

No. 24-337

IN THE
Supreme Court of the United States

NANTUCKET RESIDENTS AGAINST TURBINES, ET AL.,
Petitioners,

v.

BUREAU OF OCEAN ENERGY MANAGEMENT, ET AL.,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit**

BRIEF IN OPPOSITION

CARTER G. PHILLIPS*
KATHLEEN M. MUELLER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Respondents Vineyard Wind 1, LLC

December 10, 2024

* Counsel of Record

CORPORATE DISCLOSURE STATEMENT

Vineyard Wind 1 LLC (Vineyard Wind) is jointly owned 50% by Copenhagen Infrastructure Partners, P/S, and 50% by Avangrid Renewables, LLC. No publicly held corporation has a 10% or greater ownership interest in Vineyard Wind.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
STATEMENT OF THE CASE.....	3
REASONS FOR DENYING THE PETITION ...	14
I. THE DECISION BELOW IS CORRECT AND DOES NOT CONFLICT WITH THE DECISIONS OF ANY OTHER CIRCUIT ...	15
II. THIS CASE IS NOT A GOOD VEHICLE TO ADDRESS THE QUESTION PRESENTED	18
CONCLUSION	19

TABLE OF AUTHORITIES

	Page
CASES	
<i>Conner v. Burford</i> , 848 F.2d 1441 (9th Cir. 1988)	16
<i>Cottonwood Env't Law Ctr. v. U.S. Forest Serv.</i> , 789 F.3d 1075 (9th Cir. 2015)	17
<i>Me. Loberstermen's Ass'n v. Nat'l Marine Fisheries Serv.</i> , 70 F.4th 582 (DC Cir. 2023)	17
<i>Melone v. Coit</i> , 100 F.4th 21 (1st Cir. 2024)	13
<i>Thomas v. Peterson</i> , 753 F.2d 754 (9th Cir. 1985)	17
<i>Wild Fish Conservancy v. Salazar</i> , 628 F.3d 513 (9th Cir. 2010)	17
<i>Youakim v. Miller</i> , 425 U.S. 231 (1976)	18
STATUTES AND REGULATIONS	
16 U.S.C. §1536(a)(2)	2, 15
89 Fed. Reg. 75,654 (Sept. 16, 2024)	13
OTHER AUTHORITIES	
Nat'l Marine Fisheries Serv., <i>Endangered Species Act Section 7 Consultation Biological Opinion for Construction, Operation, Maintenance, and Decommissioning of Vineyard Wind 1 Offshore Energy Project (Lease OCS-A 0501)</i> (Aug. 23, 2024), https://repository.library.noaa.gov/view/noaa/65722	13, 14, 19

INTRODUCTION

Vineyard Wind is constructing an offshore wind energy project on the outer-continental shelf about 14 nautical miles south of Martha's Vineyard and Nantucket Island. When completed, the project will send up to 800 megawatts of electricity to Massachusetts electric utilities—enough to power 400,000 homes.

Petitioners are Nantucket residents who oppose Vineyard Wind's project and claim that it will jeopardize the continued existence of the endangered North Atlantic right whale. The federal agencies with principal regulatory authority over the project disagree with petitioners. Before approving the project, the Bureau of Ocean Energy Management (BOEM) conducted an extensive environmental review and consulted with the National Marine Fisheries Service (NMFS), which concluded that the project is not likely to jeopardize the right whales' continued existence. The agencies also identified a suite of measures that Vineyard Wind agreed to implement to protect right whales. The district court and the First Circuit both upheld NMFS's biological opinion, rejecting petitioners' arguments that it ignored the best scientific data available and reached conclusions that were arbitrary and capricious.

Having failed to persuade the lower courts that the biological opinion was arbitrary and capricious, petitioners try a new tack in this Court, arguing that NMFS's error was actually a legal error committed solely to support the Biden administration's policy initiatives. In petitioners' new rendition, NMFS violated Section 7 of the Endangered Species Act (ESA) by focusing on the effects of Vineyard Wind's project, and excluding consideration of projects that are in the planning stages and cannot be built unless

they undergo their own Section 7 consultation and approval.

The petition does not warrant this Court's review. The First Circuit did not address petitioners' new challenge to the biological opinion because petitioners did not raise it below. Further, NMFS's biological opinion is consistent with the statute, the implementing regulations, and the agency's longstanding practice. This is reason enough to deny the petition.

Section 7 requires federal agencies to consult with NMFS to ensure that "any action" they "authoriz[e]" is "not likely to jeopardize the continued existence of any endangered species." 16 U.S.C. §1536(a)(2). NMFS properly focused on the effects of Vineyard Wind's project, because that is the only project that BOEM was seeking to approve in the agency action at issue.

As the biological opinion made clear, this does not mean that the cumulative effects of multiple offshore wind projects will be ignored. Rather, each time an offshore wind project is approved, the effects of that project become part of the "environmental baseline" of factors that may affect the status of an endangered species going forward. NMFS then uses that enhanced environmental baseline to evaluate future projects. If consultation over a future project reveals that its construction in combination with that of previously approved projects will impose more cumulative stress or injury than an endangered species can bear, NMFS can issue a jeopardy opinion that prohibits BOEM from approving that project. But nothing in Section 7 or any case cited in the petition supports petitioners' view that BOEM and NMFS may withhold approval of Vineyard Wind's project that does not jeopardize any endangered species simply because petitioners fear

that a species could face jeopardy if BOEM approves construction of 30 more projects over the next 10 years.

STATEMENT OF THE CASE

1. In 2009, BOEM began evaluating the possibility of issuing leases under the Outer Continental Shelf Lands Act for the development of wind energy projects on the outer continental shelf off the coast of Massachusetts. Pet. App. 35a. For the next several years, BOEM engaged with stakeholders, accepted comments from the public, and prepared an Environmental Assessment under the National Environmental Policy Act (NEPA). Pet. App. 35a–36a. As a result of the information it received about potential impacts, BOEM reduced the size of the lease area it made available for offshore wind energy development. Pet. App. 36a.

In January 2015, BOEM held a competitive lease sale and awarded Vineyard Wind’s predecessor a lease on the outer continental shelf about 14 nautical miles southeast of Martha’s Vineyard. Pet. App. 7a, 36a–37a. After doing a thorough assessment of the site, Vineyard Wind developed a plan for construction and operation of its wind energy project, which covers only a portion of its lease site. Vineyard Wind submitted the plan to BOEM in December 2017. Pet. App. 7a. BOEM and other federal agencies with permitting authority over the project then commenced a multi-year review of the plan.

2. Pursuant to NEPA, the agencies prepared an environmental impact statement analyzing the environmental, economic, historic and cultural impact of construction and operation of Vineyard Wind’s project. Pet. App. 40a. This three-year effort began with a public scoping process in which BOEM (acting as the lead agency for purposes of the NEPA review)

invited public comment to help it determine the impact-producing factors of the project and reasonable alternatives and mitigation measures that should be analyzed in the environmental impact statement. Pet. App. 38a.

In December 2018, BOEM published a draft environmental impact statement analyzing the proposed construction and operation plan and several alternatives. Pet. App. 38a. BOEM invited the public to submit written comments and/or to participate in public hearings on the draft. Pet. App. 38a–39a.

In June 2020, BOEM responded to the public comments by preparing a supplemental draft environmental impact statement. The supplemental draft analyzed different alternative layouts for the project and contained an expanded analysis of the cumulative impact of Vineyard Wind’s project and the potential development of other offshore wind energy projects. Pet. App. 38a. Again, BOEM invited the public to submit written comments and/or to participate in public hearings on the supplemental draft. Pet. App. 38a–39a.

In March 2021, BOEM issued the final environmental impact statement (FEIS), a 4-volume 1600-page document that analyzed the alternatives and respective impacts considered in both the original and supplemental drafts. Pet. App. 8a, 40a. As relevant here, the FEIS contained an updated cumulative impact analysis that considered the impact of Vineyard Wind’s project as well as potential development on 17 other wind energy leases that BOEM deemed to be “reasonably foreseeable.” SA1005–07. This analysis included projects in various stages of development. Some had not even submitted a construction and operation plan for BOEM to review, while others had submitted plans that BOEM had not

yet approved. *Id.* The FEIS also identified 101 measures for Vineyard Wind to undertake to avoid, reduce, mitigate or monitor project impacts, including any cumulative impacts. SA1377–1412.

3. BOEM also consulted with NMFS pursuant to Section 7(a)(2) of the Endangered Species Act to ensure that its approval of Vineyard Wind’s construction and operation plan would not be likely to jeopardize the continued existence of any endangered species. Pet. App. 7a, 41a. That consultation ended in September 2020, when NMFS issued a biological opinion concluding that the project is not likely to jeopardize any endangered species, including the North Atlantic right whale. Pet. App. 7a, 41a.

In conducting this analysis, NMFS focused on the effects of Vineyard Wind’s project, and not the effects of other offshore wind projects that had not yet received authorization for construction. NMFS did this because, under the Endangered Species Act, those potential future projects are neither “effects” nor “cumulative effects” of Vineyard Wind’s project. SA146, SA202–93.

“Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur.” SA145 (quoting 50 C.F.R. §402.02). NMFS concluded that future offshore wind projects are not “effects of the Vineyard Wind Project,” because Vineyard Wind is not the “but for cause” of those projects; none “are dependent on the Vineyard Wind project and all would have an independent utility apart from the Vineyard Wind project.” SA146. Moreover, NMFS found that no other project is “at this

time, reasonably certain to occur, given the significant economic, administrative, and legal requirements necessary for the activity to go forward.” *Id.*

NMFS further explained that future offshore wind projects are not “cumulative effects” of Vineyard Wind’s project. Under the ESA, “[c]umulative effects’ are those effects of future state or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” SA292–93 (quoting 50 C.F.R. §402.02). Offshore wind projects that may be developed in the future fall outside that definition because each will involve federal action: BOEM will have to approve the construction and operation plan for each future project before it can be built. SA293. And as part of that approval process, BOEM will consult with NMFS about each project’s impact on endangered species. *Id.*

NMFS emphasized that this does not mean that the cumulative effects of multiple offshore wind energy projects will be ignored. Rather, when a wind energy project like Vineyard Wind is approved, the project is added to the “environmental baseline” of factors that may affect the status of an endangered species going forward. NMFS will then use that enhanced environmental baseline when evaluating future projects to determine whether their construction and operation will jeopardize the existence of any endangered species. SA293.

Focusing on Vineyard Wind’s project, NMFS found that its construction and operation will not result in “any serious injury or mortality of any right whale,” or cause any “reduction in fitness” or “effects on reproductive success.” SA298. Nor will the project cause “an appreciable reduction in the likelihood of survival and recovery of North Atlantic right whales

in the wild.” SA299. And to further minimize the impact on right whales, NMFS included in the biological opinion a list of protective measures that Vineyard Wind must take during construction and operation of the project. Pet. App. 7a; SA304–16.

4. In May 2021 BOEM reinitiated consultation with NMFS under Section 7(a)(2) of the Endangered Species Act to consider the impact of fisheries monitoring surveys that BOEM was going to require Vineyard Wind to conduct as a condition of approving the project’s construction and operation plan. NMFS had not known that BOEM would require these surveys, so it had not considered their impact in the initial consultation and biological opinion. Pet. App. 42a. During this second consultation, NMFS also considered new information about the status of the right whale. *Id.*

5. In July 2021 BOEM approved Vineyard Wind’s construction and operation plan and imposed conditions requiring the project to implement the protective measures identified in the final environmental impact statement, the biological opinion, and any new biological opinion that NMFS might issue after the renewed consultation. Pet. App. 8a; Pet. App. 48a–49a.

6. The renewed consultation ended in October 2021, when NMFS issued a new biological opinion that superseded the one from 2020. The 2021 biological opinion again concluded that construction and operation of Vineyard Wind’s project is not likely to jeopardize the continued existence of right whales or any other endangered species. Pet. App. 43a.

As it had done in the 2020 biological opinion, NMFS again concluded that future offshore wind projects are not “effects” or “cumulative effects” of Vineyard Wind’s

project. SA509–10, SA692–93. NMFS reiterated that this does not mean that it will ignore the cumulative effects of projects that may be constructed in the future. Rather, “any future offshore wind project will require section 7 consultation,” and “in each successive consultation, the effects on listed species of other offshore wind projects under construction or completed would be considered to the extent they influence the status of the species and/or environmental baseline according to the best available scientific information.” SA693.

NMFS followed that process in the 2021 biological opinion by updating the environmental baseline to include the South Fork Wind Farm—an offshore wind project that was not considered in the 2020 biological opinion but that had subsequently undergone Section 7 consultation and been approved. SA506, SA664. Using that new baseline, NMFS concluded that the cumulative effects of construction and operation of Vineyard Wind’s project and South Fork’s project would not jeopardize right whales. See, *e.g.*, SA696 (“Based on project schedules we do not anticipate that construction of these two projects would occur concurrently” and because the “lease areas are about 30 km apart at their closest points,” there “is enough separation to ensure no overlap of sound fields even in the extremely unlikely event that pile driving occurred for the two projects at the same time.”).

Finally, as it had done in 2020, NMFS included in the 2021 biological opinion a list of reasonable and prudent measures and conditions that Vineyard Wind must take to minimize the potential impact on right whales. SA751–87. As noted, BOEM made these measures conditions of its approval of Vineyard Wind’s project. Pet. App. 45a.

7. The upshot of the ESA consultations is that Vineyard Wind was required to implement many measures to minimize the project's impact on right whales. See Pet. App. 8a–10a; Pet. App. 49a–53a. Because right whales and other animals in the marine environment can be impacted by underwater noise, the agencies paid particular attention to pile driving, the activity to secure the “monopiles” (the foundations for the wind turbines) into the ocean floor. These requirements for pile driving and other project activities that may impact right whales include:

Seasonal restrictions that limit pile driving to months when right whales are less likely to be in the Project area. These restrictions prohibit pile driving from January 1 through April 30 and permit pile driving in December only with BOEM's approval and pursuant to a plan of enhanced procedures to minimize the risk of exposing right whales to pile-driving noise. SA394; SA1778.

Time and weather restrictions that limit pile driving to times when visibility is clear. Among other restrictions, pile driving may not commence until at least one hour after sunrise, and it may not commence within 1.5 hours before sunset. Additionally, pile driving may only commence when clearance zones are fully visible (i.e., not obscured by darkness, rain, fog, etc.) for at least 30 minutes. Vineyard Wind must also develop and implement measures for enhanced monitoring in the event that poor visibility conditions unexpectedly arise. SA395; SA1778–79.

Clearance and shutdown zones to avoid pile driving when right whales are present. The zones must be monitored by both protected species observers (“PSOs”) and passive acoustic monitoring (“PAM”). The size of these zones can vary depending on the type of monitoring, the time of year, and the type of pile

being installed. Clearance zones must be monitored for 60 minutes prior to the commencement of pile driving, and pile driving may not commence unless the zones are free of right whales for 30 minutes immediately before pile driving. If pile driving has commenced, it must cease if a right whale is detected within the shutdown zone (unless stopping pile-driving would risk human safety or pile instability, in which case reduced hammer energy must be used where practicable). SA399–402; SA1784–88. A PSO must treat a right whale “visually detected at any distance from the pile-driving vessel as a detection that triggers the required pre-construction delay or shutdown during pile installation, regardless of the minimum distance from the clearance or shutdown zone.” SA399.

Requirements that PSOs and PAM operators be trained and independent. PSOs and PAM operators must have completed a training program and been approved by NMFS. PSOs may not have any Project-related tasks other than to observe, collect and report data and communicate with and instruct vessel crew regarding the presence of protected species and mitigation requirements. They must have suitable equipment and good vantage points for visual monitoring, and there are limits on how many hours they can work to limit fatigue. SA395–96; SA1779–80.

A pile-driving monitoring plan must be developed by Vineyard Wind (and approved by BOEM and NMFS) with information on PSOs and PAM, including descriptions of all equipment, procedures and protocols. SA397; SA1781.

Soft start for pile driving. Vineyard Wind must begin pile driving with the “soft start” process in which the first three hammer strikes are at reduced energy, followed by a 1-minute interval, and the process is repeated three times to alert any unobserved whales

that might be within the clearance zones and provide them with time to leave.

Noise attenuation equipment must be used to reduce the intensity of pile driving noise and how far it travels. Vineyard Wind is using trained construction contractors to install a “hydro sound damper” and two “bubble curtains” around the perimeter of each pile for the full depth of the water column to create bubbles that act as a barrier to sound transmission. Vineyard Wind must conduct field tests on the initial foundations to verify that the equipment is effective. SA398–99; SA1783–84; SA518; SA61; SA22–23. Based on the results of the field tests, NMFS may adjust the size of the clearance zones. SA38.

Weekly pile driving reports of PSO and PAM monitoring activities must be submitted to NMFS and BOEM documenting pile-driving activities and detections of any marine mammals or sea turtles. SA403; SA1789–90.

Speed limits for Project vessels. Project vessels must travel at speeds less than or equal to 10 knots when they are transitioning to, from, or within the wind development area between November 1 and May 14, or any time a NMFS-designated Right Whale Slow Zone or Dynamic Management Area is in effect, except that crew transfer vessels may transit faster if they have dedicated observers to watch for whales and Passive Acoustic Monitoring. SA392–93; SA1773–74.

Vessel strike avoidance measures. If a right whale is observed, a vessel must reduce its speed and maintain a distance of 500 meters from any whale. SA393–94; SA1775–76.

7. Petitioners filed this lawsuit against the federal agency respondents in the District of Massachusetts in August 2021. Petitioners alleged that NMFS violated

the Endangered Species Act when it issued the biological opinion and that BOEM violated the Endangered Species Act, NEPA and the Administrative Procedure Act when it approved Vineyard Wind's construction and operation plan. Pet. App. 56a–57a. The district court allowed Vineyard Wind to intervene to defend the federal approvals of its project. Pet. App. 56a.

In May 2023, the district court granted summary judgment to defendants in a comprehensive 52-page opinion rejecting petitioners' myriad claims. Pet. App. 33a–102a.

In April 2024, the First Circuit issued a decision affirming the district court. The First Circuit rejected petitioners' argument that the 2021 biological opinion ignored the best available scientific data about the status of the right whale. Pet. App. 13a–19a. It held that the biological opinion's analysis of construction noise, operational noise, the risk of right whale entanglement in fishing lines, and the risk of vessel strikes is not arbitrary and capricious; and it rejected petitioners' challenges to the efficacy of the protective measures. Pet. App. 19a–30a.

Finally, the court rejected petitioners' argument that the biological opinion's no-jeopardy conclusion is arbitrary and capricious in light of a study referred to as "Quintana-Rizzo." Pet. App. 31a. Quintana-Rizzo tallied recorded sightings of right whales in southern New England between March 2011 and December 2019 and concluded that the presence of right whales in the area is "an important consideration for the planning and execution of offshore wind development." Appx.449, Appx.462. The study did not suggest, however, that "right whale survival was incompatible with wind energy development." Pet. App. 31a. Instead, it "urged policymakers to implement

comprehensive monitoring and mitigation plans”—which, the court held, “is what NMFS did here.” *Id.*

8. The 2021 biological opinion upheld by the First Circuit is no longer in effect. Four months after the First Circuit issued its decision, NMFS issued a new biological opinion that superseded the 2021 biological opinion.¹ This new biological opinion was issued on August 24, 2024 to address new information about North Atlantic right whales and the effects of a new Incidental Harassment Authorization (IHA) that NMFS’s Office of Protected Resources proposed to issue under the Marine Mammal Protection Act. See *2024 Biological Opinion* §§ 1.1, 1.2. Vineyard Wind requested the Incidental Harassment Authorization to permit the potential temporary harassment of marine mammals (including right whales) incidental to the installation of 15 monopile foundations that were not installed before its previous IHA expired. See 89 Fed. Reg. 75,654 (Sept. 16, 2024) (discussing new IHA); *Melone v. Coit*, 100 F.4th 21 (1st Cir. 2024) (upholding Vineyard Wind’s prior IHA).

As it did in the 2020 and 2021 biological opinions, NMFS again concluded that Vineyard Wind’s project is not likely to threaten the continued existence of North Atlantic right whales or any other species. Although pile-driving noise may cause temporary disturbances and minor changes in the movement of up to seven right whales, it is not expected to result in

¹ See Nat’l Marine Fisheries Serv., *Endangered Species Act Section 7 Consultation Biological Opinion for Construction, Operation, Maintenance, and Decommissioning of Vineyard Wind 1 Offshore Energy Project (Lease OCS-A 0501)* (Aug. 23, 2024) (“2024 Biological Opinion”), <https://repository.library.noaa.gov/view/noaa/65722>.

the injury or death of any right whales, or adversely affect their ability to reproduce. *2024 Biological Opinion* at 353. In making that determination, NMFS used an updated environmental baseline that included the effects of additional offshore wind projects that had undergone Section 7 consultation after the issuance of the 2021 biological opinion. *Id.* at 353, 135–39.

The 2024 biological opinion also required Vineyard Wind to comply with the new IHA, which had even more stringent protective measures than were imposed in the prior IHA and 2021 biological opinion. See, *e.g.*, *2024 Biological Opinion* at 34 (requiring a visual clearance zone of 4,000 meters observable by PSOs on the pile-driving vessel and at least two PSO support vessels, compared to the 2,000 meter visual clearance zone in the prior IHA).

REASONS FOR DENYING THE PETITION

The First Circuit’s decision upholding the 2021 biological opinion for Vineyard Wind’s project is correct and does not conflict with the decisions of any other court. In arguing otherwise, petitioners raise a new challenge to the definition of “cumulative effects” in the ESA regulations that they did not press below and that was not addressed by the First Circuit. Further, this case is not a good vehicle for addressing petitioners’ new-found argument because NMFS’s 2024 biological opinion supersedes the 2021 biological opinion and addresses the impact of all but one of the projects identified in the petition. The petition should be denied.

I. THE DECISION BELOW IS CORRECT AND DOES NOT CONFLICT WITH THE DECISIONS OF ANY OTHER CIRCUIT

In upholding the 2021 biological opinion, the First Circuit did not sanction a violation of the Endangered Species Act. The relevant provision, Section 7(a)(2), requires federal agencies to consult with NMFS to ensure that “any action” they “authoriz[e]” is not “likely to jeopardize the continued existence of any endangered species,” and to do so using the “best scientific and commercial data available.” 16 U.S.C. §1536(a)(2). The ESA regulatory definition of “cumulative effects” that NMFS cited in declining to consider the effects of future offshore wind projects that have not yet been approved is fully consistent with that statutory requirement.

In the “agency action” at issue here, BOEM was authorizing only the construction and operation of Vineyard Wind’s project. It was not authorizing any other offshore wind project, much less “30 offshore wind projects” that were “in various stages of development.” Pet. 10. Thus, the agencies’ duty was not to ensure that construction and operation of 30 offshore wind energy projects is not likely to jeopardize the North Atlantic right whale; their duty was to ensure that construction and operation of *Vineyard Wind* is not likely to cause such jeopardy.

Of course, in deciding whether Vineyard Wind’s project is likely to cause jeopardy, NMFS must use the “best scientific and commercial data available.” 16 U.S.C. §1536(a)(2). But that “best data” requirement is an evidentiary requirement; it is not a substantive requirement that expands the scope of the required jeopardy analysis to include other projects that are not part of the agency action at issue in the consultation

and that will undergo their own federal review before they can be built.

Nothing in Section 7 supports petitioners' suggestion that BOEM and NMFS are required to deny approval to Vineyard Wind's project that does not jeopardize the existence of any endangered species based on the possibility that there might be jeopardy if 30 more projects are built in different locations off the eastern seaboard of the United States over the next 10 years. Rather, Section 7(a)(2) requires BOEM to consult with NMFS about each offshore wind project it seeks to approve, allowing BOEM to deny approval (or impose more stringent protective measures) if the consultation shows that any additional project will impose more cumulative stress or injury than an endangered species can bear.

Petitioners cite no case that contradicts that analysis. They cite three decisions from the Ninth Circuit, each of which is distinguishable. *Conner v. Burford*, 848 F.2d 1441, (9th Cir. 1988), involved a Forest Service decision to sell oil and gas leases. During the ESA consultation, the agencies considered only the effects of the lease sales, and not the effects of the oil and gas development that would take place on the leased land. The Ninth Circuit held that the scope of the jeopardy analysis must match the scope of the "agency action" at issue; and, it further held, the "agency action" action there "encompassed the entire leasing project, from the issuance of the leases through post-leasing development and production." 848 F.2d at 1453. That reasoning does not call into question the biological opinion for Vineyard Wind because, as noted above, the "agency action" BOEM took was the approval of Vineyard Wind's project, not the approval of 30 other projects.

Wild Fish Conservancy v. Salazar, 628 F.3d 513 (9th Cir. 2010), involved the operation of a national fish hatchery that adversely affected endangered Bull Trout. The agencies consulted about the effects of the operation of the hatchery over a five-year period, rather than over the expected life of the project. Following *Conner*, the Ninth Circuit held that the agencies had to “analyze the *effect* of the entire agency action”—i.e., the operation of the hatchery over its expected life. *Id.* at 522. That holding is irrelevant here, where there is no claim that the biological opinion failed to consider the effects of Vineyard Wind over its expected operational life.

Finally, in *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985), the Forest Service decided to build a road in a national forest without doing any ESA consultation. The Ninth Circuit held the failure to consult violated Section 7(a)(2) and warranted an injunction against construction of the road. *Id.* at 763–64. The holding was based on a presumption that the failure to consult caused irreparable injury to endangered species—a presumption that is contrary to this Court’s precedents and has since been disavowed by the Ninth Circuit. See *Cottonwood Env’t Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1088–91 (9th Cir. 2015). And it has no bearing on this case, where BOEM did consult with NMFS about Vineyard Wind’s project.²

² The petition also cites *Maine Lobstermen’s Ass’n v. National Marine Fisheries Service*, 70 F.4th 582, 595–96 (DC Cir. 2023), which held that NMFS violated Section 7(a)(2) by giving the “benefit of the doubt” to the North Atlantic right whale when the “best scientific and commercial data available” left uncertainty about the effects of lobster fishing in the Gulf of Maine. While the petition is correct that the D.C. Circuit refused to give *Chevron* deference to NMFS’s interpretation of Section 7(a)(2), Pet. 26,

II. THIS CASE IS NOT A GOOD VEHICLE TO ADDRESS THE QUESTION PRESENTED

This case is also a poor vehicle for deciding whether the definition of “cumulative effects” in the Endangered Species Act regulations violates the statute’s “best available science” requirement by allowing NMFS to exclude consideration of projects that are only in the planning stages and that will have to undergo their own federal approval and Endangered Species Act consultation before they can be built. Pet. 7–8.

For starters, the First Circuit did not address that question because petitioners did not ask it to. That is itself sufficient reason to deny the petition. See, *e.g.*, *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curiam*) (“Ordinarily, this Court does not decide questions not raised or resolved in the lower court”).

Petitioners did not argue below that the regulatory definition of “cumulative effects” violates Section 7(a) of the Endangered Species Act. Nor did they argue that NMFS misapplied that regulatory definition or departed from its prior practice when it did not consider the cumulative effects of future offshore wind projects that will have to undergo their own federal review and Endangered Species Act consultation. Petitioners argued that the 2021 biological opinion did not sufficiently address the Quintana-Rizzo study’s concern that development of offshore wind projects in southern New England could have an impact on right whales. Pet. App. 8a. The First Circuit disagreed. See Pet. App. 31a; *supra* at 12-13. That inherently fact-

that holding poses no conflict with the First Circuit’s decision in this case, which neither cites nor relies upon *Chevron* deference.

bound holding is correct and does not warrant further review.

In addition, the 2021 biological opinion that petitioners challenged below and the First Circuit upheld is no longer in effect. It has been superseded by the biological opinion issued by NMFS on August 21, 2024. See *supra* at 13-14. By then, NMFS had completed consultation on several additional offshore wind projects, including Revolution Wind, Sunrise Wind and Ocean Wind 1. See *2024 Biological Opinion* at 135–36. Because it had already completed consultation on these projects, NMFS considered them to be in the environmental baseline and considered their effects in its analysis of the cumulative effects of Vineyard Wind’s project, see *id.* at 135–39, 238, 294, 300–01, 333—thereby satisfying petitioners’ contention that they should have been considered “[e]ven under NMFS’ truncated cumulative effects definition and analysis.” Pet. 12.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully Submitted,

CARTER G. PHILLIPS*
KATHLEEN M. MUELLER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Respondents Vineyard Wind 1, LLC

December 10, 2024

* Counsel of Record