mammal products either--

(A) move in interstate commerce, or

(B) affect the balance of marine ecosystems in a manner which is important to other animals and animal products which move in interstate commerce,

and that the protection and conservation of marine mammals and their habitats is therefore necessary to insure the continuing availability of those products which move in interstate commerce; and

(6) marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest

extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.

CREDIT(S)

(Pub.L. 92-522, § 2, Oct. 21, 1972, 86 Stat. 1027; Pub.L. 97-58, § 1(b)(1), Oct. 9, 1981, 95 Stat. 979; Pub.L. 103-238, § 3, Apr. 30, 1994, 108 Stat. 532.)

16 U.S.C.A. § 1361, 16 USCA § 1361
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 16. Conservation
Chapter 31. Marine Mammal Protection (Refs & Annos)
Subchapter II. Conservation and Protection of Marine Mammals (Refs & Annos)

16 U.S.C.A. § 1371

§ 1371. Moratorium on taking and importing marine mammals and marine mammal products

Effective: August 13, 2018
Currentness

(a) Imposition; exceptions

There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this chapter, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States except in the following cases:

(1) Consistent with the provisions of section 1374 of this title, permits may be issued by the Secretary for taking, and importation for purposes of scientific research, public display, photography for educational or commercial purposes, or enhancing the survival or recovery of a species or stock, or for importation of polar bear parts (other than internal organs) taken in sport hunts in Canada. Such permits, except permits issued under section 1374(c)(5) of this title, may be issued if the taking or importation proposed to be made is first reviewed by the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under subchapter III. The Commission and Committee shall recommend any proposed taking or importation, other than importation under section 1374(c)(5) of this title, which is consistent with the purposes and policies of section 1361 of this title. If the Secretary issues such a permit for importation, the Secretary shall issue to the importer concerned a certificate to that effect in such form as the Secretary of the Treasury prescribes, and such importation may be made upon presentation of the certificate to the customs officer concerned.

(2) Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 1374 of this title subject to regulations prescribed by the Secretary in accordance with section 1373 of this title, or in lieu of such permits, authorizations may be granted therefor under section 1387 of this title, subject to regulations prescribed under that section by the Secretary without regard to section 1373 of this title. Such authorizations may be granted under subchapter IV with respect to purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean, subject to regulations prescribed under that subchapter by the Secretary without regard to section 1373 of this title. In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate. The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For purposes of applying the preceding sentence, the Secretary--

(A) shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States;

(B) in the case of yellowfin tuna harvested with purse seine nets in the eastern tropical Pacific Ocean, and products therefrom, to be exported to the United States, shall require that the government of the exporting nation provide documentary evidence that--

(i)(I) the tuna or products therefrom were not banned from importation under this paragraph before the effective date of section 4 of the International Dolphin Conservation Program Act; or

(II) the tuna or products therefrom were harvested after the effective date of section 4 of the International Dolphin Conservation Program Act by vessels of a nation which participates in the International Dolphin Conservation Program, and such harvesting nation is either a member of the Inter-American Tropical Tuna Commission or has initiated (and within 6 months thereafter completed) all steps required of applicant nations, in accordance with article V, paragraph 3 of the Convention establishing the Inter-American Tropical Tuna Commission, to become a member of that organization;

(ii) such nation is meeting the obligations of the International Dolphin Conservation Program and the obligations of membership in the Inter-American Tropical Tuna Commission, including all financial obligations; and

(iii) the total dolphin mortality limits, and per-stock per-year dolphin mortality limits permitted for that nation's vessels under the International Dolphin Conservation Program do not exceed the limits determined for 1997, or for any year thereafter, consistent with the objective of progressively reducing dolphin mortality to a level approaching zero through the setting of annual limits and the goal of eliminating dolphin mortality, and requirements of the International Dolphin Conservation Program;

(C) shall not accept such documentary evidence if--

(i) the government of the harvesting nation does not provide directly or authorize the Inter-American Tropical Tuna Commission to release complete and accurate information to the Secretary in a timely manner--

(I) to allow determination of compliance with the International Dolphin Conservation Program; and

(II) for the purposes of tracking and verifying compliance with the minimum requirements established by the Secretary in regulations promulgated under section 1385(f) of this title; or

(ii) after taking into consideration such information, findings of the Inter-American Tropical Tuna Commission, and any other relevant information, including information that a nation is consistently failing to take enforcement actions on violations which diminish the effectiveness of the International Dolphin Conservation Program, the Secretary, in consultation with the Secretary of State, finds that the harvesting nation is not in compliance with the International Dolphin Conservation Program.

(D) shall require the government of any intermediary nation to certify and provide reasonable proof to the Secretary that it has not imported, within the preceding six months, any yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation to the United States under subparagraph (B);

Add107

(E) shall, six months after importation of yellowfin tuna or tuna products has been banned under this section, certify such fact to the President, which certification shall be deemed to be a certification for the purposes of section 1978(a) of Title 22 for as long as such ban is in effect; and

(F)(i) except as provided in clause (ii), in the case of fish or products containing fish harvested by a nation whose fishing vessels engage in high seas driftnet fishing, shall require that the government of the exporting nation provide documentary evidence that the fish or fish product was not harvested with a large-scale driftnet in the South Pacific Ocean after July 1, 1991, or in any other water of the high seas after January 1, 1993, and

(ii) in the case of tuna or a product containing tuna harvested by a nation whose fishing vessels engage in high seas driftnet fishing, shall require that the government of the exporting nation provide documentary evidence that the tuna or tuna product was not harvested with a large-scale driftnet anywhere on the high seas after July 1, 1991.

For purposes of subparagraph (F), the term "driftnet" has the meaning given such term in section 4003 of the Driftnet Impact Monitoring, Assessment, and Control Act of 1987 (16 U.S.C. 1822 note), except that, until January 1, 1994, the term "driftnet" does not include the use in the northeast Atlantic Ocean of gillnets with a total length not to exceed five kilometers if the use is in accordance with regulations adopted by the European Community pursuant to the October 28, 1991, decision by the Council of Fisheries Ministers of the Community.

(3)(A) The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, is authorized and directed, from time to time, having due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals, to determine when, to what extent, if at all, and by what means, it is compatible with this chapter to waive the requirements of this section so as to allow taking, or importing of any marine mammal, or any marine mammal product, and to adopt suitable regulations, issue permits, and make determinations in accordance with sections 1372, 1373, 1374, and 1381 of this title permitting and governing such taking and importing, in accordance with such determinations: *Provided, however,* That the Secretary, in making such determinations, must be assured that the taking of such marine mammal is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of this chapter: *Provided further, however,* That no marine mammal or no marine mammal product may be imported into the United States unless the Secretary certifies that the program for taking marine mammals in the country of origin is consistent with the provisions and policies of this chapter. Products of nations not so certified may not be imported into the United States for any purpose, including processing for exportation.

(B) Except for scientific research purposes, photography for educational or commercial purposes, or enhancing the survival or recovery of a species or stock as provided for in paragraph (1) of this subsection, or as provided for under paragraph (5) of this subsection, during the moratorium no permit may be issued for the taking of any marine mammal which has been designated by the Secretary as depleted, and no importation may be made of any such mammal.

(4)(A) Except as provided in subparagraphs (B) and (C), the provisions of this chapter shall not apply to the use of measures--

(i) by the owner of fishing gear or catch, or an employee or agent of such owner, to deter a marine mammal from damaging the gear or catch;

(ii) by the owner of other private property, or an agent, bailee, or employee of such owner, to deter a marine mammal from damaging private property;

(iii) by any person, to deter a marine mammal from endangering personal safety; or

(iv) by a government employee, to deter a marine mammal from damaging public property,

so long as such measures do not result in the death or serious injury of a marine mammal.

(B) The Secretary shall, through consultation with appropriate experts, and after notice and opportunity for public comment, publish in the Federal Register a list of guidelines for use in safely deterring marine mammals. In the case of marine mammals listed as endangered species or threatened species under the Endangered Species Act of 1973, the Secretary shall recommend specific measures which may be used to nonlethally deter marine mammals. Actions to deter marine mammals consistent with such guidelines or specific measures shall not be a violation of this chapter.

(C) If the Secretary determines, using the best scientific information available, that certain forms of deterrence have a significant adverse effect on marine mammals, the Secretary may prohibit such deterrent methods, after notice and opportunity for public comment, through regulation under this chapter.

(D) The authority to deter marine mammals pursuant to subparagraph (A) applies to all marine mammals, including all stocks designated as depleted under this chapter.

(5)(A)(i) Except as provided by clause (ii), upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specified geographical region, the Secretary shall allow, during periods of not more than five consecutive years each, the incidental, but not intentional, taking by citizens while engaging in that activity within that region of small numbers of marine mammals of a species or population stock if the Secretary, after notice (in the Federal Register and in newspapers of general circulation, and through appropriate electronic media, in the coastal areas that may be affected by such activity) and opportunity for public comment--

(I) finds that the total of such taking during each five-year (or less) period concerned will have a negligible impact on such species or stock and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b) or section 1379(f) of this title or, in the case of a cooperative agreement under both this chapter and the Whaling Convention Act of 1949, pursuant to section 1382(c) of this title; and

(II) prescribes regulations setting forth--

(aa) permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses; and

(bb) requirements pertaining to the monitoring and reporting of such taking.

(ii) In the case of a military readiness activity (as defined in section 315(f) of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314; 16 U.S.C. 703 note), clause (i) shall be applied--

(I) in the matter preceding clause (I), by substituting "seven consecutive years" for "five consecutive years"; and

(II) in clause (I), by substituting "seven-year" for "five-year".

(iii) For a military readiness activity (as defined in section 315(f) of Public Law 107-314; 16 U.S.C. 703 note), a determination of "least practicable adverse impact on such species or stock" under clause (i)(II)(aa) shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. Before making the required determination, the Secretary shall consult with the Department of Defense regarding personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

(iv) Notwithstanding clause (i), for any authorization affecting a military readiness activity (as defined in section 315(f) of Public Law 107-314; 16 U.S.C. 703 note), the Secretary shall publish the notice required by such clause only in the Federal Register.

(B) The Secretary shall withdraw, or suspend for a time certain (either on an individual or class basis, as appropriate) the permission to take marine mammals under subparagraph (A) pursuant to a specified activity within a specified geographical region if the Secretary finds, after notice and opportunity for public comment (as required under subparagraph (A) unless subparagraph (C)(i) applies), that--

(i) the regulations prescribed under subparagraph (A) regarding methods of taking, monitoring, or reporting are not being substantially complied with by a person engaging in such activity; or

(ii) the taking allowed under subparagraph (A) pursuant to one or more activities within one or more regions is having, or may have, more than a negligible impact on the species or stock concerned.

(C)(i) The requirement for notice and opportunity for public comment in subparagraph (B) shall not apply in the case of a suspension of permission to take if the Secretary determines that an emergency exists which poses a significant risk to the well-being of the species or stock concerned.

(ii) Sections 1373 and 1374 of this title shall not apply to the taking of marine mammals under the authority of this paragraph.

(D)(i) Upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specific geographic region, the Secretary shall authorize, for periods of not more than 1 year, subject to such conditions as the Secretary may specify, the incidental, but not intentional, taking by harassment of small numbers of marine mammals of a species or population stock by such citizens while engaging in that activity within that region if the Secretary finds that such harassment during each period concerned--

(I) will have a negligible impact on such species or stock, and

(II) will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b), or section 1379(f) of this title or pursuant to a cooperative agreement under section 1388 of this title.

(ii) The authorization for such activity shall prescribe, where applicable--

(I) permissible methods of taking by harassment pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b) or section 1379(f) of this title or pursuant to a cooperative agreement under section 1388 of this title,

(II) the measures that the Secretary determines are necessary to ensure no unmitigable adverse impact on the availability of the species or stock for taking for subsistence uses pursuant to subsection (b) or section 1379(f) of this title or pursuant to a cooperative agreement under section 1388 of this title, and

(III) requirements pertaining to the monitoring and reporting of such taking by harassment, including requirements for the independent peer review of proposed monitoring plans or other research proposals where the proposed activity may affect the availability of a species or stock for taking for subsistence uses pursuant to subsection (b) or section 1379(f) of this title or pursuant to a cooperative agreement under section 1388 of this title.

(iii) The Secretary shall publish a proposed authorization not later than 45 days after receiving an application under this subparagraph and request public comment through notice in the Federal Register, newspapers of general circulation, and appropriate electronic media and to all locally affected communities for a period of 30 days after publication. Not later than 45 days after the close of the public comment period, if the Secretary makes the findings set forth in clause (i), the Secretary shall issue an authorization with appropriate conditions to meet the requirements of clause (ii).

(iv) The Secretary shall modify, suspend, or revoke an authorization if the Secretary finds that the provisions of clauses (i) or (ii) are not being met.

(v) A person conducting an activity for which an authorization has been granted under this subparagraph shall not be subject to the penalties of this chapter for taking by harassment that occurs in compliance with such authorization.

(vi) For a military readiness activity (as defined in section 315(f) of Public Law 107-314; 16 U.S.C. 703 note), a determination of "least practicable adverse impact on such species or stock" under clause (i)(I) [1] shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. Before making the required determination, the Secretary shall consult with the Department of Defense regarding personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

(vii) Notwithstanding clause (iii), for any authorization affecting a military readiness activity (as defined in section 315(f) of Public Law 107-314; 16 U.S.C. 703 note), the Secretary shall publish the notice required by such clause only in the Federal Register.

(E)(i) During any period of up to 3 consecutive years, the Secretary shall allow the incidental, but not the intentional, taking by persons using vessels of the United States or vessels which have valid fishing permits issued by the Secretary in accordance with section 1824(b) of this title, while engaging in commercial fishing operations, of marine mammals from a species or stock designated as depleted because of its listing as an endangered species or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) if the Secretary, after notice and opportunity for public comment, determines that--

(I) the incidental mortality and serious injury from commercial fisheries will have a negligible impact on such species or stock;

(II) a recovery plan has been developed or is being developed for such species or stock pursuant to the Endangered Species Act of 1973; and

(III) where required under section 1387 of this title, a monitoring program is established under subsection (d) of such section, vessels engaged in such fisheries are registered in accordance with such section, and a take reduction plan has been developed or is being developed for such species or stock.

(ii) Upon a determination by the Secretary that the requirements of clause (i) have been met, the Secretary shall publish in the Federal Register a list of those fisheries for which such determination was made, and, for vessels required to register under section 1387 of this title, shall issue an appropriate permit for each authorization granted under such section to vessels to which this paragraph applies. Vessels engaged in a fishery included in the notice published by the Secretary under this clause which are not required to register under section 1387 of this title shall not be subject to the penalties of this chapter for the incidental taking of marine mammals to which this paragraph applies, so long as the owner or master of such vessel reports any incidental mortality or injury of such marine mammals to the Secretary in accordance with section 1387 of this title.

(iii) If, during the course of the commercial fishing season, the Secretary determines that the level of incidental mortality or serious injury from commercial fisheries for which a determination was made under clause (i) has resulted or is likely to result in an impact that is more than negligible on the endangered or threatened species or stock, the Secretary shall use the emergency authority granted under section 1387 of this title to protect such species or stock, and may modify any permit granted under this paragraph as necessary.

(iv) The Secretary may suspend for a time certain or revoke a permit granted under this subparagraph only if the Secretary determines that the conditions or limitations set forth in such permit are not being complied with. The Secretary may amend or modify, after notice and opportunity for public comment, the list of fisheries published under clause (ii) whenever the Secretary determines there has been a significant change in the information or conditions used to determine such list.

(v) Sections 1373 and 1374 of this title shall not apply to the taking of marine mammals under the authority of this subparagraph.

Add112

(vi) This subparagraph shall not govern the incidental taking of California sea otters and shall not be deemed to amend or repeal the Act of November 7, 1986 (Public Law 99-625; 100 Stat. 3500).

(F) Notwithstanding the provisions of this subsection, any authorization affecting a military readiness activity (as defined in section 315(f) of Public Law 107-314; 16 U.S.C. 703 note) shall not be subject to the following requirements:

(i) In subparagraph (A), "within a specified geographical region" and "within that region of small numbers".

(ii) In subparagraph (B), "within a specified geographical region" and "within one or more regions".

(iii) In subparagraph (D), "within a specific geographic region", "of small numbers", and "within that region".

(6)(A) A marine mammal product may be imported into the United States if the product--

(i) was legally possessed and exported by any citizen of the United States in conjunction with travel outside the United States, provided that the product is imported into the United States by the same person upon the termination of travel;

(ii) was acquired outside of the United States as part of a cultural exchange by an Indian, Aleut, or Eskimo residing in Alaska; or

(iii) is owned by a Native inhabitant of Russia, Canada, or Greenland and is imported for noncommercial purposes in conjunction with travel within the United States or as part of a cultural exchange with an Indian, Aleut, or Eskimo residing in Alaska.

(B) For the purposes of this paragraph, the term--

(i) "Native inhabitant of Russia, Canada, or Greenland" means a person residing in Russia, Canada, or Greenland who is related by blood, is a member of the same clan or ethnological grouping, or shares a common heritage with an Indian, Aleut, or Eskimo residing in Alaska; and

(ii) "cultural exchange" means the sharing or exchange of ideas, information, gifts, clothing, or handicrafts between an Indian, Aleut, or Eskimo residing in Alaska and a Native inhabitant of Russia, Canada, or Greenland, including rendering of raw marine mammal parts as part of such exchange into clothing or handicrafts through carving, painting, sewing, or decorating.

(b) Exemptions for Alaskan natives

Except as provided in section 1379 of this title, the provisions of this chapter shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking--

Add113

(1) is for subsistence purposes; or

(2) is done for purposes of creating and selling authentic native articles of handicrafts and clothing: *Provided,* That only authentic native articles of handicrafts and clothing may be sold in interstate commerce: *And provided further,* That any edible portion of marine mammals may be sold in native villages and towns in Alaska or for native consumption. For the purposes of this subsection, the term "authentic native articles of handicrafts and clothing" means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing and painting; and

(3) in each case, is not accomplished in a wasteful manner.

Notwithstanding the preceding provisions of this subsection, when, under this chapter, the Secretary determines any species or stock of marine mammal subject to taking by Indians, Aleuts, or Eskimos to be depleted, he may prescribe regulations upon the taking of such marine mammals by any Indian, Aleut, or Eskimo described in this subsection. Such regulations may be established with reference to species or stocks, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the purposes of this chapter. Such regulations shall be prescribed after notice and hearing required by section 1373 of this title and shall be removed as soon as the Secretary determines that the need for their imposition has disappeared. In promulgating any regulation or making any assessment pursuant to a hearing or proceeding under this subsection or section 1386(b)(2) of this title, or in making any determination of depletion under this subsection or finding regarding unmitigable adverse impacts under subsection (a)(5) that affects stocks or persons to which this subsection applies, the Secretary shall be responsible for demonstrating that such regulation, assessment, determination, or finding is supported by substantial evidence on the basis of the record as a whole. The preceding sentence shall only be applicable in an action brought by one or more Alaska Native organizations representing persons to which this subsection applies.

(c) Taking in defense of self or others

It shall not be a violation of this chapter to take a marine mammal if such taking is imminently necessary in self-defense or to save the life of a person in immediate danger, and such taking is reported to the Secretary within 48 hours. The Secretary may seize and dispose of any carcass.

(d) Good Samaritan exemption

It shall not be a violation of this chapter to take a marine mammal if--

(1) such taking is imminently necessary to avoid serious injury, additional injury, or death to a marine mammal entangled in fishing gear or debris;

(2) reasonable care is taken to ensure the safe release of the marine mammal, taking into consideration the equipment, expertise, and conditions at hand;

(3) reasonable care is exercised to prevent any further injury to the marine mammal; and

(4) such taking is reported to the Secretary within 48 hours.

(e) Chapter not to apply to incidental takings by United States citizens employed on foreign vessels outside United States EEZ

The provisions of this chapter shall not apply to a citizen of the United States who incidentally takes any marine mammal during fishing operations outside the United States exclusive economic zone (as defined in section 1802 of this title) when employed on a foreign fishing vessel of a harvesting nation which is in compliance with the International Dolphin Conservation Program.

(f) Exemption of actions necessary for national defense

(1) The Secretary of Defense, after conferring with the Secretary of Commerce, the Secretary of the Interior, or both, as appropriate, may exempt any action or category of actions undertaken by the Department of Defense or its components from compliance with any requirement of this chapter, if the Secretary determines that it is necessary for national defense.

(2) An exemption granted under this subsection--

(A) subject to subparagraph (B), shall be effective for a period specified by the Secretary of Defense; and

(B) shall not be effective for more than 2 years.

(3)(A) The Secretary of Defense may issue additional exemptions under this subsection for the same action or category of actions, after--

(i) conferring with the Secretary of Commerce, the Secretary of the Interior, or both as appropriate; and

(ii) making a new determination that the additional exemption is necessary for national defense.

(B) Each additional exemption under this paragraph shall be effective for a period specified by the Secretary of Defense, of not more than 2 years.

(4) Not later than 30 days after issuing an exemption under paragraph (1) or an additional exemption under paragraph (3), the Secretary of Defense shall submit to the Committee on Armed Services of the House of Representatives and the Committee on Armed Services of the Senate notice describing the exemption and the reasons therefor. The notice may be provided in classified form if the Secretary of Defense determines that use of the classified form is necessary for reasons of national security.

CREDIT(S)

(Pub.L. 92-522, Title I, § 101, Oct. 21, 1972, 86 Stat. 1029; Pub.L. 93-205, § 13(e)(2), Dec. 28, 1973, 87 Stat. 903; Pub.L. 97-58, § 2, Oct. 9, 1981, 95 Stat. 979; Pub.L. 98-364, Title I, § 101, July 17, 1984, 98 Stat. 440; Pub.L. 99-659, Title IV, § 411(a), Nov. 14, 1986, 100 Stat. 3741; Pub.L. 100-711, §§ 4(a), 5(c), (e)(1), Nov. 23, 1988, 102 Stat. 4765, 4769, 4771; Pub.L. 101-627, Title IX, § 901(g), Nov. 28, 1990, 104 Stat. 4467; Pub.L. 102-582, Title I, § 103, Title IV, § 401(b), Nov. 2, 1992, 106 Stat. 4903, 4909; Pub.L. 103-238, § 4, Apr. 30, 1994, 108 Stat. 532; Pub.L. 104-208, Div. A, Title I, § 101(a) [Title II, § 211(b)], Sept. 30, 1996, 110 Stat. 3009, 3009-41; Pub.L. 105-18, Title II, § 2003, June 12, 1997, 111 Stat. 174; Pub.L. 105-42, § 4(a) to (c), Aug. 15, 1997, 111 Stat. 1123, 1124; Pub.L. 108-136, Div. A, Title III, § 319(b), (c), Nov. 24, 2003, 117 Stat. 1434; Pub.L. 115-232, Div. A, Title III, § 316, Aug. 13, 2018, 132 Stat. 1714.)

Footnotes

1 So in original. Probably should be a reference to cl. (ii)(I).

16 U.S.C.A. § 1371, 16 USCA § 1371
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1531

§ 1531. Congressional findings and declaration of purposes and policy

Currentness

(a) Findings

The Congress finds and declares that--

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to--

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

CREDIT(S)

(Pub.L. 93-205, § 2, Dec. 28, 1973, 87 Stat. 884; Pub.L. 96-159, § 1, Dec. 28, 1979, 93 Stat. 1225; Pub.L. 97-304, § 9(a), Oct. 13, 1982, 96 Stat. 1426; Pub.L. 100-478, Title I, § 1013(a), Oct. 7, 1988, 102 Stat. 2315.)

16 U.S.C.A. § 1531, 16 USCA § 1531
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1532

§ 1532. Definitions

Currentness

For the purposes of this chapter--

(1) The term "alternative courses of action" means all alternatives and thus is not limited to original project objectives and agency jurisdiction.

(2) The term "commercial activity" means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however*, That it does not include exhibition of commodities by museums or similar cultural or historical organizations.

(3) The terms "conserve", "conserving", and "conservation" mean 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. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(4) The term "Convention" means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto.

(5)(A) The term "critical habitat" for a threatened or endangered species means--

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

(7) The term "Federal agency" means any department, agency, or instrumentality of the United States.

(8) The term "fish or wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

(9) The term "foreign commerce" includes, among other things, any transaction--

(A) between persons within one foreign country;

(B) between persons in two or more foreign countries;

(C) between a person within the United States and a person in a foreign country; or

(D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.

(10) The term "import" means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

(11) Repealed. Pub.L. 97-304, § 4(b), Oct. 13, 1982, 96 Stat. 1420.

(12) The term "permit or license applicant" means, when used with respect to an action of a Federal agency for which exemption is sought under section 1536 of this title, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 1536(a) of this title to such agency action.

(13) The term "person" means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

Add120

(14) The term "plant" means any member of the plant kingdom, including seeds, roots and other parts thereof.

(15) The term "Secretary" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

(16) The term "species" includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

(17) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(18) The term "State agency" means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

(21) The term "United States", when used in a geographical context, includes all States.

CREDIT(S)

(Pub.L. 93-205, § 3, Dec. 28, 1973, 87 Stat. 885; Pub.L. 94-359, § 5, July 12, 1976, 90 Stat. 913; Pub.L. 95-632, § 2, Nov. 10, 1978, 92 Stat. 3751; Pub.L. 96-159, § 2, Dec. 28, 1979, 93 Stat. 1225; Pub.L. 97-304, § 4(b), Oct. 13, 1982, 96 Stat. 1420; Pub.L. 100-478, Title I, § 1001, Oct. 7, 1988, 102 Stat. 2306.)

16 U.S.C.A. § 1532, 16 USCA § 1532
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1536

§ 1536. Interagency cooperation

Currentness

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) 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 (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)--

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth--

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), 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. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3), and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2), the Secretary concludes that--

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that--

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2), each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not 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 which would not violate subsection (a)(2) of this section.

Add124

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of Title 5.

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

Add125

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act, the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications.

Add126

Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to--

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2), the Secretary's opinion under subsection (b) indicates that the agency action would violate subsection (a)(2). An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary--

(A) determine that the Federal agency concerned and the exemption applicant have--

(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

(ii) conducted any biological assessment required by subsection (c); and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d); or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of Title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of Title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing--

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of Title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall grant an exemption from the requirements of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person--

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) and on such other testimony or evidence as it may receive, that--

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action--

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless--

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) or was not identified in any biological assessment conducted under subsection (c), and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

Add129

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) Review by Secretary of State; violation of international treaty or other international obligation of United States

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969: *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

Add130

(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of section 1540(g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) Judicial review

Any person, as defined by section 1532(13) of this title, may obtain judicial review, under chapter 7 of Title 5, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section--

(1) any action for which an exemption is granted under subsection (h) shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) shall not be considered to be a prohibited taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act, the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act, and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

CREDIT(S)

(Pub.L. 93-205, § 7, Dec. 28, 1973, 87 Stat. 892; Pub.L. 95-632, § 3, Nov. 10, 1978, 92 Stat. 3752; Pub.L. 96-159, § 4, Dec. 28, 1979, 93 Stat. 1226; Pub.L. 97-304, §§ 4(a), 8(b), Oct. 13, 1982, 96 Stat. 1417, 1426; Pub.L. 99-659, Title IV, § 411(b), (c), Nov. 14, 1986, 100 Stat. 3742; Pub.L. 100-707, Title I, § 109(g), Nov. 23, 1988, 102 Stat. 4709.)

16 U.S.C.A. § 1536, 16 USCA § 1536

Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter I. Research and Related Programs (Refs & Annos)

33 U.S.C.A. § 1251

§ 1251. Congressional declaration of goals and policy

Currentness

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of

Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

CREDIT(S)

(June 30, 1948, c. 758, Title I, § 101, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 816; amended Pub.L. 95-217, §§ 5(a), 26(b), Dec. 27, 1977, 91 Stat. 1567, 1575; Pub.L. 100-4, Title III, § 316(b), Feb. 4, 1987, 101 Stat. 60.)

Add134

33 U.S.C.A. § 1251, 33 USCA § 1251
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter III. Standards and Enforcement (Refs & Annos)

33 U.S.C.A. § 1311

§ 1311. Effluent limitations

Currentness

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved--

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which

meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub.L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

Add137

(d) Review and revision of effluent limitations

Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste, or medical waste

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants

(1) General authority

The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F)) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications

A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that--

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(3) Limitation on authority to apply for subsection (c) modification

If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants

(A) General authority

Upon petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing

(i) Sufficient information

The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the determinations required by this subparagraph.

(ii) Toxic criteria determination

The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title.

(iii) Listing as toxic pollutant

If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title, the Administrator shall list the pollutant as a toxic pollutant under section 1317(a) of this title.

(iv) Nonconventional criteria determination

If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the determinations required by paragraph (2) of this subsection with respect to the pollutant, the Administrator shall add the pollutant to the list of pollutants specified in paragraph (1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions

A petition for listing of a pollutant under this paragraph--

(i) must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title;

(ii) may be filed before promulgation of such guideline; and

(iii) may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition

A decision to add a pollutant to the list of pollutants for which modifications under this subsection are authorized must be made within 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title.

(E) Burden of proof

The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

(5) Removal of pollutants

The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if the Administrator determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.

(h) Modification of secondary treatment requirements

The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that--

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 1314(a)(6) of this title;

(2) the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) in the case of any treatment works serving a population of 50,000 or more, with respect to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and if such works had no pretreatment program with respect to such pollutant;

(7) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(8) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(9) the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria established under section 1314(a)(1) of this title after initial mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 1251(a)(2) of this title. For the purposes of paragraph (9), "primary or equivalent treatment" means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. In order for a permit to be issued under this subsection for the discharge of a pollutant into marine waters, such marine waters must exhibit characteristics assuring that water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of 73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions

(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this chapter available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 1342 of this title or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after February 4, 1987. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 1281 of this title, section 1317 of this title, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this chapter.

(2)(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and--

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this chapter for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 1342 of this title to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after December 27, 1977, or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this chapter.

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works

have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 1284 of this title, and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 1317(a) and (b) of this title during the period of such time modification.

(j) Modification procedures

(1) Any application filed under this section for a modification of the provisions of--

(A) subsection (b)(1)(B) under subsection (h) of this section shall be filed not later that [1] the 365th day which begins after December 29, 1981, except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h), may apply for a modification of subsection (h) in its own right not later than 30 days after February 4, 1987, and except as provided in paragraph (5);

(B) subsection (b)(2)(A) as it applies to pollutants identified in subsection (b)(2)(F) shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title or not later than 270 days after December 27, 1977, whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this chapter, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(3) Compliance requirements under subsection (g)

(A) Effect of filing

An application for a modification under subsection (g) and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the requirement that the person seeking such modification or listing comply with effluent limitations under this chapter for all pollutants not the subject of such application or petition.

(B) Effect of disapproval

Disapproval of an application for a modification under subsection (g) shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this chapter.

(4) Deadline for subsection (g) decision

An application for a modification with respect to a pollutant filed under subsection (g) must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such application must be approved or disapproved not later than 365 days after the date of approval of such petition.

(5) Extension of application deadline

(A) In general

In the 180-day period beginning on October 31, 1994, the city of San Diego, California, may apply for a modification pursuant to subsection (h) of the requirements of subsection (b)(1)(B) with respect to biological oxygen demand and total suspended solids in the effluent discharged into marine waters.

(B) Application

An application under this paragraph shall include a commitment by the applicant to implement a waste water reclamation program that, at a minimum, will--

(i) achieve a system capacity of 45,000,000 gallons of reclaimed waste water per day by January 1, 2010; and

(ii) result in a reduction in the quantity of suspended solids discharged by the applicant into the marine environment during the period of the modification.

(C) Additional conditions

The Administrator may not grant a modification pursuant to an application submitted under this paragraph unless the Administrator determines that such modification will result in removal of not less than 58 percent of the biological oxygen demand (on an annual average) and not less than 80 percent of total suspended solids (on a monthly average) in the discharge to which the application applies.

(D) Preliminary decision deadline

The Administrator shall announce a preliminary decision on an application submitted under this paragraph not later than 1 year after the date the application is submitted.

(k) Innovative technology

In the case of any facility subject to a permit under section 1342 of this title which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent

limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 1342 of this title, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industrywide application.

(l) Toxic pollutants

Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.

(m) Modification of effluent limitation requirements for point sources

(1) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 1343 of this title, with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that--

(A) the facility for which modification is sought is covered at the time of the enactment of this subsection by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) and section 1343 of this title exceed by an unreasonable amount the benefits to be obtained, including the objectives of this chapter;

(C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

(D) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(E) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(F) the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance with this subsection and section 1251(a)(2) of this title;

(G) the applicant accepts as a condition to the permit a contractural[2] obligation to use funds in the amount required (but not less than $250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;

(H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this chapter applicable to similarly situated discharges; and

(I) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.

(3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: *Provided*, That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) Fundamentally different factors

(1) General rule

The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) or section 1317(b) of this title for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that--

(A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 1314(b) or 1314(g) of this title and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B) the application--

(i) is based solely on information and supporting data submitted to the Administrator during the rulemaking for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a non-water quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

(2) Time limit for applications

An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) Time limit for decision

The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.

(4) Submission of information

The Administrator may allow an applicant under this subsection to submit information and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) Treatment of pending applications

For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on February 4, 1987, shall be treated as having been submitted to the Administrator on the 180th day following February 4, 1987. The applicant may amend the application to take into account the provisions of this subsection.

(6) Effect of submission of application

An application for an alternative requirement under this subsection shall not stay the applicant's obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.

(7) Effect of denial

If an application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection is denied by the Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.

(8) Reports

By January 1, 1997, and January 1 of every odd-numbered year thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under section 1311 or 1314 of this title or any national categorical pretreatment standard under section 1317(b) of this title filed before, on, or after February 4, 1987.

(o) Application fees

The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of this section, section 1314(d)(4) of this title, and section 1326(a) of this title. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled "Water Permits and Related Services" which shall thereafter be available for appropriation to carry out activities of the Environmental Protection Agency for which such fees were collected.

(p) Modified permit for coal remining operations

(1) In general

Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 1342(b) of this title, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

(2) Limitations

The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No discharge from, or affected by, the remining operation shall exceed State water quality standards established under section 1313 of this title.

(3) Definitions

For purposes of this subsection--

(A) Coal remining operation

The term "coal remining operation" means a coal mining operation which begins after February 4, 1987 at a site on which coal mining was conducted before August 3, 1977.

(B) Remined area

The term "remined area" means only that area of any coal remining operation on which coal mining was conducted before August 3, 1977.

(C) Pre-existing discharge

The term "pre-existing discharge" means any discharge at the time of permit application under this subsection.

(4) Applicability of strip mining laws

Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 to any coal remining operation, including the application of such Act to suspended solids.

CREDIT(S)

(June 30, 1948, c. 758, Title III, § 301, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 844; amended Pub.L. 95-217, §§ 42-47, 53(c), Dec. 27, 1977, 91 Stat. 1582-1586, 1590; Pub.L. 97-117, §§ 21, 22(a)-(d), Dec. 29, 1981, 95 Stat. 1631, 1632; Pub.L. 97-440, Jan. 8, 1983, 96 Stat. 2289; Pub.L. 100-4, Title III, §§ 301(a) to (e), 302(a) to (d), 303(a), (b)(1), (c) to (f), 304(a), 305, 306(a), (b), 307, Feb. 4, 1987, 101 Stat. 29-37; Pub.L. 100-688, Title III, § 3202(b), Nov. 18, 1988, 102 Stat. 4154; Pub.L. 103-431, § 2, Oct. 31, 1994, 108 Stat. 4396; Pub.L. 104-66, Title II, § 2021(b), Dec. 21, 1995, 109 Stat. 727.)

Footnotes

1 So in original. Probably should be "than".

2 So in original. Probably should be "contractual".

33 U.S.C.A. § 1311, 33 USCA § 1311
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter III. Standards and Enforcement (Refs & Annos)

33 U.S.C.A. § 1319

§ 1319. Enforcement

Effective: January 14, 2019
Currentness

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person--

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1322(p), 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under

paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Negligent violations

Any person who--

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1322(p), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who--

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1322(p), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1322(p), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions

For the purpose of subparagraph (A) of this paragraph--

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury--

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of--

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term “organization” means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term “serious bodily injury” means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset

For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(7) Hazardous substance defined

For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of this title, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of Title 42, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of this title, and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1322(p), 1328,,[1] or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(e) State liability for judgments and expenses

Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

(f) Wrongful introduction of pollutant into treatment works

Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 1317 of this title, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment

works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter.

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available--

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1322(p), 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties

(A) Class I

The amount of a class I civil penalty under paragraph (1) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II

The amount of a class II civil penalty under paragraph (1) may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice

and opportunity for a hearing on the record in accordance with section 554 of Title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(4) Rights of interested persons

(A) Public notice

Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

(B) Presentation of evidence

Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing

If no hearing is held under paragraph (2) before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

(5) Finality of order

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation--

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

(B) Applicability of limitation with respect to citizen suits

The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which--

(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

(7) Effect of action on compliance

No action by the Administrator or the Secretary under this subsection shall affect any person's obligation to comply with any section of this chapter or with the terms and conditions of any permit issued pursuant to section 1342 or 1344 of this title.

(8) Judicial review

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment--

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

(9) Collection

If any person fails to pay an assessment of a civil penalty--

(A) after the order making the assessment has become final, or

(B) after a court in an action brought under paragraph (8) has entered a final judgment in favor of the Administrator or the Secretary, as the case may be,

the Administrator or the Secretary shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus interest at currently prevailing rates from the date of the final order or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of such person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

(10) Subpoenas

The Administrator or Secretary, as the case may be, may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this subsection. In case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(11) Protection of existing procedures

Nothing in this subsection shall change the procedures existing on the day before February 4, 1987, under other subsections of this section for issuance and enforcement of orders by the Administrator.

(h) Implementation of integrated plans

(1) In general

In conjunction with an enforcement action under subsection (a) or (b) relating to municipal discharges, the Administrator shall inform a municipality of the opportunity to develop an integrated plan, as defined in section 1342(s) of this title.

(2) Modification

Any municipality under an administrative order under subsection (a) or settlement agreement (including a judicial consent decree) under subsection (b) that has developed an integrated plan consistent with section 1342(s) of this title may request a modification of the administrative order or settlement agreement based on that integrated plan.

CREDIT(S)

(June 30, 1948, c. 758, Title III, § 309, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 859; amended Pub.L. 95-217, §§ 54(b), 55, 56, 67(c)(2), Dec. 27, 1977, 91 Stat. 1591, 1592, 1606; Pub.L. 100-4, Title III, §§ 312, 313(a)(1), (b)(1), (c), 314(a), Feb. 4, 1987, 101 Stat. 42, 45, 46; Pub.L. 101-380, Title IV, § 4301(c), Aug. 18, 1990, 104 Stat. 537; Pub.L. 115-282, Title IX, § 903(c)(2), Dec. 4, 2018, 132 Stat. 4356; Pub.L. 115-436, § 3(b), Jan. 14, 2019, 132 Stat. 5560.)

Footnotes

1 So in original.

33 U.S.C.A. § 1319, 33 USCA § 1319
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter IV. Permits and Licenses (Refs & Annos)

33 U.S.C.A. § 1344

§ 1344. Permits for dredged or fill material

Currentness

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category

of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material--

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

(g) State administration

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

(2) Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies of such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.

(3) Not later than the ninetieth day after the date of the receipt by the Administrator of the program and statement submitted by any State, under paragraph (1) of this subsection, the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which--

(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

(ii) are for fixed terms not exceeding five years; and

Add162

(iii) can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the permit;

(II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(III) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

(B) To issue permits which apply, and assure compliance with, all applicable requirements of section 1318 of this title, or to inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.

(C) To assure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.

(D) To assure that the Administrator receives notice of each application (including a copy thereof) for a permit.

(E) To assure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.

(F) To assure that no permit will be issued if, in the judgment of the Secretary, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.

(G) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(H) To assure continued coordination with Federal and Federal-State water-related planning and review processes.

(2) If, with respect to a State program submitted under subsection (g)(1) of this section, the Administrator determines that such State--

(A) has the authority set forth in paragraph (1) of this subsection, the Administrator shall approve the program and so notify (i) such State and (ii) the Secretary, who upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or

(B) does not have the authority set forth in paragraph (1) of this subsection, the Administrator shall so notify such State, which notification shall also describe the revisions or modifications necessary so that such State may resubmit such program for a determination by the Administrator under this subsection.

(3) If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such program, such program shall be deemed approved pursuant to paragraph (2)(A) of this subsection and the Administrator shall so notify such State and the Secretary who, upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsection (a) and (e) of this section for activities with respect to which a permit may be issued by such State.

(4) After the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.

(5) Upon notification from a State with a permit program approved under this subsection that such State intends to administer and enforce the terms and conditions of a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the administration and enforcement of such general permit with respect to such activities.

(i) Withdrawal of approval

Whenever the Administrator determines after public hearing that a State is not administering a program approved under subsection (h)(2)(A) of this section, in accordance with this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, the Administrator shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days after the date of the receipt of such notification, the Administrator shall (1) withdraw approval of such program until the Administrator determines such corrective action has been taken, and (2) notify the Secretary that the Secretary shall resume the program for the issuance of permits under subsections (a) and (e) of this section for activities with respect to which the State was issuing permits and that such authority of the Secretary shall continue in effect until such time as the Administrator makes the determination described in clause (1) of this subsection and such State again has an approved program.

(j) Copies of applications for State permits and proposed general permits to be transmitted to Administrator

Each State which is administering a permit program pursuant to this section shall transmit to the Administrator (1) a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State, and (2) a copy of each proposed general permit which such State intends to issue. Not later than the tenth day after the date of the receipt of such permit application or such proposed general permit, the Administrator shall provide copies of such permit application or such proposed general permit to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service. If the Administrator intends to provide written comments to such State with respect to such permit application or such proposed general permit, he shall so notify such State not later than the thirtieth day after the date of the receipt of such application or such proposed general permit and provide such written comments to such State, after consideration of any comments made in writing with respect to such application or such proposed general permit by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, not later than the ninetieth day after the date of such receipt. If such State is so notified by the Administrator, it shall not issue the proposed permit until after the receipt of such comments

from the Administrator, or after such ninetieth day, whichever first occurs. Such State shall not issue such proposed permit after such ninetieth day if it has received such written comments in which the Administrator objects (A) to the issuance of such proposed permit and such proposed permit is one that has been submitted to the Administrator pursuant to subsection (h)(1)(E), or (B) to the issuance of such proposed permit as being outside the requirements of this section, including, but not limited to, the guidelines developed under subsection (b)(1) of this section unless it modifies such proposed permit in accordance with such comments. Whenever the Administrator objects to the issuance of a permit under the preceding sentence such written objection shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by the Administrator. In any case where the Administrator objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary may issue the permit pursuant to subsection (a) or (e) of this section, as the case may be, for such source in accordance with the guidelines and requirements of this chapter.

(k) Waiver

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (j) of this section at the time of the approval of a program pursuant to subsection (h)(2)(A) of this section for any category (including any class, type, or size within such category) of discharge within the State submitting such program.

(l) Categories of discharges not subject to requirements

The Administrator shall promulgate regulations establishing categories of discharges which he determines shall not be subject to the requirements of subsection (j) of this section in any State with a program approved pursuant to subsection (h)(2)(A) of this section. The Administrator may distinguish among classes, types, and sizes within any category of discharges.

(m) Comments on permit applications or proposed general permits by Secretary of the Interior acting through Director of United States Fish and Wildlife Service

Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application or such proposed general permit in writing to the Secretary.

(n) Enforcement authority not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(o) Public availability of permits and permit applications

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

(q) Minimization of duplication, needless paperwork, and delays in issuance; agreements

Not later than the one-hundred-eightieth day after December 27, 1977, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section.

(r) Federal projects specifically authorized by Congress

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

(s) Violation of permits

(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or

resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton [1] shall be given immediately to the appropriate State.

(4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

(t) Navigable waters within State jurisdiction

Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

CREDIT(S)

(June 30, 1948, c. 758, Title IV, § 404, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 884; amended Pub.L. 95-217, § 67(a), (b), Dec. 27, 1977, 91 Stat. 1600; Pub.L. 100-4, Title III, § 313(d), Feb. 4, 1987, 101 Stat. 45.)

Footnotes

1 So in original. Probably should be “action”.

33 U.S.C.A. § 1344, 33 USCA § 1344
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 55. National Environmental Policy (Refs & Annos)

42 U.S.C.A. § 4321

§ 4321. Congressional declaration of purpose

Currentness

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

CREDIT(S)

(Pub.L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852.)

42 U.S.C.A. § 4321, 42 USCA § 4321
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 55. National Environmental Policy (Refs & Annos)
Subchapter I. Policies and Goals (Refs & Annos)

42 U.S.C.A. § 4331

§ 4331. Congressional declaration of national environmental policy

Currentness

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may--

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Add169

CREDIT(S)

(Pub.L. 91-190, Title I, § 101, Jan. 1, 1970, 83 Stat. 852.)

42 U.S.C.A. § 4331, 42 USCA § 4331
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 55. National Environmental Policy (Refs & Annos)
Subchapter I. Policies and Goals (Refs & Annos)

42 U.S.C.A. § 4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

Effective: June 3, 2023
Currentness

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) consistent with the provisions of this chapter and except where compliance would be inconsistent with other statutory requirements, include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) reasonably foreseeable environmental effects of the proposed agency action;

(ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented.

Prior to making any detailed statement, the head of the lead agency shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) ensure the professional integrity, including scientific integrity, of the discussion and analysis in an environmental document;

(E) make use of reliable data and resources in carrying out this chapter;

(F) consistent with the provisions of this chapter, study, develop, and describe technically and economically feasible alternatives;

(G) any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction. [1]

(H) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(I) consistent with the provisions of this chapter, recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(J) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(K) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(L) assist the Council on Environmental Quality established by subchapter II of this chapter.

CREDIT(S)

(Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424; Pub.L. 118-5, Div. C, Title III, § 321(a), June 3, 2023, 137 Stat. 38.)

Footnotes

1 So in original. The period probably should be a semicolon.

42 U.S.C.A. § 4332, 42 USCA § 4332
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 43. Public Lands (Refs & Annos)
Chapter 29. Submerged Lands
Subchapter III. Outer Continental Shelf Lands (Refs & Annos)

43 U.S.C.A. § 1332

§ 1332. Congressional declaration of policy

Currentness

It is hereby declared to be the policy of the United States that--

(1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter;

(2) 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;

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments--

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts;

(B) the distribution of a portion of the receipts from the leasing of mineral resources of the outer Continental Shelf adjacent to State lands, as provided under section 1337(g) of this title, will provide affected coastal States and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of such resources; and

(C) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf. [1]

(5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized; and

(6) operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

CREDIT(S)

(Aug. 7, 1953, c. 345, § 3, 67 Stat. 462; Pub.L. 95-372, Title II, § 202, Sept. 18, 1978, 92 Stat. 634; Pub.L. 99-272, Title VIII, § 8002, Apr. 7, 1986, 100 Stat. 148.)

Footnotes

1 So in original. The period probably should be a semicolon.

43 U.S.C.A. § 1332, 43 USCA § 1332
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 43. Public Lands (Refs & Annos)
Chapter 29. Submerged Lands
Subchapter III. Outer Continental Shelf Lands (Refs & Annos)

43 U.S.C.A. § 1334

§ 1334. Administration of leasing

Effective: August 8, 2005
Currentness

(a) Rules and regulations; amendment; cooperation with State agencies; subject matter and scope of regulations

The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of safety, environmental, and conservation laws and regulations, the Secretary shall cooperate with the relevant departments and agencies of the Federal Government and of the affected States. In the formulation and promulgation of regulations, the Secretary shall request and give due consideration to the views of the Attorney General with respect to matters which may affect competition. In considering any regulations and in preparing any such views, the Attorney General shall consult with the Federal Trade Commission. The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions--

(1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit;

(2) with respect to cancellation of any lease or permit--

(A) that such cancellation may occur at any time, if the Secretary determines, after a hearing, that--

(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment;

(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

(iii) the advantages of cancellation outweigh the advantages of continuing such lease or permit in force;

(B) that such cancellation shall not occur unless and until operations under such lease or permit shall have been under suspension, or temporary prohibition, by the Secretary, with due extension of any lease or permit term continuously for a period of five years, or for a lesser period upon request of the lessee;

(C) that such cancellation shall entitle the lessee to receive such compensation as he shows to the Secretary as being equal to the lesser of (i) the fair value of the canceled rights as of the date of cancellation, taking account of both anticipated revenues from the lease and anticipated costs, including costs of compliance with all applicable regulations and operating orders, liability for cleanup costs or damages, or both, in the case of an oilspill, and all other costs reasonably anticipated on the lease, or (ii) the excess, if any, over the lessee's revenues, from the lease (plus interest thereon from the date of receipt to date of reimbursement) of all consideration paid for the lease and all direct expenditures made by the lessee after the date of issuance of such lease and in connection with exploration or development, or both, pursuant to the lease (plus interest on such consideration and such expenditures from date of payment to date of reimbursement), except that (I) with respect to leases issued before September 18, 1978, such compensation shall be equal to the amount specified in clause (i) of this subparagraph; and (II) in the case of joint leases which are canceled due to the failure of one or more partners to exercise due diligence, the innocent parties shall have the right to seek damages for such loss from the responsible party or parties and the right to acquire the interests of the negligent party or parties and be issued the lease in question;

(3) for the assignment or relinquishment of a lease;

(4) for unitization, pooling, and drilling agreements;

(5) for the subsurface storage of oil and gas from any source other than by the Federal Government;

(6) for drilling or easements necessary for exploration, development, and production;

(7) for the prompt and efficient exploration and development of a lease area; and

(8) for compliance with the national ambient air quality standards pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.), to the extent that activities authorized under this subchapter significantly affect the air quality of any State.

(b) Compliance with regulations as condition for issuance, continuation, assignment, or other transfer of leases

The issuance and continuance in effect of any lease, or of any assignment or other transfer of any lease, under the provisions of this subchapter shall be conditioned upon compliance with regulations issued under this subchapter.

(c) Cancellation of nonproducing lease

Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in this subchapter, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

(d) Cancellation of producing lease

Whenever the owner of any producing lease fails to comply with any of the provisions of this subchapter, of the lease, or of the regulations issued under this subchapter, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of this subchapter.

(e) Pipeline rights-of-way; forfeiture of grant

Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this subchapter, may be granted by the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other minerals, or under such regulations and upon such conditions as may be prescribed by the Secretary, or where appropriate the Secretary of Transportation, including (as provided in section 1347(b) of this title) assuring maximum environmental protection by utilization of the best available and safest technologies, including the safest practices for pipeline burial and upon the express condition that oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from submerged lands or outer Continental Shelf lands in the vicinity of the pipelines in such proportionate amounts as the Federal Energy Regulatory Commission, in consultation with the Secretary of Energy, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevention of waste. Failure to comply with the provisions of this section or the regulations and conditions prescribed under this section shall be grounds for forfeiture of the grant in an appropriate judicial proceeding instituted by the United States in any United States district court having jurisdiction under the provisions of this subchapter.

(f) Competitive principles governing pipeline operation

(1) Except as provided in paragraph (2), every permit, license, easement, right-of-way, or other grant of authority for the transportation by pipeline on or across the outer Continental Shelf of oil or gas shall require that the pipeline be operated in accordance with the following competitive principles:

(A) The pipeline must provide open and nondiscriminatory access to both owner and nonowner shippers.

(B) Upon the specific request of one or more owner or nonowner shippers able to provide a guaranteed level of throughput, and on the condition that the shipper or shippers requesting such expansion shall be responsible for bearing their proportionate share of the costs and risks related thereto, the Federal Energy Regulatory Commission may, upon finding, after a full hearing with due notice thereof to the interested parties, that such expansion is within technological limits and economic feasibility, order a subsequent expansion of throughput capacity of any pipeline for which the permit, license, easement, right-of-way, or other grant of authority is approved or issued after September 18, 1978. This subparapraph [1] shall not apply to any such grant of authority approved or issued for the Gulf of Mexico or the Santa Barbara Channel.

(2) The Federal Energy Regulatory Commission may, by order or regulation, exempt from any or all of the requirements of paragraph (1) of this subsection any pipeline or class of pipelines which feeds into a facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed.

(3) The Secretary of Energy and the Federal Energy Regulatory Commission shall consult with and give due consideration to the views of the Attorney General on specific conditions to be included in any permit, license, easement, right-of-way, or grant of authority in order to ensure that pipelines are operated in accordance with the competitive principles set forth in paragraph (1) of this subsection. In preparing any such views, the Attorney General shall consult with the Federal Trade Commission.

(4) Nothing in this subsection shall be deemed to limit, abridge, or modify any authority of the United States under any other provision of law with respect to pipelines on or across the outer Continental Shelf.

(g) Rates of production

(1) The lessee [2] shall produce any oil or gas, or both, obtained pursuant to an approved development and production plan, at rates consistent with any rule or order issued by the President in accordance with any provision of law.

(2) If no rule or order referred to in paragraph (1) has been issued, the lessee shall produce such oil or gas, or both, at rates consistent with any regulation promulgated by the Secretary of Energy which is to assure the maximum rate of production which may be sustained without loss of ultimate recovery of oil or gas, or both, under sound engineering and economic principles, and which is safe for the duration of the activity covered by the approved plan. The Secretary may permit the lessee to vary such rates if he finds that such variance is necessary.

(h) Federal action affecting outer Continental Shelf; notification; recommended changes

The head of any Federal department or agency who takes any action which has a direct and significant effect on the outer Continental Shelf or its development shall promptly notify the Secretary of such action and the Secretary shall thereafter notify the Governor of any affected State and the Secretary may thereafter recommend such changes in such action as are considered appropriate.

(i) Flaring of natural gas

After September 18, 1978, no holder of any oil and gas lease issued or maintained pursuant to this subchapter shall be permitted to flare natural gas from any well unless the Secretary finds that there is no practicable way to complete production of such gas, or that such flaring is necessary to alleviate a temporary emergency situation or to conduct testing or work-over operations.

(j) Cooperative development of common hydrocarbon-bearing areas

(1) Findings

(A) [3] The Congress of the United States finds that the unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing geological area underlying the Federal and State boundary may result in a number of harmful national effects, including--

(i) the drilling of unnecessary wells, the installation of unnecessary facilities and other imprudent operating practices that result in economic waste, environmental damage, and damage to life and property;

(ii) the physical waste of hydrocarbons and an unnecessary reduction in the amounts of hydrocarbons that can be produced from certain hydrocarbon-bearing areas; and

(iii) the loss of correlative rights which can result in the reduced value of national hydrocarbon resources and disorders in the leasing of Federal and State resources.

(2) Prevention of harmful effects

The Secretary shall prevent, through the cooperative development of an area, the harmful effects of unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing area underlying the Federal and State boundary.

CREDIT(S)

(Aug. 7, 1953, c. 345, § 5, 67 Stat. 464; Pub.L. 95-372, Title II, § 204, Sept. 18, 1978, 92 Stat. 636; Pub.L. 101-380, Title VI, § 6004(a), Aug. 18, 1990, 104 Stat. 558; Pub.L. 109-58, Title III, § 321(a), Aug. 8, 2005, 119 Stat. 694.)

Footnotes

1 So in original. Probably should be “subparagraph”.

2 So in original. Probably should be “lessee”.

3 So in original. No subpar. (B) was enacted.

43 U.S.C.A. § 1334, 43 USCA § 1334
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 43. Public Lands (Refs & Annos)
Chapter 29. Submerged Lands
Subchapter III. Outer Continental Shelf Lands (Refs & Annos)

43 U.S.C.A. § 1337

§ 1337. Leases, easements, and rights-of-way on the outer Continental Shelf

Effective: August 16, 2022
Currentness

(a) Oil and gas leases; award to highest responsible qualified bidder; method of bidding; royalty relief; Congressional consideration of bidding system; notice

(1) The Secretary is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding, under regulations promulgated in advance, any oil and gas lease on submerged lands of the outer Continental Shelf which are not covered by leases meeting the requirements of subsection (a) of section 1335 of this title. Such regulations may provide for the deposit of cash bids in an interest-bearing account until the Secretary announces his decision on whether to accept the bids, with the interest earned thereon to be paid to the Treasury as to bids that are accepted and to the unsuccessful bidders as to bids that are rejected. The bidding shall be by sealed bid and, at the discretion of the Secretary, on the basis of--

(A) cash bonus bid with a royalty at not less than 16 $^{2}/_{3}$ percent, but not more than 18 ¾ percent, during the 10-year period beginning on August 16, 2022, and not less than 16 $^{2}/_{3}$ percent thereafter, fixed by the Secretary in amount or value of the production saved, removed, or sold;

(B) variable royalty bid based on a per centum in amount or value of the production saved, removed, or sold, with either a fixed work commitment based on dollar amount for exploration or a fixed cash bonus as determined by the Secretary, or both;

(C) cash bonus bid, or work commitment bid based on a dollar amount for exploration with a fixed cash bonus, and a diminishing or sliding royalty based on such formulae as the Secretary shall determine as equitable to encourage continued production from the lease area as resources diminish, but not less than 16 $^{2}/_{3}$ percent, but not more than 18 ¾ percent, during the 10-year period beginning on August 16, 2022, and not less than 16 $^{2}/_{3}$ percent thereafter, at the beginning of the lease period in amount or value of the production saved, removed, or sold;

(D) cash bonus bid with a fixed share of the net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(E) fixed cash bonus with the net profit share reserved as the bid variable;

(F) cash bonus bid with a royalty at not less than 16 2/3 percent, but not more than 18 ¾ percent, during the 10-year period beginning on August 16, 2022, and not less than 16 2/3 percent thereafter, fixed by the Secretary in amount or value of the production saved, removed, or sold and a fixed per centum share of net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(G) work commitment bid based on a dollar amount for exploration with a fixed cash bonus and a fixed royalty in amount or value of the production saved, removed, or sold;

(H) cash bonus bid with royalty at not less than 16 2/3 percent, but not more than 18 ¾ percent, during the 10-year period beginning on August 16, 2022, and not less than 16 2/3 percent thereafter, fixed by the Secretary in amount or value of production saved, removed, or sold, and with suspension of royalties for a period, volume, or value of production determined by the Secretary, which suspensions may vary based on the price of production from the lease; or

(I) subject to the requirements of paragraph (4) of this subsection, any modification of bidding systems authorized in subparagraphs (A) through (G), or any other systems of bid variables, terms, and conditions which the Secretary determines to be useful to accomplish the purposes and policies of this subchapter, except that no such bidding system or modification shall have more than one bid variable.

(2) The Secretary may, in his discretion, defer any part of the payment of the cash bonus, as authorized in paragraph (1) of this subsection, according to a schedule announced at the time of the announcement of the lease sale, but such payment shall be made in total no later than five years after the date of the lease sale.

(3)(A) The Secretary may, in order to promote increased production on the lease area, through direct, secondary, or tertiary recovery means, reduce or eliminate any royalty or net profit share set forth in the lease for such area.

(B) In the Western and Central Planning Areas of the Gulf of Mexico and the portion of the Eastern Planning Area of the Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude and in the Planning Areas offshore Alaska, the Secretary may, in order to--

(i) promote development or increased production on producing or non-producing leases; or

(ii) encourage production of marginal resources on producing or non-producing leases;

through primary, secondary, or tertiary recovery means, reduce or eliminate any royalty or net profit share set forth in the lease(s). With the lessee's consent, the Secretary may make other modifications to the royalty or net profit share terms of the lease in order to achieve these purposes.

(C)(i) Notwithstanding the provisions of this subchapter other than this subparagraph, with respect to any lease or unit in existence on November 28, 1995, meeting the requirements of this subparagraph, no royalty payments shall be due on new production, as defined in clause (iv) of this subparagraph, from any lease or unit located in water depths of 200 meters or greater in the Western and Central Planning Areas of the Gulf of Mexico, including that portion of the Eastern Planning Area of the

Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude, until such volume of production as determined pursuant to clause (ii) has been produced by the lessee.

(ii) Upon submission of a complete application by the lessee, the Secretary shall determine within 180 days of such application whether new production from such lease or unit would be economic in the absence of the relief from the requirement to pay royalties provided for by clause (i) of this subparagraph. In making such determination, the Secretary shall consider the increased technological and financial risk of deep water development and all costs associated with exploring, developing, and producing from the lease. The lessee shall provide information required for a complete application to the Secretary prior to such determination. The Secretary shall clearly define the information required for a complete application under this section. Such application may be made on the basis of an individual lease or unit. If the Secretary determines that such new production would be economic in the absence of the relief from the requirement to pay royalties provided for by clause (i) of this subparagraph, the provisions of clause (i) shall not apply to such production. If the Secretary determines that such new production would not be economic in the absence of the relief from the requirement to pay royalties provided for by clause (i), the Secretary must determine the volume of production from the lease or unit on which no royalties would be due in order to make such new production economically viable; except that for new production as defined in clause (iv)(I), in no case will that volume be less than 17.5 million barrels of oil equivalent in water depths of 200 to 400 meters, 52.5 million barrels of oil equivalent in 400-800 meters of water, and 87.5 million barrels of oil equivalent in water depths greater than 800 meters. Redetermination of the applicability of clause (i) shall be undertaken by the Secretary when requested by the lessee prior to the commencement of the new production and upon significant change in the factors upon which the original determination was made. The Secretary shall make such redetermination within 120 days of submission of a complete application. The Secretary may extend the time period for making any determination or redetermination under this clause for 30 days, or longer if agreed to by the applicant, if circumstances so warrant. The lessee shall be notified in writing of any determination or redetermination and the reasons for and assumptions used for such determination. Any determination or redetermination under this clause shall be a final agency action. The Secretary's determination or redetermination shall be judicially reviewable under section 702 of Title 5, only for actions filed within 30 days of the Secretary's determination or redetermination.

(iii) In the event that the Secretary fails to make the determination or redetermination called for in clause (ii) upon application by the lessee within the time period, together with any extension thereof, provided for by clause (ii), no royalty payments shall be due on new production as follows:

(I) For new production, as defined in clause (iv)(I) of this subparagraph, no royalty shall be due on such production according to the schedule of minimum volumes specified in clause (ii) of this subparagraph.

(II) For new production, as defined in clause (iv)(II) of this subparagraph, no royalty shall be due on such production for one year following the start of such production.

(iv) For purposes of this subparagraph, the term “new production” is--

(I) any production from a lease from which no royalties are due on production, other than test production, prior to November 28, 1995; or

(II) any production resulting from lease development activities pursuant to a Development Operations Coordination Document, or supplement thereto that would expand production significantly beyond the level anticipated in the Development Operations Coordination Document, approved by the Secretary after November 28, 1995.

Add183

(v) During the production of volumes determined pursuant to clauses [1] (ii) or (iii) of this subparagraph, in any year during which the arithmetic average of the closing prices on the New York Mercantile Exchange for light sweet crude oil exceeds $28.00 per barrel, any production of oil will be subject to royalties at the lease stipulated royalty rate. Any production subject to this clause shall be counted toward the production volume determined pursuant to clause (ii) or (iii). Estimated royalty payments will be made if such average of the closing prices for the previous year exceeds $28.00. After the end of the calendar year, when the new average price can be calculated, lessees will pay any royalties due, with interest but without penalty, or can apply for a refund, with interest, of any overpayment.

(vi) During the production of volumes determined pursuant to clause (ii) or (iii) of this subparagraph, in any year during which the arithmetic average of the closing prices on the New York Mercantile Exchange for natural gas exceeds $3.50 per million British thermal units, any production of natural gas will be subject to royalties at the lease stipulated royalty rate. Any production subject to this clause shall be counted toward the production volume determined pursuant to clauses [1] (ii) or (iii). Estimated royalty payments will be made if such average of the closing prices for the previous year exceeds $3.50. After the end of the calendar year, when the new average price can be calculated, lessees will pay any royalties due, with interest but without penalty, or can apply for a refund, with interest, of any overpayment.

(vii) The prices referred to in clauses (v) and (vi) of this subparagraph shall be changed during any calendar year after 1994 by the percentage, if any, by which the implicit price deflator for the gross domestic product changed during the preceding calendar year.

(4)(A) The Secretary of Energy shall submit any bidding system authorized in subparagraph (H) of paragraph (1) to the Senate and House of Representatives. The Secretary may institute such bidding system unless either the Senate or the House of Representatives passes a resolution of disapproval within thirty days after receipt of the bidding system.

(B) Subparagraphs (C) through (J) of this paragraph are enacted by Congress--

(i) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but they are applicable only with respect to the procedures to be followed in that House in the case of resolutions described by this paragraph, and they supersede other rules only to the extent that they are inconsistent therewith; and

(ii) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

(C) A resolution disapproving a bidding system submitted pursuant to this paragraph shall immediately be referred to a committee (and all resolutions with respect to the same request shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

(D) If the committee to which has been referred any resolution disapproving the bidding system of the Secretary has not reported the resolution at the end of ten calendar days after its referral, it shall be in order to move either to discharge the committee

from further consideration of the resolution or to discharge the committee from further consideration of any other resolution with respect to the same bidding system which has been referred to the committee.

(E) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same recommendation), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(F) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same bidding system.

(G) When the committee has reported, or has been discharged from further consideration of, a resolution as provided in this paragraph, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(H) Debate on the resolution is limited to not more than two hours, to be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order, and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(I) Motions to postpone, made with respect to the discharge from the committee, or the consideration of a resolution with respect to a bidding system, and motions to proceed to the consideration of other business, shall be decided without debate.

(J) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a bidding system shall be decided without debate.

(5)(A) During the five-year period commencing on September 18, 1978, the Secretary may, in order to obtain statistical information to determine which bidding alternatives will best accomplish the purposes and policies of this subchapter, require, as to no more than 10 per centum of the tracts offered each year, each bidder to submit bids for any area of the outer Continental Shelf in accordance with more than one of the bidding systems set forth in paragraph (1) of this subsection. For such statistical purposes, leases may be awarded using a bidding alternative selected at random for the acquisition of valid statistical data if such bidding alternative is otherwise consistent with the provisions of this subchapter.

(B) The bidding systems authorized by paragraph (1) of this subsection, other than the system authorized by subparagraph (A), shall be applied to not less than 20 per centum and not more than 60 per centum of the total area offered for leasing each year during the five-year period beginning on September 18, 1978, unless the Secretary determines that the requirements set forth in this subparagraph are inconsistent with the purposes and policies of this subchapter.

(6) At least ninety days prior to notice of any lease sale under subparagraph (D), (E), (F), or, if appropriate, (H) of paragraph (1), the Secretary shall by regulation establish rules to govern the calculation of net profits. In the event of any dispute between the

United States and a lessee concerning the calculation of the net profits under the regulation issued pursuant to this paragraph, the burden of proof shall be on the lessee.

(7) After an oil and gas lease is granted pursuant to any of the work commitment options of paragraph (1) of this subsection--

(A) the lessee, at its option, shall deliver to the Secretary upon issuance of the lease either (i) a cash deposit for the full amount of the exploration work commitment, or (ii) a performance bond in form and substance and with a surety satisfactory to the Secretary, in the principal amount of such exploration work commitment assuring the Secretary that such commitment shall be faithfully discharged in accordance with this section, regulations, and the lease; and for purposes of this subparagraph, the principal amount of such cash deposit or bond may, in accordance with regulations, be periodically reduced upon proof, satisfactory to the Secretary, that a portion of the exploration work commitment has been satisfied;

(B) 50 per centum of all exploration expenditures on, or directly related to, the lease, including, but not limited to (i) geological investigations and related activities, (ii) geophysical investigations including seismic, geomagnetic, and gravity surveys, data processing and interpretation, and (iii) exploratory drilling, core drilling, redrilling, and well completion or abandonment, including the drilling of wells sufficient to determine the size and a real extent of any newly discovered field, and including the cost of mobilization and demobilization of drilling equipment, shall be included in satisfaction of the commitment, except that the lessee's general overhead cost shall not be so included against the work commitment, but its cost (including employee benefits) of employees directly assigned to such exploration work shall be so included; and

(C) if at the end of the primary term of the lease, including any extension thereof, the full dollar amount of the exploration work commitment has not been satisfied, the balance shall then be paid in cash to the Secretary.

(8) Not later than thirty days before any lease sale, the Secretary shall submit to the Congress and publish in the Federal Register a notice--

(A) identifying any bidding system which will be utilized for such lease sale and the reasons for the utilization of such bidding system; and

(B) designating the lease tracts selected which are to be offered in such sale under the bidding system authorized by subparagraph (A) of paragraph (1) and the lease tracts selected which are to be offered under any one or more of the bidding systems authorized by subparagraphs (B) through (H) of paragraph (1), and the reasons such lease tracts are to be offered under a particular bidding system.

(b) Terms and provisions of oil and gas leases

An oil and gas lease issued pursuant to this section shall--

(1) be for a tract consisting of a compact area not exceeding five thousand seven hundred and sixty acres, as the Secretary may determine, unless the Secretary finds that a larger area is necessary to comprise a reasonable economic production unit;

(2) be for an initial period of--

(A) five years; or

(B) not to exceed ten years where the Secretary finds that such longer period is necessary to encourage exploration and development in areas because of unusually deep water or other unusually adverse conditions,

and as long after such initial period as oil or gas is produced from the area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon;

(3) require the payment of amount or value as determined by one of the bidding systems set forth in subsection (a) of this section;

(4) entitle the lessee to explore, develop, and produce the oil and gas contained within the lease area, conditioned upon due diligence requirements and the approval of the development and production plan required by this subchapter;

(5) provide for suspension or cancellation of the lease during the initial lease term or thereafter pursuant to section 1334 of this title;

(6) contain such rental and other provisions as the Secretary may prescribe at the time of offering the area for lease; and

(7) provide a requirement that the lessee offer 20 per centum of the crude oil, condensate, and natural gas liquids produced on such lease, at the market value and point of delivery applicable to Federal royalty oil, to small or independent refiners as defined in the Emergency Petroleum Allocation Act of 1973.

(c) Antitrust review of lease sales

(1) Following each notice of a proposed lease sale and before the acceptance of bids and the issuance of leases based on such bids, the Secretary shall allow the Attorney General, in consultation with the Federal Trade Commission, thirty days to review the results of such lease sale, except that the Attorney General, after consultation with the Federal Trade Commission, may agree to a shorter review period.

(2) The Attorney General may, in consultation with the Federal Trade Commission, conduct such antitrust review on the likely effects the issuance of such leases would have on competition as the Attorney General, after consultation with the Federal Trade Commission, deems appropriate and shall advise the Secretary with respect to such review. The Secretary shall provide such information as the Attorney General, after consultation with the Federal Trade Commission, may require in order to conduct any antitrust review pursuant to this paragraph and to make recommendations pursuant to paragraph (3) of this subsection.

(3) The Attorney General, after consultation with the Federal Trade Commission, may make such recommendations to the Secretary, including the nonacceptance of any bid, as may be appropriate to prevent any situation inconsistent with the antitrust laws. If the Secretary determines, or if the Attorney General advises the Secretary, after consultation with the Federal Trade

Commission and prior to the issuance of any lease, that such lease may create or maintain a situation inconsistent with the antitrust laws, the Secretary may--

(A) refuse (i) to accept an otherwise qualified bid for such lease, or (ii) to issue such lease, notwithstanding subsection (a) of this section; or

(B) issue such lease, and notify the lessee and the Attorney General of the reason for such decision.

(4)(A) Nothing in this subsection shall restrict the power under any other Act or the common law of the Attorney General, the Federal Trade Commission, or any other Federal department or agency to secure information, conduct reviews, make recommendations, or seek appropriate relief.

(B) Neither the issuance of a lease nor anything in this subsection shall modify or abridge any private right of action under the antitrust laws.

(d) Due diligence

No bid for a lease may be submitted if the Secretary finds, after notice and hearing, that the bidder is not meeting due diligence requirements on other leases.

(e) Secretary's approval for sale, exchange, assignment, or other transfer of leases

No lease issued under this subchapter may be sold, exchanged, assigned, or otherwise transferred except with the approval of the Secretary. Prior to any such approval, the Secretary shall consult with and give due consideration to the views of the Attorney General.

(f) Antitrust immunity or defenses

Nothing in this subchapter shall be deemed to convey to any person, association, corporation, or other business organization immunity from civil or criminal liability, or to create defenses to actions, under any antitrust law.

(g) Leasing of lands within three miles of seaward boundaries of coastal States; deposit of revenues; distribution of revenues

(1) At the time of soliciting nominations for the leasing of lands containing tracts wholly or partially within three nautical miles of the seaward boundary of any coastal State, and subsequently as new information is obtained or developed by the Secretary, the Secretary shall, in addition to the information required by section 1352 of this title, provide the Governor of such State--

(A) an identification and schedule of the areas and regions proposed to be offered for leasing;

(B) at the request of the Governor of such State, all information from all sources concerning the geographical, geological, and ecological characteristics of such tracts;

(C) an estimate of the oil and gas reserves in the areas proposed for leasing; and

(D) at the request of the Governor of such State, an identification of any field, geological structure, or trap located wholly or partially within three nautical miles of the seaward boundary of such coastal State, including all information relating to the entire field, geological structure, or trap.

The provisions of the first sentence of subsection (c) and the provisions of subsections (e)--(h) of section 1352 of this title shall be applicable to the release by the Secretary of any information to any coastal State under this paragraph. In addition, the provisions of subsections (c) and (e)--(h) of section 1352 of this title shall apply in their entirety to the release by the Secretary to any coastal State of any information relating to Federal lands beyond three nautical miles of the seaward boundary of such coastal State.

(2) Notwithstanding any other provision of this subchapter, the Secretary shall deposit into a separate account in the Treasury of the United States all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1)), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of any Federal tract which lies wholly (or, in the case of Alaska, partially [2] until seven years from the date of settlement of any boundary dispute that is the subject of an agreement under section 1336 of this title entered into prior to January 1, 1986 or until April 15, 1993 with respect to any other tract) within three nautical miles of the seaward boundary of any coastal State, or, (except as provided above for Alaska) in the case where a Federal tract lies partially within three nautical miles of the seaward boundary, a percentage of bonuses, rents, royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1)), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of such tract equal to the percentage of surface acreage of the tract that lies within such three nautical miles. Except as provided in paragraph (5) of this subsection, not later than the last business day of the month following the month in which those revenues are deposited in the Treasury, the Secretary shall transmit to such coastal State 27 percent of those revenues, together with all accrued interest thereon. The remaining balance of such revenues shall be transmitted simultaneously to the miscellaneous receipts account of the Treasury of the United States.

(3) Whenever the Secretary or the Governor of a coastal State determines that a common potentially hydrocarbon-bearing area may underlie the Federal and State boundary, the Secretary or the Governor shall notify the other party in writing of his determination and the Secretary shall provide to the Governor notice of the current and projected status of the tract or tracts containing the common potentially hydrocarbon-bearing area. If the Secretary has leased or intends to lease such tract or tracts, the Secretary and the Governor of the coastal State may enter into an agreement to divide the revenues from production of any common potentially hydrocarbon-bearing area, by unitization or other royalty sharing agreement, pursuant to existing law. If the Secretary and the Governor do not enter into an agreement, the Secretary may nevertheless proceed with the leasing of the tract or tracts. Any revenues received by the United States under such an agreement shall be subject to the requirements of paragraph (2).

(4) The deposits in the Treasury account described in this section shall be invested by the Secretary of the Treasury in securities backed by the full faith and credit of the United States having maturities suitable to the needs of the account and yielding the highest reasonably available interest rates as determined by the Secretary of the Treasury.

Add189

(5)(A) When there is a boundary dispute between the United States and a State which is subject to an agreement under section 1336 of this title, the Secretary shall credit to the account established pursuant to such agreement all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1)), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of any Federal tract which lies wholly or partially within three nautical miles of the seaward boundary asserted by the State, if that money has not otherwise been deposited in such account. Proceeds of an escrow account established pursuant to an agreement under section 1336 of this title shall be distributed as follows:

(i) Twenty-seven percent of all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1)), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978, of any tract which lies wholly within three nautical miles of the seaward boundary asserted by the Federal Government in the boundary dispute, together with all accrued interest thereon, shall be paid to the State either--

(I) within thirty days of December 1, 1987, or

(II) by the last business day of the month following the month in which those revenues are deposited in the Treasury, whichever date is later.

(ii) Upon the settlement of a boundary dispute which is subject to a section 1336 of this title agreement between the United States and a State, the Secretary shall pay to such State any additional moneys due such State from amounts deposited in the escrow account. If there is insufficient money deposited in or credited to the escrow account, the Secretary shall transmit, from any revenues derived from any lease of Federal lands under this subchapter, the remaining balance due such State in accordance with the formula set forth in section 8004(b)(1)(B) of the Outer Continental Shelf Lands Act Amendments of 1985.

(B) This paragraph applies to all Federal oil and gas lease sales, under this subchapter, including joint lease sales, occurring after September 18, 1978.

(6) This section shall be deemed to take effect on October 1, 1985, for purposes of determining the amounts to be deposited in the separate account and the States' shares described in paragraph (2).

(7) When the Secretary leases any tract which lies wholly or partially within three miles of the seaward boundary of two or more States, the revenues from such tract shall be distributed as otherwise provided by this section, except that the State's share of such revenues that would otherwise result under this section shall be divided equally among such States.

(h) State claims to jurisdiction over submerged lands

Nothing contained in this section shall be construed to alter, limit, or modify any claim of any State to any jurisdiction over, or any right, title, or interest in, any submerged lands.

(i) Sulphur leases; award to highest bidder; method of bidding

In order to meet the urgent need for further exploration and development of the sulphur deposits in the submerged lands of the outer Continental Shelf, the Secretary is authorized to grant to the qualified persons offering the highest cash bonuses on a basis of competitive bidding sulphur leases on submerged lands of the outer Continental Shelf, which are not covered by leases which include sulphur and meet the requirements of section 1335(a) of this title, and which sulphur leases shall be offered for bid by sealed bids and granted on separate leases from oil and gas leases, and for a separate consideration, and without priority or preference accorded to oil and gas lessees on the same area.

(j) Terms and provisions of sulphur leases

A sulphur lease issued by the Secretary pursuant to this section shall (1) cover an area of such size and dimensions as the Secretary may determine, (2) be for a period of not more than ten years and so long thereafter as sulphur may be produced from the area in paying quantities or drilling, well reworking, plant construction, or other operations for the production of sulphur, as approved by the Secretary, are conducted thereon, (3) require the payment to the United States of such royalty as may be specified in the lease but not less than 5 per centum of the gross production or value of the sulphur at the wellhead, and (4) contain such rental provisions and such other terms and provisions as the Secretary may by regulation prescribe at the time of offering the area for lease.

(k) Other mineral leases; award to highest bidder; terms and conditions; agreements for use of resources for shore protection, beach or coastal wetlands restoration, or other projects

(1) The Secretary is authorized to grant to the qualified persons offering the highest cash bonuses on a basis of competitive bidding leases of any mineral other than oil, gas, and sulphur in any area of the outer Continental Shelf not then under lease for such mineral upon such royalty, rental, and other terms and conditions as the Secretary may prescribe at the time of offering the area for lease.

(2)(A) Notwithstanding paragraph (1), the Secretary may negotiate with any person an agreement for the use of Outer Continental Shelf sand, gravel and shell resources--

(i) for use in a program of, or project for, shore protection, beach restoration, or coastal wetlands restoration undertaken by a Federal, State, or local government agency; or

(ii) for use in a construction project, other than a project described in clause (i), that is funded in whole or in part by or authorized by the Federal Government.

(B) In carrying out a negotiation under this paragraph, the Secretary may assess a fee based on an assessment of the value of the resources and the public interest served by promoting development of the resources. No fee shall be assessed directly or indirectly under this subparagraph against a Federal, State, or local government agency.

(C) The Secretary may, through this paragraph and in consultation with the Secretary of Commerce, seek to facilitate projects in the coastal zone, as such term is defined in section 1453 of Title 16, that promote the policy set forth in section 1452 of Title 16.

(D) Any Federal agency which proposes to make use of sand, gravel and shell resources subject to the provisions of this subchapter shall enter into a Memorandum of Agreement with the Secretary concerning the potential use of those resources.

The Secretary shall notify the Committee on Merchant Marine and Fisheries and the Committee on Natural Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate on any proposed project for the use of those resources prior to the use of those resources.

(l) Publication of notices of sale and terms of bidding

Notice of sale of leases, and the terms of bidding, authorized by this section shall be published at least thirty days before the date of sale in accordance with rules and regulations promulgated by the Secretary.

(m) Disposition of revenues

All moneys paid to the Secretary for or under leases granted pursuant to this section shall be deposited in the Treasury in accordance with section 1338 of this title.

(n) Issuance of lease as nonprejudicial to ultimate settlement or adjudication of controversies

The issuance of any lease by the Secretary pursuant to this subchapter, or the making of any interim arrangements by the Secretary pursuant to section 1336 of this title shall not prejudice the ultimate settlement or adjudication of the question as to whether or not the area involved is in the outer Continental Shelf.

(o) Cancellation of leases for fraud

The Secretary may cancel any lease obtained by fraud or misrepresentation.

(p) Leases, easements, or rights-of-way for energy and related purposes

(1) In general

The Secretary, in consultation with the Secretary of the Department in which the Coast Guard is operating and other relevant departments and agencies of the Federal Government, may grant a lease, easement, or right-of-way on the outer Continental Shelf for activities not otherwise authorized in this subchapter, the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.), the Ocean Thermal Energy Conversion Act of 1980 (42 U.S.C. 9101 et seq.), or other applicable law, if those activities--

(A) support exploration, development, production, or storage of oil or natural gas, except that a lease, easement, or right-of-way shall not be granted in an area in which oil and gas preleasing, leasing, and related activities are prohibited by a moratorium;

(B) support transportation of oil or natural gas, excluding shipping activities;

(C) produce or support production, transportation, storage, or transmission of energy from sources other than oil and gas;

(D) use, for energy-related purposes or for other authorized marine-related purposes, facilities currently or previously used for activities authorized under this subchapter, except that any oil and gas energy-related uses shall not be authorized in areas in which oil and gas preleasing, leasing, and related activities are prohibited by a moratorium; or

(E) provide for, support, or are directly related to the injection of a carbon dioxide stream into sub-seabed geologic formations for the purpose of long-term carbon sequestration.

(2) Payments and revenues

(A) 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.

(B) The Secretary shall provide for the payment of 27 percent of the revenues received by the Federal Government as a result of payments under this section from projects that are located wholly or partially within the area extending three nautical miles seaward of State submerged lands. Payments shall be made based on a formula established by the Secretary by rulemaking no later than 180 days after August 8, 2005, that provides for equitable distribution, based on proximity to the project, among coastal states that have a coastline that is located within 15 miles of the geographic center of the project.

(3) Competitive or noncompetitive basis

Except with respect to projects that meet the criteria established under section 388(d) of the Energy Policy Act of 2005, the Secretary shall issue a lease, easement, or right-of-way under paragraph (1) on a competitive basis unless the Secretary determines after public notice of a proposed lease, easement, or right-of-way that there is no competitive interest.

(4) Requirements

The Secretary shall ensure that any activity under this subsection is carried out in a manner that provides for--

(A) safety;

(B) protection of the environment;

(C) prevention of waste;

(D) conservation of the natural resources of the outer Continental Shelf;

(E) coordination with relevant Federal agencies;

(F) protection of national security interests of the United States;

(G) protection of correlative rights in the outer Continental Shelf;

(H) a fair return to the United States for any lease, easement, or right-of-way under this subsection;

(I) prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas;

(J) consideration of--

(i) the location of, and any schedule relating to, a lease, easement, or right-of-way for an area of the outer Continental Shelf; and

(ii) any other use of the sea or seabed, including use for a fishery, a sealane, a potential site of a deepwater port, or navigation;

(K) public notice and comment on any proposal submitted for a lease, easement, or right-of-way under this subsection; and

(L) oversight, inspection, research, monitoring, and enforcement relating to a lease, easement, or right-of-way under this subsection.

(5) Lease duration, suspension, and cancellation

The Secretary shall provide for the duration, issuance, transfer, renewal, suspension, and cancellation of a lease, easement, or right-of-way under this subsection.

(6) Security

The Secretary shall require the holder of a lease, easement, or right-of-way granted under this subsection to--

(A) furnish a surety bond or other form of security, as prescribed by the Secretary;

(B) comply with such other requirements as the Secretary considers necessary to protect the interests of the public and the United States; and

(C) provide for the restoration of the lease, easement, or right-of-way.

(7) Coordination and consultation with affected State and local governments

The Secretary shall provide for coordination and consultation with the Governor of any State or the executive of any local government that may be affected by a lease, easement, or right-of-way under this subsection.

(8) Regulations

Not later than 270 days after August 8, 2005, the Secretary, in consultation with the Secretary of Defense, the Secretary of the Department in which the Coast Guard is operating, the Secretary of Commerce, heads of other relevant departments and agencies of the Federal Government, and the Governor of any affected State, shall issue any necessary regulations to carry out this subsection.

(9) Effect of subsection

Nothing in this subsection displaces, supersedes, limits, or modifies the jurisdiction, responsibility, or authority of any Federal or State agency under any other Federal law.

(10) Applicability

This subsection does not apply to any area on the outer Continental Shelf within the exterior boundaries of any unit of the National Park System, National Wildlife Refuge System, or National Marine Sanctuary System, or any National Monument.

CREDIT(S)

(Aug. 7, 1953, c. 345, § 8, 67 Stat. 468; Pub.L. 95-372, Title II, § 205(a), (b), Sept. 18, 1978, 92 Stat. 640, 644; Pub.L. 99-272, Title VIII, § 8003, Apr. 7, 1986, 100 Stat. 148; Pub.L. 100-202, § 101(g) [Title I, § 100], Dec. 22, 1987, 101 Stat. 1329-225; Pub.L. 103-426, § 1(a), Oct. 31, 1994, 108 Stat. 4371; Pub.L. 104-58, Title III, §§ 302, 303, Nov. 28, 1995, 109 Stat. 563, 565; Pub.L. 105-362, Title IX, § 901(k), Nov. 10, 1998, 112 Stat. 3290; Pub.L. 106-53, Title II, § 215(b)(1), Aug. 17, 1999, 113 Stat. 292; Pub.L. 109-58, Title III, §§ 346, 388(a), (c), Aug. 8, 2005, 119 Stat. 704, 744, 747; Pub.L. 117-58, Div. D, Title III, §§ 40307(b), 40343, Nov. 15, 2021, 135 Stat. 1003, 1033; Pub.L. 117-169, Title V, § 50261, Aug. 16, 2022, 136 Stat. 2056.)

Footnotes

1 So in original. Probably should be “clause”.

2 So in original.

43 U.S.C.A. § 1337, 43 USCA § 1337
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 43. Public Lands (Refs & Annos)
Chapter 29. Submerged Lands
Subchapter III. Outer Continental Shelf Lands (Refs & Annos)

43 U.S.C.A. § 1349

§ 1349. Citizens suits, jurisdiction and judicial review

Currentness

(a) Persons who may bring actions; persons against whom action may be brought; time of action; intervention by Attorney General; costs and fees; security

(1) Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this subchapter or any regulation promulgated under this subchapter, or of the terms of any permit or lease issued by the Secretary under this subchapter.

(2) Except as provided in paragraph (3) of this subsection, no action may be commenced under subsection (a)(1) of this section--

(A) prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary and any other appropriate Federal official, to the State in which the violation allegedly occurred or is occurring, and to any alleged violator; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States or a State with respect to such matter, but in any such action in a court of the United States any person having a legal interest which is or may be adversely affected may intervene as a matter of right.

(3) An action may be brought under this subsection immediately after notification of the alleged violation in any case in which the alleged violation constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff.

(4) In any action commenced pursuant to this section, the Attorney General, upon the request of the Secretary or any other appropriate Federal official, may intervene as a matter of right.

(5) A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in a sufficient amount to compensate for any loss or damage suffered, in accordance with the Federal Rules of Civil Procedure.

(6) Except as provided in subsection (c) of this section, all suits challenging actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this subchapter, or any regulation promulgated under this subchapter, or the terms of any permit or lease issued by the Secretary under this subchapter, shall be undertaken in accordance with the procedures described in this subsection. Nothing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.

(b) Jurisdiction and venue of actions

(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this subchapter may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

(c) Review of Secretary's approval of leasing program; review of approval, modification or disapproval of exploration or production plan; persons who may seek review; scope of review; certiorari to Supreme Court

(1) Any action of the Secretary to approve a leasing program pursuant to section 1344 of this title shall be subject to judicial review only in the United States Court of Appeal [1] for the District of Columbia.

(2) Any action of the Secretary to approve, require modification of, or disapprove any exploration plan or any development and production plan under this subchapter shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located.

(3) The judicial review specified in paragraphs (1) and (2) of this subsection shall be available only to a person who (A) participated in the administrative proceedings related to the actions specified in such paragraphs, (B) is adversely affected or aggrieved by such action, (C) files a petition for review of the Secretary's action within sixty days after the date of such action, and (D) promptly transmits copies of the petition to the Secretary and to the Attorney General.

(4) Any action of the Secretary specified in paragraph (1) or (2) shall only be subject to review pursuant to the provisions of this subsection, and shall be specifically excluded from citizen suits which are permitted pursuant to subsection (a) of this section.

(5) The Secretary shall file in the appropriate court the record of any public hearings required by this subchapter and any additional information upon which the Secretary based his decision, as required by section 2112 of Title 28. Specific objections to the action of the Secretary shall be considered by the court only if the issues upon which such objections are based have been submitted to the Secretary during the administrative proceedings related to the actions involved.

(6) The court of appeals conducting a proceeding pursuant to this subsection shall consider the matter under review solely on the record made before the Secretary. The findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary for such further action as it may direct.

(7) Upon the filing of the record with the court, pursuant to paragraph (5), the jurisdiction of the court shall be exclusive and its judgment shall be final, except that such judgment shall be subject to review by the Supreme Court of the United States upon writ of certiorari.

CREDIT(S)

(Aug. 7, 1953, c. 345, § 23, as added Pub.L. 95-372, Title II, § 208, Sept. 18, 1978, 92 Stat. 657; amended Pub.L. 98-620, Title IV, § 402(44), Nov. 8, 1984, 98 Stat. 3360.)

Footnotes

1 So in original. Probably should be “Appeals”.

43 U.S.C.A. § 1349, 43 USCA § 1349
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

Code of Federal Regulations
Title 33. Navigation and Navigable Waters
Chapter II. Corps of Engineers, Department of the Army
Part 323. Permits for Discharges of Dredged or Fill Material into Waters of the United States (Refs & Annos)

33 C.F.R. § 323.2

§ 323.2 Definitions.

Effective: December 30, 2008
Currentness

For the purpose of this part, the following terms are defined:

(a) The term waters of the United States and all other terms relating to the geographic scope of jurisdiction are defined at 33 CFR part 328.

(b) The term lake means a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.

(c) The term dredged material means material that is excavated or dredged from waters of the United States.

(d)(1) Except as provided below in paragraph (d)(2), the term discharge of dredged material means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, the following:

(i) The addition of dredged material to a specified discharge site located in waters of the United States;

(ii) The runoff or overflow from a contained land or water disposal area; and

(iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

(2) The term discharge of dredged material does not include the following:

(i) Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable State section 404 program.

(ii) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

(iii) Incidental fallback.

(3) Section 404 authorization is not required for the following:

(i) Any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States as defined in paragraphs (d)(4) and (d)(5) of this section; however, this exception does not apply to any person preparing to undertake mechanized landclearing, ditching, channelization and other excavation activity in a water of the United States, which would result in a redeposit of dredged material, unless the person demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to commencing the activity involving the discharge, that the activity would not have the effect of destroying or degrading any area of waters of the United States, as defined in paragraphs (d)(4) and (d)(5) of this section. The person proposing to undertake mechanized landclearing, ditching, channelization or other excavation activity bears the burden of demonstrating that such activity would not destroy or degrade any area of waters of the United States.

(ii) Incidental movement of dredged material occurring during normal dredging operations, defined as dredging for navigation in navigable waters of the United States, as that term is defined in part 329 of this chapter, with proper authorization from the Congress and/or the Corps pursuant to part 322 of this Chapter; however, this exception is not applicable to dredging activities in wetlands, as that term is defined at section 328.3 of this Chapter.

(iii) Certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by or otherwise subject to regulation under section 404. See 33 CFR 323.4 for discharges that do not required permits.

(4) For purposes of this section, an activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States.

Note: Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.

(5) For purposes of this section, an activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a de minimis (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function.

Add200

(6) [Redesignated as subsection (d)(5) by 73 FR 79645]

(e)(1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

(f) The term discharge of fill material means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms). See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

(g) The term individual permit means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project involving the proposed discharge(s) in accordance with the procedures of this part and 33 CFR part 325 and a determination that the proposed discharge is in the public interest pursuant to 33 CFR part 320.

(h) The term general permit means a Department of the Army authorization that is issued on a nationwide or regional basis for a category or categories of activities when:

(1) Those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

(2) The general permit would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, State, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR part 330.)

Add201

Credits

[58 FR 45035, Aug. 25, 1993; 58 FR 48424, Sept. 15, 1993; 64 FR 25123, May 10, 1999; 66 FR 4574, Jan. 17, 2001; 66 FR 10367, Feb. 15, 2001; 67 FR 31142, May 9, 2002; 73 FR 79645, Dec. 30, 2008]

SOURCE: 51 FR 41232, Nov. 13, 1986, unless otherwise noted.

AUTHORITY: 33 U.S.C. 1344.

Notes of Decisions (78)

Current through Feb. 29, 2024, 89 FR 15010. Some sections may be more current. See credits for details.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter H. Ocean Dumping
Part 230. Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material (Refs & Annos)
Subpart B. Compliance with the Guidelines

40 C.F.R. § 230.11

§ 230.11 Factual determinations.

Currentness

The permitting authority shall determine in writing the potential short-term or long-term effects of a proposed discharge of dredged or fill material on the physical, chemical, and biological components of the aquatic environment in light of subparts C through F. Such factual determinations shall be used in § 230.12 in making findings of compliance or non-compliance with the restrictions on discharge in § 230.10. The evaluation and testing procedures described in § 230.60 and § 230.61 of subpart G shall be used as necessary to make, and shall be described in, such determination. The determinations of effects of each proposed discharge shall include the following:

(a) Physical substrate determinations. Determine the nature and degree of effect that the proposed discharge will have, individually and cumulatively, on the characteristics of the substrate at the proposed disposal site. Consideration shall be given to the similarity in particle size, shape, and degree of compaction of the material proposed for discharge and the material constituting the substrate at the disposal site, and any potential changes in substrate elevation and bottom contours, including changes outside of the disposal site which may occur as a result of erosion, slumpage, or other movement of the discharged material. The duration and physical extent of substrate changes shall also be considered. The possible loss of environmental values (§ 230.20) and actions to minimize impact (subpart H) shall also be considered in making these determinations. Potential changes in substrate elevation and bottom contours shall be predicted on the basis of the proposed method, volume, location, and rate of discharge, as well as on the individual and combined effects of current patterns, water circulation, wind and wave action, and other physical factors that may affect the movement of the discharged material.

(b) Water circulation, fluctuation, and salinity determinations. Determine the nature and degree of effect that the proposed discharge will have individually and cumulatively on water, current patterns, circulation including downstream flows, and normal water fluctuation. Consideration shall be given to water chemistry, salinity, clarity, color, odor, taste, dissolved gas levels, temperature, nutrients, and eutrophication plus other appropriate characteristics. Consideration shall also be given to the potential diversion or obstruction of flow, alterations of bottom contours, or other significant changes in the hydrologic regime. Additional consideration of the possible loss of environmental values (§§ 230.23 through 230.25) and actions to minimize impacts (subpart H), shall be used in making these determinations. Potential significant effects on the current patterns, water circulation, normal water fluctuation and salinity shall be evaluated on the basis of the proposed method, volume, location, and rate of discharge.

(c) Suspended particulate/turbidity determinations. Determine the nature and degree of effect that the proposed discharge will have, individually and cumulatively, in terms of potential changes in the kinds and concentrations of suspended particulate/turbidity in the vicinity of the disposal site. Consideration shall be given to the grain size of the material proposed for discharge,

the shape and size of the plume of suspended particulates, the duration of the discharge and resulting plume and whether or not the potential changes will cause violations of applicable water quality standards. Consideration should also be given to the possible loss of environmental values (§ 230.21) and to actions for minimizing impacts (subpart H). Consideration shall include the proposed method, volume, location, and rate of discharge, as well as the individual and combined effects of current patterns, water circulation and fluctuations, wind and wave action, and other physical factors on the movement of suspended particulates.

(d) Contaminant determinations. Determine the degree to which the material proposed for discharge will introduce, relocate, or increase contaminants. This determination shall consider the material to be discharged, the aquatic environment at the proposed disposal site, and the availability of contaminants.

(e) Aquatic ecosystem and organism determinations. Determine the nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the structure and function of the aquatic ecosystem and organisms. Consideration shall be given to the effect at the proposed disposal site of potential changes in substrate characteristics and elevation, water or substrate chemistry, nutrients, currents, circulation, fluctuation, and salinity, on the recolonization and existence of indigenous aquatic organisms or communities. Possible loss of environmental values (§ 230.31), and actions to minimize impacts (subpart H) shall be examined. Tests as described in § 230.61 (Evaluation and Testing), may be required to provide information on the effect of the discharge material on communities or populations of organisms expected to be exposed to it.

(f) Proposed disposal site determinations.

(1) Each disposal site shall be specified through the application of these Guidelines. The mixing zone shall be confined to the smallest practicable zone within each specified disposal site that is consistent with the type of dispersion determined to be appropriate by the application of these Guidelines. In a few special cases under unique environmental conditions, where there is adequate justification to show that widespread dispersion by natural means will result in no significantly adverse environmental effects, the discharged material may be intended to be spread naturally in a very thin layer over a large area of the substrate rather than be contained within the disposal site.

(2) The permitting authority and the Regional Administrator shall consider the following factors in determining the acceptability of a proposed mixing zone:

(i) Depth of water at the disposal site;

(ii) Current velocity, direction, and variability at the disposal site;

(iii) Degree of turbulence;

(iv) Stratification attributable to causes such as obstructions, salinity or density profiles at the disposal site;

(v) Discharge vessel speed and direction, if appropriate;

(vi) Rate of discharge;

(vii) Ambient concentration of constituents of interest;

(viii) Dredged material characteristics, particularly concentrations of constituents, amount of material, type of material (sand, silt, clay, etc.) and settling velocities;

(ix) Number of discharge actions per unit of time;

(x) Other factors of the disposal site that affect the rates and patterns of mixing.

(g) Determination of cumulative effects 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 the evaluation of individual permit applications, the issuance of a General permit, and monitoring and enforcement of existing permits.

(h) Determination of secondary effects on the aquatic ecosystem.

(1) Secondary effects are effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material. Information about secondary effects on aquatic ecosystems shall be considered prior to the time final section 404 action is taken by permitting authorities.

(2) Some examples of secondary effects on an aquatic ecosystem are fluctuating water levels in an impoundment and downstream associated with the operation of a dam, septic tank leaching and surface runoff from residential or commercial developments on fill, and leachate and runoff from a sanitary landfill located in waters of the U.S. Activities to be conducted on fast land created by the discharge of dredged or fill material in waters of the United States may have secondary impacts within those waters which should be considered in evaluating the impact of creating those fast lands.

SOURCE: 45 FR 85344, Dec. 24, 1980; 80 FR 37115, June 29, 2015; 84 FR 56669, Oct. 22, 2019; 85 FR 22341, April 21, 2020, unless otherwise noted.

AUTHORITY: 33 U.S.C. 1251 et seq.

Add205

Notes of Decisions (38)

Current through Feb. 29, 2024, 89 FR 15010. Some sections may be more current. See credits for details.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Subchapter A. National Environmental Policy Act Implementing Regulations (Refs & Annos)
Part 1500. Purpose and Policy (Refs & Annos)

40 C.F.R. § 1500.1

§ 1500.1 Purpose and policy.

Effective: September 14, 2020
Currentness

(a) The National Environmental Policy Act (NEPA) is a procedural statute intended to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process. Section 101 of NEPA establishes the national environmental policy of the Federal Government to use all practicable means and measures to foster and promote the general welfare, create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. Section 102(2) of NEPA establishes the procedural requirements to carry out the policy stated in section 101 of NEPA. In particular, it requires Federal agencies to provide a detailed statement on proposals for major Federal actions significantly affecting the quality of the human environment. The purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information, and the public has been informed regarding the decision-making process. NEPA does not mandate particular results or substantive outcomes. NEPA's purpose is not to generate paperwork or litigation, but to provide for informed decision making and foster excellent action.

(b) The regulations in this subchapter implement section 102(2) of NEPA. They provide direction to Federal agencies to determine what actions are subject to NEPA's procedural requirements and the level of NEPA review where applicable. The regulations in this subchapter are intended to ensure that relevant environmental information is identified and considered early in the process in order to ensure informed decision making by Federal agencies. The regulations in this subchapter are also intended to ensure that Federal agencies conduct environmental reviews in a coordinated, consistent, predictable and timely manner, and to reduce unnecessary burdens and delays. Finally, the regulations in this subchapter promote concurrent environmental reviews to ensure timely and efficient decision making.

SOURCE: 85 FR 43357, July 16, 2020, unless otherwise noted.

AUTHORITY: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123; and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

Notes of Decisions (49)

Current through Feb. 29, 2024, 89 FR 15010. Some sections may be more current. See credits for details.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Subchapter A. National Environmental Policy Act Implementing Regulations (Refs & Annos)
Part 1501. NEPA and Agency Planning (Refs & Annos)

40 C.F.R. § 1501.3

§ 1501.3 Determine the appropriate level of NEPA review.

Effective: September 14, 2020
Currentness

(a) In assessing the appropriate level of NEPA review, Federal agencies should determine whether the proposed action:

(1) Normally does not have significant effects and is categorically excluded (§ 1501.4);

(2) Is not likely to have significant effects or the significance of the effects is unknown and is therefore appropriate for an environmental assessment (§ 1501.5); or

(3) Is likely to have significant effects and is therefore appropriate for an environmental impact statement (part 1502 of this chapter).

(b) In considering whether the effects of the proposed action are significant, agencies shall analyze the potentially affected environment and degree of the effects of the action. Agencies should consider connected actions consistent with § 1501.9(e)(1).

(1) In considering the potentially affected environment, agencies should consider, as appropriate to the specific action, the affected area (national, regional, or local) and its resources, such as listed species and designated critical habitat under the Endangered Species Act. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend only upon the effects in the local area.

(2) In considering the degree of the effects, agencies should consider the following, as appropriate to the specific action:

(i) Both short- and long-term effects.

(ii) Both beneficial and adverse effects.

(iii) Effects on public health and safety.

(iv) Effects that would violate Federal, State, Tribal, or local law protecting the environment.

SOURCE: 85 FR 43357, July 16, 2020; 85 FR 43359, July 16, 2020, unless otherwise noted.

AUTHORITY: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123; and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

Notes of Decisions (2)

Current through Feb. 29, 2024, 89 FR 15010. Some sections may be more current. See credits for details.

Code of Federal Regulations
Title 50. Wildlife and Fisheries
Chapter IV. Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations
Subchapter A
Part 402. Interagency Cooperation—Endangered Species Act of 1973, as Amended (Refs & Annos)
Subpart B. Consultation Procedures

50 C.F.R. § 402.10

§ 402.10 Conference on proposed species or proposed critical habitat.

Currentness

(a) Each Federal agency shall confer with the Service on any action which is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat. The conference is designed to assist the Federal agency and any applicant in identifying and resolving potential conflicts at an early stage in the planning process.

(b) The Federal agency shall initiate the conference with the Director. The Service may request a conference if, after a review of available information, it determines that a conference is required for a particular action.

(c) A conference between a Federal agency and the Service shall consist of informal discussions concerning an action that is likely to jeopardize the continued existence of the proposed species or result in the destruction or adverse modification of the proposed critical habitat at issue. Applicants may be involved in these informal discussions to the greatest extent practicable. During the conference, the Service will make advisory recommendations, if any, on ways to minimize or avoid adverse effects. If the proposed species is subsequently listed or the proposed critical habitat is designated prior to completion of the action, the Federal agency must review the action to determine whether formal consultation is required.

(d) If requested by the Federal agency and deemed appropriate by the Service, the conference may be conducted in accordance with the procedures for formal consultation in § 402.14. An opinion issued at the conclusion of the conference may be adopted as the biological opinion when the species is listed or critical habitat is designated, but only if no significant new information is developed (including that developed during the rulemaking process on the proposed listing or critical habitat designation) and no significant changes to the Federal action are made that would alter the content of the opinion. An incidental take statement provided with a conference opinion does not become effective unless the Service adopts the opinion once the listing is final.

(e) The conclusions reached during a conference and any recommendations shall be documented by the Service and provided to the Federal agency and to any applicant. The style and magnitude of this document will vary with the complexity of the conference. If formal consultation also is required for a particular action, then the Service will provide the results of the conference with the biological opinion.

SOURCE: 51 FR 19957, June 3, 1986, unless otherwise noted.

Add210

AUTHORITY: 16 U.S.C. 1531 et seq.

Notes of Decisions (5)

Current through Feb. 29, 2024, 89 FR 15010. Some sections may be more current. See credits for details.

Code of Federal Regulations
Title 50. Wildlife and Fisheries
Chapter IV. Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations
Subchapter A
Part 402. Interagency Cooperation—Endangered Species Act of 1973, as Amended (Refs & Annos)
Subpart B. Consultation Procedures

50 C.F.R. § 402.11

§ 402.11 Early consultation.

Currentness

(a) Purpose. Early consultation is designed to reduce the likelihood of conflicts between listed species or critical habitat and proposed actions and occurs prior to the filing of an application for a Federal permit or license. Although early consultation is conducted between the Service and the Federal agency, the prospective applicant should be involved throughout the consultation process.

(b) Request by prospective applicant. If a prospective applicant has reason to believe that the prospective action may affect listed species or critical habitat, it may request the Federal agency to enter into early consultation with the Service. The prospective applicant must certify in writing to the Federal agency that (1) it has a definitive proposal outlining the action and its effects and (2) it intends to implement its proposal, if authorized.

(c) Initiation of early consultation. If the Federal agency receives the prospective applicant's certification in paragraph (b) of this section, then the Federal agency shall initiate early consultation with the Service. This request shall be in writing and contain the information outlined in § 402.14(c) and, if the action is a major construction activity, the biological assessment as outlined in § 402.12.

(d) Procedures and responsibilities. The procedures and responsibilities for early consultation are the same as outlined in § 402.14(c)–(j) for formal consultation, except that all references to the “applicant” shall be treated as the “prospective applicant” and all references to the “biological opinion” or the “opinion” shall be treated as the “preliminary biological opinion” for the purpose of this section.

(e) Preliminary biological opinion. The contents and conclusions of a preliminary biological opinion are the same as for a biological opinion issued after formal consultation except that the incidental take statement provided with a preliminary biological opinion does not constitute authority to take listed species.

(f) Confirmation of preliminary biological opinion as final biological opinion. A preliminary biological opinion may be confirmed as a biological opinion issued after formal consultation if the Service reviews the proposed action and finds that there have been no significant changes in the action as planned or in the information used during the early consultation. A written request for confirmation of the preliminary biological opinion should be submitted after the prospective applicant applies to

the Federal agency for a permit or license but prior to the issuance of such permit or license. Within 45 days of receipt of the Federal agency's request, the Service shall either:

(1) Confirm that the preliminary biological opinion stands as a final biological opinion; or

(2) If the findings noted above cannot be made, request that the Federal agency initiate formal consultation.

SOURCE: 51 FR 19957, June 3, 1986, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1531 et seq.

Notes of Decisions (12)

Current through Feb. 29, 2024, 89 FR 15010. Some sections may be more current. See credits for details.

Code of Federal Regulations
Title 50. Wildlife and Fisheries
Chapter IV. Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations
Subchapter A
Part 402. Interagency Cooperation—Endangered Species Act of 1973, as Amended (Refs & Annos)
Subpart B. Consultation Procedures

50 C.F.R. § 402.12

§ 402.12 Biological assessments.

Currentness

(a) Purpose. A biological assessment shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action and is used in determining whether formal consultation or a conference is necessary.

(b) Preparation requirement.

(1) The procedures of this section are required for Federal actions that are "major construction activities"; provided that a contract for construction was not entered into or actual construction was not begun on or before November 10, 1978. Any person, including those who may wish to apply for an exemption from section 7(a)(2) of the Act, may prepare a biological assessment under the supervision of the Federal agency and in cooperation with the Service consistent with the procedures and requirements of this section. An exemption from the requirements of section 7(a)(2) is not permanent unless a biological assessment has been prepared.

(2) The biological assessment shall be completed before any contract for construction is entered into and before construction is begun.

(c) Request for information. The Federal agency or the designated non-Federal representative shall convey to the Director either (1) a written request for a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area; or (2) a written notification of the species and critical habitat that are being included in the biological assessment.

(d) Director's response. Within 30 days of receipt of the notification of, or the request for, a species list, the Director shall either concur with or revise the list or, in those cases where no list has been provided, advise the Federal agency or the designated non-Federal representative in writing whether, based on the best scientific and commercial data available, any listed or proposed species or designated or proposed critical habitat may be present in the action area. In addition to listed and proposed species, the Director will provide a list of candidate species that may be present in the action area. Candidate species refers to any species being considered by the Service for listing as endangered or threatened species but not yet the subject of a proposed rule. Although candidate species have no legal status and are accorded no protection under the Act, their inclusion will alert the Federal agency of potential proposals or listings.

Add214

(1) If the Director advises that no listed species or critical habitat may be present, the Federal agency need not prepare a biological assessment and further consultation is not required. If only proposed species or proposed critical habitat may be present in the action area, then the Federal agency must confer with the Service if required under § 402.10, but preparation of a biological assessment is not required unless the proposed listing and/or designation becomes final.

(2) If a listed species or critical habitat may be present in the action area, the Director will provide a species list or concur with the species list provided. The Director also will provide available information (or references thereto) regarding these species and critical habitat, and may recommend discretionary studies or surveys that may provide a better information base for the preparation of an assessment. Any recommendation for studies or surveys is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act.

(e) Verification of current accuracy of species list. If the Federal agency or the designated non-Federal representative does not begin preparation of the biological assessment within 90 days of receipt of (or concurrence with) the species list, the Federal agency or the designated non-Federal representative must verify (formally or informally) with the Service the current accuracy of the species list at the time the preparation of the assessment is begun.

(f) Contents. The contents of a biological assessment are at the discretion of the Federal agency and will depend on the nature of the Federal action. The following may be considered for inclusion:

(1) The results of an on-site inspection of the area affected by the action to determine if listed or proposed species are present or occur seasonally.

(2) The views of recognized experts on the species at issue.

(3) A review of the literature and other information.

(4) An analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies.

(5) An analysis of alternate actions considered by the Federal agency for the proposed action.

(g) Incorporation by reference. If a proposed action requiring the preparation of a biological assessment is identical, or very similar, to a previous action for which a biological assessment was prepared, the Federal agency may fulfill the biological assessment requirement for the proposed action by incorporating by reference the earlier biological assessment, plus any supporting data from other documents that are pertinent to the consultation, into a written certification that:

(1) The proposed action involves similar impacts to the same species in the same geographic area;

(2) No new species have been listed or proposed or no new critical habitat designated or proposed for the action area; and

(3) The biological assessment has been supplemented with any relevant changes in information.

(h) Permit requirements. If conducting a biological assessment will involve the taking of a listed species, a permit under section 10 of the Act (16 U.S.C. 1539) and part 17 of this title (with respect to species under the jurisdiction of the FWS) or parts 220, 222, and 227 of this title (with respect to species under the jurisdiction of the NMFS) is required.

(i) Completion time. The Federal agency or the designated non- Federal representative shall complete the biological assessment within 180 days after its initiation (receipt of or concurrence with the species list) unless a different period of time is agreed to by the Director and the Federal agency. If a permit or license applicant is involved, the 180–day period may not be extended unless the agency provides the applicant, before the close of the 180–day period, with a written statement setting forth the estimated length of the proposed extension and the reasons why such an extension is necessary.

(j) Submission of biological assessment. The Federal agency shall submit the completed biological assessment to the Director for review. The Director will respond in writing within 30 days as to whether or not he concurs with the findings of the biological assessment. At the option of the Federal agency, formal consultation may be initiated under § 402.14(c) concurrently with the submission of the assessment.

(k) Use of the biological assessment.

(1) The Federal agency shall use the biological assessment in determining whether formal consultation or a conference is required under § 402.14 or § 402.10, respectively. If the biological assessment indicates that there are no listed species or critical habitat present that are likely to be adversely affected by the action and the Director concurs as specified in paragraph (j) of this section, then formal consultation is not required. If the biological assessment indicates that the action is not likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat, and the Director concurs, then a conference is not required.

(2) The Director may use the results of the biological assessment in (i) determining whether to request the Federal agency to initiate formal consultation or a conference, (ii) formulating a biological opinion, or (iii) formulating a preliminary biological opinion.

SOURCE: 51 FR 19957, June 3, 1986, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1531 et seq.

Notes of Decisions (66)

Current through Feb. 29, 2024, 89 FR 15010. Some sections may be more current. See credits for details.

End of Document

Code of Federal Regulations
Title 50. Wildlife and Fisheries
Chapter IV. Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations
Subchapter A
Part 402. Interagency Cooperation—Endangered Species Act of 1973, as Amended (Refs & Annos)
Subpart B. Consultation Procedures

50 C.F.R. § 402.13

§ 402.13 Informal consultation.

Effective: October 28, 2019
Currentness

(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non–Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required.

(b) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.

(c) If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(1) A written request for concurrence with a Federal agency's not likely to adversely affect determination shall include information similar to the types of information described for formal consultation at § 402.14(c)(1) sufficient for the Service to determine if it concurs.

(2) Upon receipt of a written request consistent with paragraph (c)(1) of this section, the Service shall provide written concurrence or non-concurrence with the Federal agency's determination within 60 days. The 60–day timeframe may be extended upon mutual consent of the Service, the Federal agency, and the applicant (if involved), but shall not exceed 120 days total from the date of receipt of the Federal agency's written request consistent with paragraph (c)(1) of this section.

Credits
[73 FR 76287, Dec. 16, 2008; 74 FR 20423, May 4, 2009; 84 FR 45016, Aug. 27, 2019; 84 FR 50333, Sept. 25, 2019]

SOURCE: 51 FR 19957, June 3, 1986, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1531 et seq.

Add217

Notes of Decisions (17)

Current through Feb. 29, 2024, 89 FR 15010. Some sections may be more current. See credits for details.

End of Document

Code of Federal Regulations
Title 50. Wildlife and Fisheries
Chapter IV. Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations
Subchapter A
Part 402. Interagency Cooperation—Endangered Species Act of 1973, as Amended (Refs & Annos)
Subpart B. Consultation Procedures

50 C.F.R. § 402.14

§ 402.14 Formal consultation.

Effective: October 28, 2019
Currentness

(a) Requirement for formal consultation. Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) Exceptions.

(1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) Initiation of formal consultation.

(1) A written request to initiate formal consultation shall be submitted to the Director and shall include:

(i) A description of the proposed action, including any measures intended to avoid, minimize, or offset effects of the action. Consistent with the nature and scope of the proposed action, the description shall provide sufficient detail to assess the effects of the action on listed species and critical habitat, including:

(A) The purpose of the action;

(B) The duration and timing of the action;

(C) The location of the action;

(D) The specific components of the action and how they will be carried out;

(E) Maps, drawings, blueprints, or similar schematics of the action; and

(F) Any other available information related to the nature and scope of the proposed action relevant to its effects on listed species or designated critical habitat.

(ii) A map or description of all areas to be affected directly or indirectly by the Federal action, and not merely the immediate area involved in the action (i.e., the action area as defined at § 402.02).

(iii) Information obtained by or in the possession of the Federal agency and any applicant on the listed species and designated critical habitat in the action area (as required by paragraph (c)(1)(ii) of this section), including available information such as the presence, abundance, density, or periodic occurrence of listed species and the condition and location of the species' habitat, including any critical habitat.

(iv) A description of the effects of the action and an analysis of any cumulative effects.

(v) A summary of any relevant information provided by the applicant, if available.

(vi) Any other relevant available information on the effects of the proposed action on listed species or designated critical habitat, including any relevant reports such as environmental impact statements and environmental assessments.

(2) A Federal agency may submit existing documents prepared for the proposed action such as NEPA analyses or other reports in substitution for the initiation package outlined in this paragraph (c). However, any such substitution shall be accompanied by a written summary specifying the location of the information that satisfies the elements above in the submitted document(s).

(3) Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12.

(4) Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area, a programmatic consultation, or a segment of a comprehensive plan. The provision in this paragraph (c)(4) does not relieve the Federal agency of the requirements for considering the effects of the action or actions as a whole.

Add220

(d) Responsibility to provide best scientific and commercial data available. The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) Duration and extension of formal consultation. Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) Additional data. When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) Service responsibilities. Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status and environmental baseline of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

Add221

(4) Add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service's opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1)–(3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45–day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45–day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10–day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take is reasonably certain to occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions as proposed or taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation. Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of binding plans.

(h) Biological opinions.

(1) The biological opinion shall include:

(i) A summary of the information on which the opinion is based;

(ii) A detailed discussion of the environmental baseline of the listed species and critical habitat;

(iii) A detailed discussion of the effects of the action on listed species or critical habitat; and

(iv) The Service's opinion on whether the action is:

Add222

(A) Likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy" biological opinion); or

(B) Not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion).

(2) A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, the Service will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(3) The Service may adopt all or part of:

(i) A Federal agency's initiation package; or

(ii) The Service's analysis required to issue a permit under section 10(a) of the Act in its biological opinion.

(4) A Federal agency and the Service may agree to follow an optional collaborative process that would further the ability of the Service to adopt the information and analysis provided by the Federal agency during consultation in the development of the Service's biological opinion to improve efficiency in the consultation process and reduce duplicative efforts. The Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat, and other relevant factors to determine whether an action or a class of actions is appropriate for this process. The Federal agency and the Service may develop coordination procedures that would facilitate adoption of the initiation package with any necessary supplementary analyses and incidental take statement to be added by the Service, if appropriate, as the Service's biological opinion in fulfillment of section 7(b) of the Act.

(i) Incidental take.

(1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species (A surrogate (e.g., similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take provided that the biological opinion or incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded.);

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 216.105 and 222.301(h) for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(6) For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a mixed programmatic action, an incidental take statement is required at the programmatic level only for those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation.

(j) Conservation recommendations. The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) Incremental steps. When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) Expedited consultations. Expedited consultation is an optional formal consultation process that a Federal agency and the Service may enter into upon mutual agreement. To determine whether an action or a class of actions is appropriate for this type of consultation, the Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat and other relevant factors. Conservation actions whose primary purpose is to have beneficial effects on listed species will likely be considered appropriate for expedited consultation.

(1) Expedited timelines. Upon agreement to use this expedited consultation process, the Federal agency and the Service shall establish the expedited timelines for the completion of this consultation process.

(2) Federal agency responsibilities. To request initiation of expedited consultation, the Federal agency shall provide all the information required to initiate consultation under paragraph (c) of this section. To maximize efficiency and ensure that it develops the appropriate level of information, the Federal agency is encouraged to develop its initiation package in coordination with the Service.

(3) Service responsibilities. In addition to the Service's responsibilities under the provisions of this section, the Service will:

(i) Provide relevant species information to the Federal agency and guidance to assist the Federal agency in completing its effects analysis in the initiation package; and

(ii) Conclude the consultation and issue a biological opinion within the agreed-upon timeframes.

(m) Termination of consultation.

(1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

Credits

[54 FR 40350, Sept. 29, 1989; 73 FR 76287, Dec. 16, 2008; 74 FR 20423, May 4, 2009; 80 FR 26844, May 11, 2015; 84 FR 45016, Aug. 27, 2019; 84 FR 50333, Sept. 25, 2019]

SOURCE: 51 FR 19957, June 3, 1986, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1531 et seq.

Notes of Decisions (357)

Current through Feb. 29, 2024, 89 FR 15010. Some sections may be more current. See credits for details.

Code of Federal Regulations
Title 50. Wildlife and Fisheries
Chapter IV. Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations
Subchapter A
Part 402. Interagency Cooperation—Endangered Species Act of 1973, as Amended (Refs & Annos)
Subpart B. Consultation Procedures

50 C.F.R. § 402.15

§ 402.15 Responsibilities of Federal agency following issuance of a biological opinion.

Currentness

(a) Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion.

(b) If a jeopardy biological opinion is issued, the Federal agency shall notify the Service of its final decision on the action.

(c) If the Federal agency determines that it cannot comply with the requirements of section 7(a)(2) after consultation with the Service, it may apply for an exemption. Procedures for exemption applications by Federal agencies and others are found in 50 CFR part 451.

SOURCE: 51 FR 19957, June 3, 1986, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1531 et seq.

Notes of Decisions (11)

Current through Feb. 29, 2024, 89 FR 15010. Some sections may be more current. See credits for details.

End of Document

Code of Federal Regulations
Title 50. Wildlife and Fisheries
Chapter IV. Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations
Subchapter A
Part 402. Interagency Cooperation—Endangered Species Act of 1973, as Amended (Refs & Annos)
Subpart B. Consultation Procedures

50 C.F.R. § 402.16

§ 402.16 Reinitiation of consultation.

Effective: October 28, 2019
Currentness

(a) Reinitiation of consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(1) If the amount or extent of taking specified in the incidental take statement is exceeded;

(2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or

(4) If a new species is listed or critical habitat designated that may be affected by the identified action.

(b) An agency shall not be required to reinitiate consultation after the approval of a land management plan prepared pursuant to 43 U.S.C. 1712 or 16 U.S.C. 1604 upon listing of a new species or designation of new critical habitat if the land management plan has been adopted by the agency as of the date of listing or designation, provided that any authorized actions that may affect the newly listed species or designated critical habitat will be addressed through a separate action-specific consultation. This exception to reinitiation of consultation shall not apply to those land management plans prepared pursuant to 16 U.S.C. 1604 if:

(1) Fifteen years have passed since the date the agency adopted the land management plan prepared pursuant to 16 U.S.C. 1604; and

(2) Five years have passed since the enactment of Public Law 115–141 [March 23, 2018] or the date of the listing of a species or the designation of critical habitat, whichever is later.

Add228

Credits
[84 FR 45017, Aug. 27, 2019; 84 FR 50333, Sept. 25, 2019]

SOURCE: 51 FR 19957, June 3, 1986, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1531 et seq.

Notes of Decisions (89)

Current through Feb. 29, 2024, 89 FR 15010. Some sections may be more current. See credits for details.

Code of Federal Regulations
Title 50. Wildlife and Fisheries
Chapter IV. Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations
Subchapter A
Part 402. Interagency Cooperation—Endangered Species Act of 1973, as Amended (Refs & Annos)
Subpart B. Consultation Procedures

50 C.F.R. § 402.17

§ 402.17 Other provisions.

Effective: October 28, 2019
Currentness

(a) Activities that are reasonably certain to occur. A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Factors to consider when evaluating whether activities caused by the proposed action (but not part of the proposed action) or activities reviewed under cumulative effects are reasonably certain to occur include, but are not limited to:

(1) Past experiences with activities that have resulted from actions that are similar in scope, nature, and magnitude to the proposed action;

(2) Existing plans for the activity; and

(3) Any remaining economic, administrative, and legal requirements necessary for the activity to go forward.

(b) Consequences caused by the proposed action. To be considered an effect of a proposed action, a consequence must be caused by the proposed action (i.e., the consequence would not occur but for the proposed action and is reasonably certain to occur). A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Considerations for determining that a consequence to the species or critical habitat is not caused by the proposed action include, but are not limited to:

(1) The consequence is so remote in time from the action under consultation that it is not reasonably certain to occur; or

(2) The consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur; or

(3) The consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur.

Add230

(c) Required consideration. The provisions in paragraphs (a) and (b) of this section must be considered by the action agency and the Services.

Credits
[84 FR 45018, Aug. 27, 2019; 84 FR 50333, Sept. 25, 2019]

SOURCE: 51 FR 19957, June 3, 1986, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1531 et seq.

Current through Feb. 29, 2024, 89 FR 15010. Some sections may be more current. See credits for details.

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